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# THE CONSTITUTION

OF THE

# UNITED STATES OF AMERICA

## ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JULY 2, 1982

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## HISTORICAL NOTE

### PUBLIC LAW 91-589, 84 STAT. 1585, 2 U.S.C. § 168

JOINT RESOLUTION Authorizing the preparation and printing of a revised edition of the Constitution of the United States of America—Analysis and Intepretation, of decennial revised editions thereof, and of biennial cumulative supplements to such revised editions.

Whereas the Constitution of the United States of America—Analysis and Interpretation, published in 1964 as Senate Document Numbered 39, Eighty-eighth Congress, serves a very useful purpose by supplying essential information, not only to the Members of Congress but also to the public at large;

Whereas such document contains annotations of cases decided by the Supreme Court of the United States to June 22, 1964;

Whereas many cases bearing significantly upon the analysis and interpretation of the Constitution have been decided by the Supreme Court since June 22, 1964;

Whereas the Congress, in recognition of the usefulness of this type of document, has in the last half century since 1913, ordered the preparation and printing of revised editions of such a document on six occasions at intervals of from ten to fourteen years; and

Whereas the continuing usefulness and importance of such a document will be greatly enhanced by revision at shorter intervals on a regular schedule and thus made more readily available to Members and Committees by means of pocket-part supplements: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Librarian of Congress shall have prepared—

(1) a hardbound revised edition of the Constitution of the United States of America—Analysis and Interpretation, published as Senate Document Numbered 39, Eighty-eighth Congress (referred to hereinafter as the "Constitution Annotated"), which shall contain annotations of decisions of the Supreme Court of the

United States through the end of the October 1971 term of the Supreme Court, construing provisions of the Constitution;

(2) upon the completion of each of the October 1973, October 1975, October 1977, and October 1979 terms of the Supreme Court, a cumulative pocket-part supplement to the hardbound revised edition of the Constitution Annotated prepared pursuant to clause (1), which shall contain cumulative annotations of all such decisions rendered by the Supreme Court after the end of the October 1971 term;

(3) upon the completion of the October 1981 term of the Supreme Court, and upon the completion of each tenth October term of the Supreme Court thereafter, a hardbound decennial revised edition of the Constitution Annotated, which shall contain annotations of all decisions theretofore rendered by the Supreme Court construing provisions of the Constitution; and

(4) upon the completion of the October 1983 term of the Supreme Court, and upon the completion of each subsequent October term of the Supreme Court beginning in an odd-numbered year (the final digit of which is not a 1), a cumulative pocket-part supplement to the most recent hardbound decennial revised edition of the Constitution Annotated, which shall contain cumulative annotations of all such decisions renderd by the Supreme Court which were not included in that hardbound decennial revised edition of the Constitution Annotated.

SEC. 2. All hardbound revised editions and all cumulative pocket-part supplements shall be printed as Senate documents.

SEC. 3. There shall be printed four thousand eight hundred and seventy additional copies of the hardbound revised editions prepared pursuant to clause (1) of the first section and of all cumulative pocket-part supplements thereto, of which two thousands six hundred and thirty-four copies shall be for the use of the House of Representatives, one thousand two hundred and thirty-six copies shall be for the use of the Senate, and one thousand copies shall be for the use of the Joint Committee on Printing. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners, newly elected subsequent to the issuance of the hardbound revised edition prepared pursuant to such clause and prior to the

first hardbound decennial revised edition, who did not receive a copy of the edition prepared pursuant to such clause, shall, upon timely request, receive one copy of such edition and the then current cumulative pocket-part supplement and any further supplements thereto. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners, no longer serving after the issuance of the hardbound revised edition prepared pursuant to such clause and who received such edition, may receive one copy of each cumulative pocket-part supplement thereto upon timely request.

Sec. 4. Additional copies of each hardbound decennial revised edition and of the cumulative pocket-part supplements thereto shall be printed and distributed in accordance with the provisions of any concurrent resolution hereafter adopted with respect thereto.

SEC. 5. There are authorized to be appropriated such sums, to remain available until expended, as may be necessary to carry out the provisions of this joint resolution.

Approved December 24, 1970.

# INTRODUCTION TO THE 1982 EDITION

In the thirty years since Professor Corwin wrote the succeeding introduction to the 1952 edition, constitutional adjudication has confirmed some of the basic trends he discerned, but, in other respects, it has opened up entire new vistas of fundamental law of which he was largely unaware. In little of his basics has he been proved wrong, although in some respects the emphasis would now be placed differently. And with respect to the range of decisions which he did not anticipate, we are witness to a series of trends in the reconstituted Court in the last few years that have resulted in eroding and cabining the activism of the 1960s and early 1970s.

This brief survey will primarily be a suggestive review of the Court's treatment of the doctrine of constitutional law set out at greater length by Professor Corwin and of the rise of the equal protection clause as a central concept of constitutional jurisprudence in the period 1953–1982.

## I

National federalism as a doctrine was proved to be far more pervasive and encompassing than it was possible to notice in 1953. In some respects, of course, later cases only confirmed what those decisions already on the books told. Foremost example of this confirmation has been the enlargement of national powers, of congressional powers, under the commerce clause. The expansive reading of that clause's authorization to Congress to reach many local incidents of business and production already apparent by 1953 was scarcely enlarged by those decisions of the 1960s and 1970s under which Congress asserted jurisdiction on the basis of an antecedent or subsequent movement over a state boundary of some element touching upon the transaction or solely upon the premise that certain transactions by their nature alone or as part of a class sufficiently *affect* interstate commerce as to warrant national regulation. Civil rights laws touching public accommodations and housing, environmental laws affecting land use regulation, criminal law coverage, and employment regulations touching health and safety as well as benefits are only the leading examples of enhanced federal activity. Conversely, state power to regulate commerce has been further restricted through the application of a doctrine of preemption which is increasingly aimed at one national standard, although under Chief Justice Burger the Court has not so readily as before seemed to favor preemption, especially in the area of labor-management relations. Only with respect to the State's own employees did the Court inhibit federal regulation and then with a decision which has yet failed to secure a stable place in the doctrine of federalism.

Of much the same import has been the application of the Bill of Rights to the States through the due process clause of the Fourteenth Amendment, a matter dealt with in greater detail below. The Court has again and again held that when a provision is applied, it means the same whether a State or the Federal Government is the challenged party, although a small but consistent minority has argued otherwise. Some flexibility, however, has been afforded the States by the judicial loosening of the standards of some of these provisions, as in the characteristics of the jury trial requirement. Adoption of the exclusionary rule in Fourth Amendment and other cases also looked to a national standard, but the more recent disparagement of the rule by majorities of the Court has relaxed its application to both States and Nation.

The Court of the last ten years has reinvigorated, to be sure, certain aspects of the old federalism. The Eleventh Amendment has been infused with new potency. The equity powers of the federal courts to interfere in on-going state court proceedings and to review state court criminal convictions under *habeas corpus* have been curtailed. A doctrine of comity and rules of prudential restraint in the exercise of federal judicial power have been invoked.

The overriding view is that the present Court where it has discretion will apply federalism concerns to limit federal powers. But the critical fact, the scope of congressional power, remains: the limits on congressional power under the commerce clause and other Article I powers, as well as under the power to enforce the Reconstruction Amendments, remain those of self-restraint.

II

For much of this period, aggregation of national power in the presidency continued unabated and not much resisted by congressional majorities, which, indeed, continued to delegate power to the Executive Branch and to the independent agencies at least to the same degree if not to a greater extent than before. The President himself, most notably in the field of foreign affairs and national defense, assumed the existence of a substantial reservoir of inherent power to effectuate his policies as well. Only in the wake of the Watergate affair did Congress move to assert itself and to attempt to claim some form of partnership with the President, most notably with respect to war powers and the declaration of national emergencies, but including as well the regulation of some domestic presidential concerns, as in the impoundment controversy.

There were few Court decisions in this area, although a renewed interest in separation of powers, as in the *Buckley* v. *Valeo* case, appeared to cast the judicial perspective favorably upon presidential prerogative and in a few cases statutory construction was utilized to preserve unto the President certain discretion that was in dispute. The conflict, in large part, has been political, and the Court resisted many efforts to involve it in litigation over the use of troops abroad in Vietnam, coming close as well to declaring, in a treaty termination context, the resurgence of the political question doctrine to all such executive-congressional disputes. Nevertheless, there does appear to have survived cessation of the Vietnam conflict a significant congressional interest in achieving a new and different balance between the political branches, an interest the assertion of which may well involve the judiciary to a much greater extent, and, in any event, one which the congressional branch is not without weapons to effectuate.

III

The demise of substantive due process, apparent when Professor Corwin wrote, is a fact today insofar as the validity of economic legislation is concerned, although in a few isolated cases, involving the obligation of contracts, the Court has demonstrated that some life is left in the old doctrines. Yet, the word "liberty" in the due process clause of the Fourteenth Amendment, noted as well by Professor Corwin, was seized upon by the Court in harnessing substantive due process to the protection of certain rights having to do with personal and familial privacy, most controversially in the abortion cases.

Whereas much of the Bill of Rights is directed to prescribing how government is to deprive one of life, liberty, or property—by judgment of a jury of one's peers or with evidence seized only through reasonable searches, for example—the First Amendment is in terms absolute and while its application has never presumed to be so absolute the effect has often been indistinguishable. Thus, the trend over the years has been to withdraw more and more speech and "speech-plus" from the regulatory and prohibitive hand of government and to free not only speech directed to political ends but that totally unrelated to any political purpose.

Thus, the constitutionalization of the law of defamation with the narrowing possibilities of recovery for libelous and slanderous criticism of public officials, political candidates, and public figures epitomizes the trend. Government's right to proscribe the advocacy of violence or unlawful activity has become more restricted. Obscenity abstractly remains outside the protective confines of the First Amendment, but the Court's changing definitional approach to what may be constitutionally denominated pornography has closely confined most governmental action taken against the verbal and pictoral representation of matters dealing with sex. The encompassing of the right to spend for political purposes and to associate together for political activity has meant that much governmental regulation of campaign finance and of limitations upon the political activities of citizens and public employees had become suspect if not impermissi-

ble. Commercial speech, long the outcast of the First Amendment, now enjoys a protected if subordinate place in free speech jurisprudence. Freedom to picket, to broadcast leaflets, to engage in physical activity representative of one's political, social, economic, or other views enjoy wide though not unlimited protection.

It may be that a differently constituted Court will view matters differently, will narrow the scope of the Amendment's protection and enlarge the permissible range of governmental action. But, in contrast to other areas in which the present Court has varied from its predecessor, the record with respect to the First Amendment has been one of substantial though uneven expansion of precedent.

IV

Unmentioned by Professor Corwin thirty years ago was the place of the equal protection clause in constitutional jurisprudence—simply because at that time Holmes' pithy characterization of it as a "last resort" argument was generally true. Today, equal protection litigation occupies a position of almost predominant character in each Term's output. Then, the rational basis standard of review of different treatments of individuals, businesses, or subjects little concerned the Justices. The clause blossomed in the Court's confrontation after *Brown* v. *Board of Education* with state and local laws and ordinances drawn on the basis of race and this aspect of the doctrinal use of the clause is still very evident on the Court's docket, though in ever new and interesting form.

Of worthy attention has been the application of the doctrine, now in a three-tier or multi-tier set of standards of review, to legislation and other governmental action classifying on the basis of sex, illegitimacy, and alienage. Of equal importance was the elaboration in adjudication under the clause of a concept of "fundamental" rights as to which a government must if it acts so as to restrict the exercise of one of these rights show not merely a reasonable basis for its actions but a justification based upon necessity, compelling necessity. The right to vote, nowhere expressly guaranteed in the Constitution (but protected against abridgment on certain grounds in the Fifteenth, Nineteenth, and Twenty-sixth Amendments) received under the clause a special dispensation that required the invalidation of all but the most simple qualifications, most barriers to ballot access by individuals and parties, and the practice of apportionment of state legislatures on any basis other than population. Wealth distinctions in the criminal process were viewed with hostility and generally invalidated.

Again, a reconstituted court made some tentative rearrangements with respect to these doctrinal developments. The suspicion of wealth classifications was largely though not entirely limited to the criminal process. Governmental discretion in the political process was enlarged a small degree. But the record generally is one of consolidation and maintenance of the doctrines, a refusal to go forward much but also a disinclination to retreat much.

V

Finally, criminal law and criminal procedure during the 1960s and 1970s has been doctrinally unstable. The story of the 1960s was largely one of the imposition of constitutional constraint upon federal and state criminal justice systems. Application of the Bill of Rights to the States was but one aspect of this story. At the same time, the Court constructed new teeth for the guarantees. For example, the privilege against self-incrimination was given new and effective meaning by requiring that at the police interrogation stage it be observed and furthermore that criminal suspects be informed of their rights under it. It was also expanded, as was the Sixth Amendment guarantee of counsel, by requiring the furnishing of counsel or at least the opportunity to consult counsel at "critical" stages of the criminal process—interrogation, preliminary hearing, and the like, rather than only at and proximate to trial. An expanded exclusionary rule was applied to keep out of evidence material obtained in violation of the suspect's search and seizure, self-incrimination, and other rights.

During the last decade, the Court has drawn the line differently here. The exclusionary rule has been cabined and redefined in several limiting ways. Search and seizure doctrine has been revised to enlarge police powers. The self-incrimination and counsel doctrines have been eroded in part although in no respect has the Court returned to the constitutional jurisprudence prevailing before the 1960s.

Moreover, substantive as well as procedural guarantees were developed. The law of capital punishment has been a course of meandering development, with the present Court almost doing away with it and then approving its revival by the States.

Undergirding the 1960s procedural and substantive development was a series of expansion of the *habeas corpus* powers of the federal courts, with the sweeping away of many jurisdictional restrictions previously imposed upon the exercise of review of state criminal convictions. Concomitantly with the narrowing of the precedents of the 1950s and 1960s Court came a retraction of federal *habeas* powers in the 1970s.

## VI

The three decades were among the most significant in the Court's history. They were as well the scene of some of the most sustained efforts to change the Court or its decisions or both with respect to a substantial number of issues. On only a few past occasions was the Court so centrally a subject of political debate and controversy in national life or an object of contention in presidential elections. One can doubt that the public any longer perceives the Court as an institution above political dispute, any longer believes that the answers to difficult issues in litigation before the Justices may be found solely in the text of the document entrusted to their keeping. But one cannot doubt either that the Court still enjoys the respect and reverence of the bar and the public generally, that its decisions generally are accorded uncoerced acquiescence, and that its pronouncements are accepted as authoritative, binding constructions of the constitutional instrument. Indeed, it can be argued that the disappearance of the myth of the absence of judicial discretion and choice strengthens the Court as an institution to the degree that it explains and justifies the exercise of discretion and choice in those areas of controversy in which the Constitution does not speak clearly or in which different sections lead to different answers. The public attitude thus established is then better enabled to understand division within the Court and within the legal profession generally, and all sides are therefore seen to be entitled to the respect accorded the good faith search for answers. As the Court's workload continues to increase, a greater and greater proportion of its cases taken are "hard" cases and while hard cases need not make bad law they do in fact lead to division among the Justices and public controversy. Increased sophistication, then, about the Court's role and its methods can only redound to its benefit.

# PROFESSOR EDWARD S. CORWIN'S INTRODUCTION TO THE 1953 EDITION

It is my purpose in this Introduction to the *Constitution of the United States, Annotated* to sketch rapidly certain outstanding phases of the Supreme Court's interpretation of the Constitution for the illustration they may afford of the interests, ideas, and contingencies which have from time to time influenced the Court in this still supremely important area of its powers and of the comparable factors which give direction to its work in the same field at the present time.

As employed in this country, Constitutional Law signifies a body of rules resulting from the interpretation by a high court of a written constitutional instrument in the course of disposing of cases in which the validity, in relation to the constitutional instrument, of some act of governmental power, State or national, has been challenged. This function, conveniently labelled "Judicial Review," involves the power and duty on the part of the Court of pronouncing void any such act which does not square with its own reading of the constitutional instrument. Theoretically, therefore, it is a purely juristic product, and as such does not alter the meaning. To those who hold this theory, the Court does not elaborate the instrument, as legislative power might; it elucidates it, bringing forth into the light of day, as it were, what was in the instrument from the first.

In the case of judicial review as exercised by the Supreme Court of the United States in relation to the national Constitution, its preservative character has been at times a theme of enthusiastic encomium, as in the following passage from a speech by Chief Justice Edward Douglass White, made shortly before he ascended the Bench:

> . . . The glory and ornament of our system which distinguishes it from every other government on the face of the earth is that there is a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of the Government within the walls of that great fabric which our fathers builded for our protection and our immunity forever.[1]

At other times the subject has been dealt with less enthusiastically, even skeptically.

One obstacle that the theory encountered very early was the refusal of certain Presidents to regard the Constitution as primarily a source of rules for judicial decision. It was rather, they urged, a broadly discretionary mandate to themselves and to Congress. And pursuing the logic of this position, the contended that while the Court was undoubtedly entitled to read the Constitution independently for the purpose of deciding cases, this very purpose automatically limited the authoritativeness of its readings; and that within their respective jurisdictions President and Congress enjoyed the same correlative independence as the Court did within its jurisdiction. This was, in effect, the position earlier of Jefferson and Jackson, later of Lincoln, and in recent times that of the two Roosevelts.

Another obstacle has been the Court's own making. Whether because of the difficulty of amending the Constitution or for cautionary reasons, the Court took the position, as early as 1851, that it would reverse previous decisions on constitutional issues when convinced they were erroneous.[2] An outstanding instance of this nature was the decision in the Legal Tender cases, in 1871, reversing the decision which had been rendered in Hepburn *v.* Griswold fifteen months earlier;[3] and no less shattering to the prestige of *stare decisis* in the constitutional

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[1] 23 Cong. Rec. 6516 (1982).

[2] The Propellor Genessee Chief *v.* Fitzhugh, 12 How. 443, 455, 459 (1852), overturning The Steamboat Thomas Jefferson, 10 Wheat. 428 (1825).

[3] Knox *v.* Lee, 12 Wall. 457 (1871); Hepburn *v.* Griswold, 8 Wall. 603 (1870).

field was the Income Tax decision of 1895,[4] in which the Court accepted Mr. Joseph Choate's invitation to "correct a century of error". The "constitutional revolution" of 1937 produced numerous reversals of earlier precedents on the ground of "error", some of them, the late Mr. James M. Beck complained, without "the ceremonious respect of a funeral oration".[5] In 1944 Justice Reed cited fourteen cases decided between March 27, 1937 and June 14, 1943 in which one or more prior constitutional decisions were overturned.[6] On the same occasion Justice Roberts expressed the opinion that adjudications of the Court were rapidly gravitating "into the same class as a restricted railroad ticket, good for this day and train only".[7]

> Years ago the eminent historian of the Supreme Court, Mr. Charles Warren, had written: However the Court may interpret the provision of the Constitution, it is still the Constitution which is the law and not the decision of the Court.[8]

In short, it is "not necessarily so" that the Constitution is preserved in the Court's reading of it.

A third difficulty in the way of the theory that Judicial Review is preservative of the Constitution is confronted when we turn to consider the statistical aspects of the matter. The suggestion that the Constitution of the United States contained in embryo from the beginning the entirety of our national Constitutional Law confronts the will to believe with an altogether impossible test. Compared with the Constitutional Document, with its 7,000 words more or less, the bulk of material requiring to be noticed in the preparation of an annotation of this kind is simply immense. First and last, the Court has probably decided well over 4,000 cases involving questions of constitutional interpretation. In many instances, to be sure, the constitutional issue was disposed of quite briefly. In some instances, on the other hand, the published report of the case runs to more than 200 pages.[9] In the total, it is probable that at least 50,000 pages of the United States Supreme Court Reports are devoted to Constitutional Law topics.

Nor is this the whole story, or indeed the most important part of it. Even more striking is the fact that the vast proportion of cases forming the corpus of national Constitutional Law has stemmed, or has purported to stem, from four or five brief phrases of the Constitutional Document, the power "to regulate . . . commerce among the States," impairment of "the obligation of contracts" (now practically dried up as a formal source of constitutional law), deprivation of "liberty or property without due process of law" (which phrase occurs both as a limitation on the National Government and, since 1868, on the States), and out of four or five doctrines which the Constitution is assumed to embody. The latter are, in truth, the essence of the matter, for it is through these doctrines, and under the cover which they afford, that outside interests, ideas, preconceptions, have found their way into Constitutional Law, have indeed become for better, for worse, its leavening element.

That is to say, the effectiveness of Constitutional Law as a system of restraints on governmental action in the United States, which is its primary *raison d'etre*, depends for the most part on the effectiveness of these doctrines as they are applied by the Court to that purpose. The doctrines to which I refer are (1) the doctrine or concept of Federalism; (2) the doctrine of the Separation of Powers; (3) the concept of a Government of Laws and not of Men, as opposed especially to indefinite conceptions of presidential power; (4) and the no longer prevalent substantive doctrine of Due Process of Law and attendant conceptions of Liberty. What I propose

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[4] Pollock *v.* Farmers' Loan & Trust Co., 157 U.S. 429; 158 U.S. 601 (1895).

[5] 78 Cong. Rec. 5358 (1934).

[6] Smith *v.* Allwright, 321 U.S. 649, 665 (1944).

[7] Ibid., 669.

[8] Warren, *The Supreme Court in United States History*, 748–749 (1935).

[9] The Dartmouth College case (Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819)), 197 pages; Gibbons *v.* Ogden, 9 Wheat. 1 (1824), 240 pages; the Charles Bridge case (Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 (1837)), 230 pages; the Passenger Cases, 7 How. 283 (1849), 220 pages; the Dred Scott case (Scott *v.* Sandford, 19 How. 393 (1857)), 240 pages; Ex parte Milligan, 4 Wall. 2 (1866), 140 pages; the first Pollock case (Pollock *v.* Farmers' Loan & Trust Co., 157 U.S. 429 (1895)), 225 pages; Myers *v.* United States, 272 U.S. 52 (1926), 243 pages.

to do is to take up each of these doctrines or concepts in turn, tell something of their earlier history, and then project against this background a summary account of what has happened to them in recent years in consequence of the impact of war, of economic crisis, and of the political and ideological reaction to the latter during the Administration of Franklin D. Roosevelt.

## I

### Federalism

Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or "States," for common purposes; (2) the division of legislative powers between a "National Government," on the one hand, and constituent "States," on the other, which division is governed by the rule that the former is "a government of enumerated powers" while the latter are governments of "residual powers"; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the "National Government" within its assigned sphere over any conflicting assertion of "State" power; (6) dual citizenship.

The third and fourth of the above-listed salient features of the American Federal System are the ones which at the outset marked it off most sharply from all preceding systems, in which the member states generally agreed to obey the mandates of a common government for certain stipulated purposes, but retained to themselves the right of ordaining and enforcing the laws of the union. This, indeed, was the system provided in the Articles of Confederation. The Convention of 1787 was well aware, of course, that if the inanities and futilities of the Confederation were to be avoided in the new system, the latter must incorporate "a coercive principle"; and as Ellsworth of Connecticut expressed it, the only question was whether it should be a "a coercion of law, or a coercion of arms," whether that "coercion which acts only upon delinquent individuals" or that which is applicable to "sovereign bodies states, in their political capacity." [10] In Judicial Review the former principle was established, albeit without entirely discarding the latter, as the War between the States was to demonstrate.

The sheer fact that Federalism enters the purview of Constitutional Law, that is, becomes a judicial concept, in consequence of the conflicts which have at times arisen between the idea of State autonomy ("State Sovereignty") and the principle of National Supremacy. Exaltation of the latter principle, as it is recognized in the Supremacy Clause (Article VI, paragraph 2) of the Constitution, was the very keystone of Chief Justice Marshall's constitutional jurisprudence. It was Marshall's position that the supremacy clause was intended to be applied literally, so that if an unforced reading of the terms in which legislative power was granted to Congress confirmed its right to enact a particular statute, the circumstance that the statute projected national power into a hitherto accustomed field of State power with unavoidable curtailment of the latter was a matter of indifference. State power, as Madison in his early nationalistic days phrased it, was "no criterion of national power," and hence no independent limitation thereof.

Quite different was the outlook of the Court over which Marshall's successor, Taney, presided. That Court took as its point of departure the Tenth Amendment, which reads, "The powers not delegated to the United States by this Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." In construing this provision the Court under Taney sometimes talked as if it regarded all the reserved powers of the States as limiting national power; at other times it talked as if it regarded certain subjects as reserved exclusively to the States, slavery being, of course, the outstanding instance.[11]

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[10] 3 Farrand, *The Records of the Federal Convention of 1787*, 240, 241 (1911).

[11] See the words of Taney, C.J., in the License Cases, 5 How. 504, 573–574 (1847); and in The Passenger Cases, 7 How. 283, 465–470 (1849).

But whether following the one line of reasoning or the other, the Taney Court subtly transformed its function, and so that of Judicial Review, in relation to the Federal System. Marshall viewed the Court as primarily an organ of the National Government and of its supremacy. The Court under Taney regarded itself as standing outside of and above both the National Government and the States, and as vested with a quasi-arbitral function between two centers of diverse, but essentially equal, because "sovereign", powers. Thus in Ableman *v.* Booth, which was decided on the eve of the War between the States, we find Taney himself using this arresting language:

> This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government. . . . So long . . . as this Constitution shall endure, this tribunal must exist with it deciding in the peaceful forms of judicial proceeding, the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.[12]

It is, therefore, the Taney Court, rather than the Marshall Court, which elaborated the concept of Dual Federalism. Marshall's federalism is more aptly termed national federalism; and turning to modern issues, we may say without exaggeration that the broad general constitutional issue between the Court and the Franklin D. Roosevelt program in such cases as Schechter Corp. v. United States and Carter v. Carter Coal.[13] was whether Marshall's or Taney's brand of federalism should prevail. More precisely, the issue in these cases was whether Congress' power to regulate commerce must stop short of regulating the employer-employee relationship in industrial production, that having been hitherto regulated by the States. In Justice Sutherland's words in the Carter case:

> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted tht interstate commerce is greatly affected thereby. . . . The conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local results. Such effect as they may have upon commerce, however extensive it may be, secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[14]

We all know how this issue was finally resolved. In the Fair Labor Standards Act of 1938 Congress not only prohibits interstate commerce in goods produced by substandard labor, but it directly forbids, with penalties, the employment of labor in industrial production for interstate commerce on other than certain prescribed terms. And in United States *v.* Darby[15] this Act was sustained by the Court, in all its sweeping provisions, on the basis of an opinion by Chief Justice Stone which in turn is based on Chief Justice Marshall's famous opinions in McCulloch *v.* Maryland and Gibbons *v.* Ogden rendered more than a century and a quarter ago. In short, as a principle capable of delimiting the national legislative power, the concept of Dual Federalism as regards the present Court seems today to be at an end, with consequent aggrandizement of national power.

There is, however, another side to the story. For in one respect even the great Marshall has been in effect overruled in support of enlarged views of national authority. Without essay-

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[12] 21 How. 506, 520-521 (1859).
[13] 295 U.S. 495 (1935); 298 U.S. 238 (1936).
[14] 298 U.S. 238, 308-309.
[15] 312 U.S. 100 (1941).

ing a vain task of "tithing mint, anise and cummin," it is fairly accurate to say that throughout the 100 years which lie between Marshall's death and the cases of the 1930's, the conception of the federal relationship which on the whole prevailed with the Court was a competitive conception, one which envisaged the National Government and the States as jealous rivals. To be sure, we occasionally get some striking statements of contrary tendency, as in Justice Bradley's opinion in 1880 for a divided Court in the Siebold Case,[16] where is reflected recognition of certain results of the War between the States; or later in a frequently quoted dictum by Justice McKenna, in Hoke *v.* United States, in which the Mann White Slave Act was sustained in 1913:

> Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.[17]

The competitive concept is, nevertheless, the one much more generally evident in the outstanding results for American Constitutional Law throughout three-quarters of its history. Of direct pertinence in this connection is the doctrine of tax exemption which converted federalism into a principle of private immunity from taxation, so that, for example, neither government could tax as income the official salaries paid by the other government.[18] This doctrine traces immediately to Marshall's famous judgment in McCulloch *v.* Maryland,[19] and bespeaks a conception of the federal relationship which regards the National Government and the States as bent on mutual frustration. Today the principle of tax exemption, except so far as Congress may choose to apply it to federal instrumentalities by virtue of its protective powers under the necessary and proper clause, is at an end.

By the cooperative conception of the federal relationship the States and the National Government are regarded as mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand. This is the conception on which the recent social and economic legislation professes to rest. It is the conception which the Court invokes throughout its decisions in sustaining the Social Security Act of 1935 and supplementary State legislation. It is the conception which underlies congressional legislation of recent years making certain crimes against the States, like theft, racketeering, kidnapping, crimes also against the National Government whenever the offender extends his activities beyond State boundary lines. The usually cited constitutional justification for such legislation is that which was advanced forty years ago in the above quoted Hoke case.[20]

It has been argued that the cooperative conception of the federal relationship, especially as it is realized in the policy of federal subventions to the States, tends to break down State initiative and to devitalize State policies. Actually, its effect has often been just the contrary, and for the reason pointed out by Justice Cardozo in Helvering *v.* Davis,[21] decided in 1937, namely, that the States, competing as they do with one another to attract investors, have not been able to embark separately upon expensive programs of relief and social insurance. Another great objection to Cooperative Federalism is more difficult to meet. This is, that Cooperative Federalism invites further aggrandizement of national power. Unquestionably it does, for when two cooperate, it is the stronger member of the combination who usually calls the tunes. Resting as it does primarily on the superior fiscal resources of the National Government, Cooperative Federalism has been, at least to date, a short expression for a constantly increasing concentration of power at Washington in the stimulation and supervision of local policies.[22]

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[16] Ex parte Siebold, 100 U.S. 371 (1880).
[17] 227 U.S. 308, 322.
[18] Dobbins *v.* Commissioners, 16 Pet. 435 (1842); Collector *v.* Day, 11 Wall. 113 (1870).
[19] 4 Wheat. 316 431 (1819).
[20] For references and further details, *see* Corwin, *Court over Constitution*, 129–176 (1938).
[21] 301 U.S. 619 (1937).
[22] In this connection, *see* Oklahoma *v.* Civil Service Comm'n., 330 U.S. 127, 142–145 (1947).

The last element of the concept of Federalism to demand attention is the doctrine that the National Government is a government of enumerated powers only, and consequently under the necessity at all times of justifying its measures juridically by pointing to some particular clause or clauses of the Constitution which, when read separately or in combination, may be thought to grant power adequate to such measures. In spite of such decisions as that in United States *v.* Darby, this time-honored doctrine still guides the authoritative interpreters of the Constitution in determining the validity of such acts which are passed by Congress in presumed exercise of its powers of domestic legislation—the course of reasoning pursued by the Chief Justice in the Darby case itself is proof that such is the fact. In the field of foreign relations, on the contrary, the doctrine of enumerated powers has always had a difficult row to hoe, and today may be unqualifiedly asserted to be defunct.

As early as the old case of Penhallow *v.* Doane, which was decided by the Supreme Court in 1795, certain counsel thought it pertinent to urge the following conception of the War Power:

> A formal compact is not essential to the institution of a government. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. In every society there must be a sovereignty. 1 Dall, Rep. 46, 57. Vatt. B. 1. ch. 1, sec. 4. The powers of war form an inherent characteristic of national sovereignty: and, it is not denied, that Congress possessed those powers. . . .[23]

To be sure, only two of the Justices felt it necessary to comment on this argument, which one of them endorsed, while the other rejected it.

Yet seventy-five years later Justice Bradley incorporated closely kindred doctrine into his concurring opinion in the Legal Tender Cases;[24] and in the years following the Court itself frequently brought the same general outlook to questions affecting the National Government's powers in the field of foreign relations. Thus in the Chinese Exclusion Case, decided in 1889, Justice Field, in asserting the unlimited power of the National Government, and hence of Congress, to exclude aliens from American shores, remarked:

> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with the powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independent and security throughout its entire territory.[25]

And four years later the power of the National Government to deport alien residents at the option of Congress was based by Justice Gray on the same general reasoning.[26]

Finally, in 1936, Justice Sutherland, speaking for the Court in U.S. *v.* Curtiss-Wright Corp., with World War I a still recent memory, took over bodily counsel's argument of 140 years earlier, and elevated it to the head of the column of authoritative constitutional doctrine. He said:

> A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . . It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality.[27]

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[23] 3 Dall. 54, 74.
[24] Knox *v.* Lee. 12 Wall. 457, 555 (1871).
[25] 130 U.S. 581, 604.
[26] Fong Yue Ting *v.* United States, 149 U.S. 698 (1893).
[27] 299 U.S. 304, 316-318.

In short, the power of the National Government in the field of international relationship is not simply a complexus of particular enumerated powers; it is an inherent power, one which it attributable to the National Government on the ground solely of its belonging to the American People as a sovereign political entity at International Law. In that field the principle of Federalism no longer holds, if it ever did.[28]

## II

### The Separation of Powers

The second great structural principle of American Constitutional Law is supplied by the doctrine of the Separation of Powers. The notion of three distinct functions of govenment approximating what we today term the legislative, the executive, and the judicial, is set forth in Aristotle's Politics,[29] but it was the celebrated Montesquieu who, by joining the idea to the notion of a "mixed constitution" of "checks and balances", in Book XI of his Spirit of the Laws, brought Aristotle's discovery to the service of the rising libertarianism of the eighteenth century. It was Montesquieu's fundamental contention that "men entrusted with power tend to abuse it". Hence it was desirable to divide the powers of government, first, in order to keep to a minimum the powers lodged in any single organ of government; secondly, in order to be able to oppose organ to organ.

In the United States libertarian application of the principle was originally not too much embarrassed by inherited institutions. In its most dogmatic form the American conception of the Separation of Powers may be summed up in the following propositions: (1) There are three intrinsically distinct functions of government, the legislative, the executive, and the judicial; (2) these distinct functions ought to be exercised respectively by three separately manned departments of government; which, (3) should be constitutionally equal and mutually independent; and finally, (4) a corollary doctrine stated by Locke—the legislature may not delegate its powers.[30]

Prior even to Franklin D. Roosevelt this entire colligation of ideas had been impaired by three developments in national governmental practice: first the growth of Presidential initiative in legislation; secondly, the delegation by Congress of legislative powers to the President; thirdly, the delegation in many instances of like powers to so-called independent agencies or commissions, in which are merged in greater or less measure the three powers of government of Montesquieu's postulate. Under Roosevelt the first two of these developments were brought to a pitch not formerly approximated, except temporarily during World War I.

The truth is that the practice of delegated legislation is inevitably and inextricably involved with the whole idea of governmental intervention in the economic field, where the conditions to be regulated are of infinite complexity and are constantly undergoing change. Granted such intervention, it is simply out of the question to demand that Congress should attempt to impose upon the shifting and complex scene the relatively permanent molds of statutory provision, unqualified by a large degree of administrative discretion. One of the major reasons urged for governmental intervention is furnished by the need for gearing the different parts of the industrial process with one another for a planned result. In wartime this need is freely conceded by all; but its need in economic crisis is conceivably even greater, the results sought being more complex. So in the interest both of unity of design and of flexibility of detail, presi-

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[28] *See* also Board of Trustees *v.* U.S., 289 U.S. 48, 59 (1933). In Lichter *v.* United States, 334 U.S. 742, 782 (1948), Justice Burton, speaking for the Court, says: "The war powers of Congress and the President are only those which are to be derived from the Constitution", but he adds: "the primary implication of a war power is that it shall be an effective power to wage the war successfully", which looks very like an attempt to duck the doctrine of an inherent war power while appropriating its results.

[29] Welldon (tr.), Book VI, XIV (1888). Jowett and some others propose a different arrangement.

[30] Locke, *The Second Treatise on Civil Government*, § 141. For the historical background of this principle, *see* Durr and Whiteside: *"Delegata Potestas Non Potest Delegari,"* 4 *Selected Essays on Constitutional Law*, 291–316 (1938).

dential power today takes increasing toll from both ends of the legislative process—both from the formulation of legislation and from its administration. In other words, as a barrier capable of preventing such fusion of presidential and congressional power, the principle of the Separation of Powers does not appear to have retained much of its original effectiveness; for on only one occasion [31] prior to the disallowance, in Youngstown Co. *v.* Sawyer,[32] President Truman's seizure in April 1952 of the steel industry, has the Court been constrained to condemn, as in conflict with that principle, a congressional delegation of legislative power. Indeed, its application in the field of foreign relations has been virtually terminated by Justice Sutherland's opinion in the Curtiss-Wright case.[33]

The Youngstown opinion appears to rest on the proposition that since Congress could have ordered the seizure, e.g., under the necessary and proper clause, the President, in making it on his own, usurped "legislative power" and thereby violated the principle of the Separation of Powers. In referring to this proposition, the Chief Justice (in his dissenting opinion, for himself and Justices Reed and Minton) quoted as follows from a 1915 brief of the then Solicitor General of the United States on this same question:

> The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress.
>
> In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation.[34]

Or, in more general terms, the fact that one of the three departments may apply its distinctive techniques to a certain subject matter sheds little or no light on the question whether one of the other departments may deal with the same subject matter according to its distinctive techniques. Indeed, were it otherwise, the action of the Court in disallowing President Truman's seizure order would have been of very questionable validity, inasmuch as the President himself conceded that Congress could do so.

The conception of the Separation of Powers doctrine advanced in Youngstown appears to have been an ad hoc discovery for the purpose of disposing of that particular case.

To sum up the argument to this point: War, the Roosevelt-Truman programs, and the doctrines of Constitutional Law on which they rest, and the conception of governmental function which they incorporate, have all tremendously strengthened forces which even earlier were making, slowly, to be sure, but with "the inevitability of gradualness," for the concentration of governmental power in the United States, first in the hands of the National Government; and, secondly, in the hands of the national Executive. In the Constitutional Law which the validation of the Roosevelt program has brought into full being, the two main structural elements of government in the United States in the past, the principle of Dual Federalism and the doctrine of the Separation of Powers, have undergone a radical and enfeebling transformation which war has, naturally, carried still further.

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[31] Panama Refining Co. *v.* Ryan, 293 U.S. 388 (1935); Schechter Corp. *v.* United States, 295 U.S. 495 (1935).

[32] 343 U.S. 579 (1952).

[33] 299 U.S. 304, 327–329.

[34] 343 U.S. 579, 690 (1952).

## III

### A Government of Laws and Not of Men

The earliest repositories of executive power in this country were the provincial governors. Being the point of tangency and hence of irriation between imperial policy and colonial particularism, these officers incurred a widespread unpopularity that was easily generalized into distrust of their office. So when Jefferson asserted in his *Summary View*, in 1774, that the King "is no more than the chief officer of the people, appointed by the laws and circumscribed with definite powers, to assist in working the great machine of government," [35] he voiced a theory of executive power which, impudently as it flouted historical fact, had the support of the draftsmen of the first American constitutions. In most of these instruments the governors were elected annually by the legislative assemblies, were stripped of every prerogative of their predecessors in relation to legislation, and were forced to exercise the powers left them subject to the advice of a council chosen also by the assembly, and from its own members if it so desired. Finally, out of abundant caution the constitution of Virginia decreed that executive powers were to be exercised "according to the laws of" the Commonwealth, and that no power or prerogative was ever to be claimed "by virtue of any law, statute or custom of England." "Executive power", in short, was left entirely to legislative definition and was cut off from all resources of the common law and the precedents of English monarchy.

Fortunately or unfortunately, the earlier tradition of executive power was not to be exorcised so readily. Historically, this tradition traces to the fact that the royal prerogative was residual power, that the monarch was first on the ground, that the other powers of government were off-shoots from monarchical power. Moreover, when our forefathers turned to Roman history, as they intermittently did, it was borne in upon them that dictatorship had at one time been a normal feature of republican institutions.

And what history consecrated, doctrine illumined. In Chapter XI of John Locke's Second Treatise on Civil Government, from the pages of which much of the opening paragraphs of the Declaration of Independence comes, we read: "Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government".[36] In Chapter XIV of the same work we are told, nevertheless, that "prerogative" is the power "to act according to discretion without the prescription of the law and sometimes against it"; and that this power belongs to the executive, it being "impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm if they are executed with inflexible rigor." Nor, continues Locke, is this "undoubted prerogative" ever questioned, "for the people are very seldom or never scrupulous or nice in the point" whilst the prerogative "is in any tolerable degree employed for the use it was meant, that is, for the good of the people." [37] A parallel ambivalence pervades both practice and adjudication under the Constitution from the beginning.

The opening clause of Article II of the Constitution reads: "The executive power shall be vested in a President of the United States of America." The primary purpose of this clause, which made its appearance late in the Convention and was never separately passed upon by it, was to settle the question whether the executive branch should be plural or single; a secondary purpose was to give the President a title. There is no hint in the published records that the clause was supposed to add cubits to the succeeding clauses which recite the President's powers and duties in detail.

For all that, the "executive power" clause was invoked as a grant of power in the first Congress to assemble under the Constitution, and outside Congress in 1793. On the former occasin Madison and others advanced the contention that the clause empowered the President to

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[35] Andrew C. McLaughlin, *A Constitutional History of the United States*, 81 (1935).
[36] Locke, op. cit., § 137.
[37] Ibid. §§ 159-161.

remove without the Senate's consent all executive officers, even those appointed with that consent, and in effect this view prevailed, to be ratified by the Supreme Court 137 years later in the famous Oregon postmaster case.[38]

In 1793 the protagonist of "executive power" was Alexander Hamilton, who appealed to the clause in defense of Washington's proclamation of neutrality, issued on the outbreak of war between France and Great Britain. Prompted by Jefferson to take up his pen and "cut him to pieces in face of the public," Madison shifted position, and charged Hamilton with endeavoring to smuggle the prerogative of the King of Great Britain into the Constitution via the "executive power" clause.[39] Three years earlier Jefferson had himself written in an official opinion as Secretary of State: [The Executive branch of the government], "possessing the rights of self-government from nature, cannot be controlled in the exercise of them but by a law, passed in the forms of the Constitution".[40]

This time judicial endorsement of the broad conception of the executive power came early. In laying the foundation in Marbury *v.* Madison for the Court's claim of power to pass on the constitutionality of acts of Congress, Marshall said: "The government of the United States has been emphatically termed a government of laws and not of men".[41] Two pages along he added these words:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to this country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.[42]

From these words arises the doctrine of Political Questions, an escape clause from the trammels of judicial review for high executive officers in the performance of their discretionary duties. The doctrine was continued, even expanded, by Marshall's successor. In Luther *v.* Borden,[43] decided in 1849, the Court was invited to review the determination by the President that the existing government of Rhode Island was "republican" in form. It declined the invitation, holding that the decision of Congress and of the President as Congress' delegate was final in the matter, and bound the courts. Otherwise said Chief Justice Taney, the guarantee clause of the Constitution (Article IV, section 4) "is a guarantee of anarchy and not of order." But a year later the same Chief Justice, speaking again for the unanimous Court, did not hesitate to rule that the President's powers as commander-in-chief were purely military in character, those of any top general or top admiral.[44] Hamilton had said the same thing in Federalist No. 69.

Alongside the opinions of the Court of this period, however, stand certain opinions of Attorneys General that yield a less balanced bill of fare. For it is the case that, from the first down to the present year of grace, these family lawyers of the Administration in power have tended to favor expansive conceptions of presidential prerogative. As early as 1831 we find an Attorney General arguing before the Supreme Court that, in performance of the trust enjoined upon him by the "faithful execution" clause, the President "not only may, but . . . is bound to avail himself of every appropriate means not forbidden by law."[45] Especially noteworthy is a series

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[38] Myers v. United States, 272 U.S. 52 (1926).

[39] For the famous debate between "Pacificus" (Hamilton) and "Helvidius" (Madison), *See* Corwin, *The President's Control of Foreign Relations*, ch. 1 (1917).

[40] 5 Jefferson, *Writings*, 209 (Ford ed. 1885).

[41] 1 Cr. 137, 163 (1803).

[42] Ibid. 165–166.

[43] 7 How. 1.

[44] Fleming *v.* Page, 9 How. 603 (1850).

[45] United States *v.* Tingey, 5 Pet. 115, 122.

of opinions handed down by Attorney General Cushing in the course of the years 1853 to 1855. In one of these the Attorney General laid down the doctrine that a marshal of the United States, when opposed in the execution of his duty by unlawful combinations too powerful to be dealt with by the ordinary process of a federal court, had authority to summon the entire able-bodied force of his precinct as a *posse comitatus*, comprising not only bystanders and citizens generally but any and all armed forces,[46] which is precisely the theory upon which Lincoln based his call for volunteers in April, 1861.

Also manifest is the debt of Lincoln's message of July 4, 1981, to these opinions. Here in so many words the President lays claim to "the war power," partly on the ground of his duty to "take care that the laws be faithfully executed," partly in reliance on his powers as Commander-in-Chief, incidentally furnishing thereby a formula which has frequently reappeared in opinions of Attorneys General in recent years. Nor did Lincoln ever relinquish the belief that on the one ground or the other he possessed extraordinary resources of power which Congress lacked and the exercise of which it could not control—an idea in the conscientious pursuit of which his successor came to the verge of utter disaster.

When first confronted with Lincoln's theory in the Prize Cases,[47] in the midst of war, a closely divided Court treated it with abundant indulgence; but in *Ex parte* Milligan [48] another closely divided Court swung violently to the other direction, adopting the comfortable position that the normal powers of the government were perfectly adequate to any emergency that could possibly arise, and citing the war just "happily terminated" in proof. But once again the principle of equilibrium asserted itself. Five months after Milligan, the same Bench held unanimously in Mississippi *v.* Johnson,[49] that the President is not accountable to any court save that of impeachment either for the nonperformance of his constitutional duties or for the exceeding of his constitutional powers.

This was in the 1866–1867 term of Court. Sixteen years later, in 1882, Justice Samuel Miller gave classic expression to the principle of "a government of laws and not of men" [50] in these words: "No man is so high that he is above the law . . . All . . . officers are creatures of the law and are bound to obey it." [51] Eight years later this same great Judge queried whether the President's duty to take care that the laws be faithfully executed is "limited to the enforcement of acts of Congress or of treaties according to their express terms," whether it did not also embrace "the rights, duties, and obligations growing out of the Constitution itself . . . and all the protection implied by the nature of the government under the Constitution." [52] Then in 1895, in the Debs case,[53] the Court sustained unanimously the right of the National Executive to go into the federal courts and secure an injunction against striking railway employees who were interfering with interstate commerce, although it was conceded that there was no statutory basis for such action. The opinion of the Court extends the logic of the holding to any widespread public interest.

The great accession to presidential power in recent decades has been accompanied by the breakdown dealt with earlier of the two great structural principles of the American Constitutional System, the doctrine of Dual Federalism and the doctrine of the Separation of Powers. The first exponent of "the New Presidency", as some termed it, was Theodore Roosevelt, who tells us in his *Autobiography* that the principle which governed him in his exercise of the presidential office was that he had not only a right but a duty "to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws." [54] In

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[46] 6 Op. Atty. Gen. 466 (1854).
[47] 2 Black 635 (1863).
[48] 4 Wall. 2 (1866).
[49] 4 Wall. 475 (1866).
[50] *See* Mass. Const., art. 30.
[51] United States *v.* Lee, 106 U.S. 196, 220.
[52] In re Neagle, 135 U.S. 1, 64.
[53] 158 U.S. 564.
[54] *Autobiography*, 388–389 (1913).

his book, *Our Chief Magistrate and his Powers*, Ex-President Taft warmly protested against the notion that the President has any constitutional warrant to attempt the role of a "Universal Providence." [55] A decade earlier his destined successor Woodrow Wilson, had avowed the opinion that "the President is at liberty, both in law and conscience, to be as big a man as he can".[56]

But it is the second Roosevelt who beyond all twentieth-century Presidents succeeded in affixing the stamp both of personality and of crisis upon the Presidency as it exists at this moment. In the solution of the problems of an economic crisis, "a crisis greater than war," he claimed for the National Government in general, and for the President in particular, powers which they had hitherto exercised only on the justification of war. Then when the greatest crisis in the history of our international relations arose, he imparted to the President's diplomatic powers new extension, now without consulting Congress, now with Congress' approval; and when at last we entered World War II, he endowed the precedents of both the War between the States and World War I with unprecedented scope.[57]

It is timely therefore to inquire whether American Constitutional Law today affords the Court a dependable weapon with which to combat effectively contemporary enlarged conceptions of presidential power. Pertinent in this connection is the aforementioned recent action of the Court in Youngstown Co. *v.* Sawyer disallowing presidential seizure of the steel industry. The net result of that case is distinctly favorable to presidential pretentions, in two respects: first, because of the failure of the Court to traverse the President's finding of facts allegedly justifying his action, an omission in accord with the doctrine of Political Questions; secondly, the evident endorsement by a majority of the Court of the doctrine that, as stated in Justice Clarks' opinion: "The Constitution does grant to the President extensive authority in times of grave and imperative national emergency".[58] That the Court would have sustained, as against the President's action, a clear-cut manifestation of congressional action to the contrary is, on the other hand, unquestionable. In short, if we are today looking for a check upon the development of executive emergency government, our best reliance is upon the powers of Congress, which can always supply needed gaps in its legislation. The Court can only say "no", and there is no guarantee that in the public interest it would wish to assume this responsibility.

## IV

### The Concept of Substantive Due Process of Law

A cursory examination of the pages of this volume reveals that fully a quarter of them deal with cases in which the Court has been asked to protect private interests of one kind or another against legislation, most generally State legislation, which is alleged to invade "liberty" or "property" contrary to "due process of law". How is this vast proliferation of cases, and attendant expansion of the Court's constitutional jurisdiction, to be explained? The explanation, in brief, is to be found in the replacement of the original meaning of the due process clause with a meaning of vastly greater scope. Judicial review is always a function, so to speak, of the viable Constitutional Law of a particular period.

From what has been previously said in this Introduction, it clearly appears that the Court's interpretation of the Constitution has involved throughout considerable lawmaking but in no other instance has its lawmaking been more evident than in its interpretation of the due process clauses, and in no other instance have the State judiciaries contributed so much to the final result. The modern concept of substantive due process is not the achievement of any one American high court; it is the joint achievement of several—in the end, of all.[59]

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[55] *Op. cit.*, 144 (1916).
[56] Wilson, *Constitutional Government in the United States*, 70 (1917).
[57] Corwin, *Liberty Against Government*, chs. 3, 4 (1948).
[58] 343 U.S. 579, 662.
[59] *See* Corwin, *Liberty Against Government*, chs. 3, 4, (1940).

The thing which renders the due process clause an important datum of American Constitutional Law is the role it has played first and last in articulating certain theories of private immunity with the Constitutional Document. The first such theory was Locke's conception of the property right as anterior to government and hence as setting a moral limit to its powers.[60] But while Locke's influence is seen to pervade the Declarations and Bills of Rights which often accompanied the revolutionary State Constitutions, yet their promise was early defeated by the overwhelming power of the first State legislatures, especially *vis-a-vis* the property right. One highly impressive exhibit of early State legislative power is afforded by the ferocious catalogue of legislation directed against the Tories, embracing acts of confiscation, bills of pains and penalties, even acts of attainder. A second exhibit of the same kind is furnished by the flood of paper money laws and other measures of like intent which the widespread debtor class forced through the great majority of the State assemblies in the years following the general collapse of values in 1780.

The most important reaction of the creditor interest to this course of legislation was its energetic part in bringing about the Philadelphia Convention. Closer, however, to our purpose is the leadership taken by the new federal judiciary in asserting the availability against predatory State legislation of extra-constitutional principles sounding in Natural Law. In 1795, Justice Patterson of the new Supreme Court admonished a Pennsylvania jury that to construe a certain State staute in a way to bring it into conflict with plaintiff's property rights would render it void. "Men," said he, "have a sense of property. . . . The preservation of property . . . is a primary object of the social compact."[61] Three years later, Justice Chase proclaimed from the Supreme Bench itself, with characteristic emphasis, his rejection of the idea that State legislative power was absolute unless its authority was "expressly restrained" by the constitution of the State.[62] He too was thinking primarily of the rights of property.

To dicta such as these constantly accrued others of like tenor from various high State courts, the total of which had come to comprise prior to the War between the States an impressive body of coherent doctrine protective of vested rights but claiming little direct support from written constitutional texts. This indeed was its weakness. For the question early obtruded itself, whether judicial review could pretend to operate on a merely moral basis. Both the notion that the Constitution was an emanation from the sovereignty of the people, and the idea that judicial review was but a special aspect of normal judicial function, forbade the suggestion. It necessarily followed that unless judicial protection of the property right against legislative power was to be waived, it must be rested on some clause of the Constitutional Document; and, inasmuch as the due process clause and the equivalent law of the land clause of certain of the early State constitutions were the only constitutional provisions which specifically mentioned property, they were the ones selected for the purpose.

The absorptive power of the law of the land clause, the precursor in the original State constitutions of the historically synonymous due process clause, was foreshadowed as early as 1819 in a dictum by Justice William Johnson of the United States Supreme Court:

> As to the words from the Magna Charta . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.[63]

Thirty-eight years later, in 1857, the prophecy of these words was realized in the famous Dred Scott case,[64] in which Section 8 of the Missouri Compromise, whereby slavery was excluded

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[60] ". . . The supreme power cannot take from any man any part of his property without his own consent". Locke, *Second Treatise*, § 138.

[61] Van Horne's Lessee *v.* Dorrance, 2 Dall. 304, 310 (1795).

[62] Calder *v.* Bull, 3 Dall. 386, 388-389 (1798). *See also* Loan Association *v.* Topeka, 20 Wall. 655 (1875).

[63] Bank of Columbia *v.* Okely, 4 Wheat. 235, 244.

[64] Scott *v.* Sandford, 19 How. 393, 450 (1857).

from the territories, was held void under the Fifth Amendment, not on the ground that the procedure for enforcing it was not due process of law, but because the Court regarded it as unjust to forbid people to take their slaves, or other property, into the territories, the common property of all the States.

Meanwhile, in the previous year (1856) the recently established Court of Appeals of New York had, in the landmark case of Wynehamer *v.* People,[65] set aside a State-wide prohibition law as comprising, with regard to liquors in existence at the time of its going into effect, an act of destruction of property not within the power of government to perform "even by the forms of due process of law". The term due process of law, in short, simply drops out of the clause, which comes to read "no person shall be deprived of property," period. At the same time Judge Comstock's opinion in the case sharply repudiates all arguments against the statute sounding in Natural Law concepts, fundamental principles of liberty, common reason and natural rights, and so forth. Such theories were subversive of the necessary powers of government. Furthermore, there was "no process of reasoning by which it can be demonstrated that the 'Act for the Prevention of Intemperance, Pauperism and Crime' is void, upon principles and theories outside of the constitution, which will not also, and by an easier induction, bring it in direct conflict with the constitution itself."[66] Thus it was foreshadowed that the law of the land and the due process of law clauses, which were originally inserted in our constitutions to consecrate a specific mode of trial in criminal cases, to wit, the grand jury, petit jury process of the common law, would be transformed into a general restraint upon substantive legislation capable of affecting property rights detrimentally.

It is against this background that the adoption of the Fourteenth Amendment in 1868 must be projected. Applied, as in the Dred Scott and Wynehamer cases, the clause which forbids any State "to deprive any person of life, liberty or property without due process of law" proffered the Court, in implication, a vast new jurisdiction, but this the Court at first manifested the greatest reluctance to enter upon. It did not wish, it protested, to become "a perpetual censor upon all State legislation"; nor did it wish, by enlarged conceptions of the rights protected by the Amendment, to encourage Congress to take over, under the fifth section of the Amendment, the regulation of all civil rights. "The federal equilibrium" had already been sufficiently disturbed by the results of the War between the States and Reconstruction.[67]

But this self-denying ordinance, which never had the support of more than a very narrow majority of the Court, soon began to crumble at the edges. It was a period of immense industrial expansion, and the men who directed this wanted a free hand. In 1878 the American Bar Association was formed from the elite of the American Bar. Organized as it was in the wake of the "barbarous" decision—as one member termed it—in Munn *v.* Illinois,[68] in which the Supreme Court had held that States were entitled by virtue of their police power to prescribe the charges of "businesses affected with a public interest," the Association, through its more eminent members, became the mouthpiece of a new constitutional philosophy which was compounded in about equal parts from the teachings of the British Manchester School of Political Economy and Herbert Spencer's highly sentimentalized version of the doctrine of evolution, just then becoming the intellectual vogue; plus a "booster"—in the chemical sense—from Sir Henry Maine's *Ancient Law*, first published in 1861. I refer to Maine's famous dictum that "the

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[65] 13 N.Y. 378 (1856).

[66] Ibid., 390–392. The absolute veto of the Court of Appeals in the Wynehamer case was replaced by the Supreme Court, under the due process clause of the Fourteenth Amendment, by a more flexible doctrine, which left it open to the State to show reasonable justification for that type of legislation in terms of acknowledged ends of the police power, namely, the promotion of the public health, safety and morals. *See* Mugler *v.* Kansas, 123 U.S. 623 (1887); and for a transitional case, Bartemeyer *v.* Iowa, 18 Wall. 129 (1874).

[67] The Slaughter House Cases, 16 Wall. 36, 78–82 (1873). The opinion of the Court was focused principally on the privileges and immunities clause, and the narrow construction given it at this time is still the law of the Court. But Justices Bradley and Swayne pointed out the potentialities of the due process of law clause, and the former's interpretation of it may be fairly regarded as the first step toward the translation by the Court of "liberty" as Freedom of Contract.

[68] 94 U.S. 113 (1876).

movement of the progressive societies has hitherto been a movement from *Status to Contract*". If hitherto, why not henceforth? [69]

In short, the American people were presented, overnight as it were, with a new doctrine of Natural Law. Encouraged by certain dicta of dissenting Justices of the Supreme Court, a growing procession of high State courts—those of New York, Pennsylvania, Illinois, and Massachusetts, leading the way—now began infiltrating the due process clauses and especially the word "liberty" thereof, of their several State constitutions within the new revelation. The product of these activities was the doctrine of freedom of contract, the substantial purport of which was that any legislation which restricted the liberty of male persons twenty-one years of age, whether they were employers or employees, in the making of business contracts, far from being presumptively constitutional, must be justified by well known facts of which the court was entitled to take judicial notice; otherwise it fell under the ban of the due process clause.[70]

At last, in 1898, the Supreme Court at Washington, following some tentative gestures in that direction, accepted the new dispensation outright. In Smyth *v.* Ames decided that year, partially overturning Munn *v.* Illinois, it gave notice of its intention to review in detail the "reasonableness" of railway rates set by State authority and in Holden *v.* Hardy it ratified, at the same term, the doctrine of freedom of contract.[71] The result of the two holdings for the Court's constitutional jurisdiction is roughly indicated by the fact that whereas it had decided 134 cases under the Amendment during the thirty preceding years, in the ensuring thirteen years it decided 430 such cases.[72]

For more than a generation now the Court became the ultimate guardian, in the name of the Constitutional Document, of the *laissez-faire* conception of the proper relation of Government to Private Enterprise, a rather inconstant guardian, however, for its fluctuating membership tipped the scales now in favor of Business, now in favor of Government. And today the latter appears to have prevailed. In its decisions early in 1937 sustaining outstanding Roosevelt Administration measures, the Court not only subordinated the freedom of employers to contract to the freedom of employees to organize, but intimated broadly that liberty in some of its phases is much more dependent upon legislative implementation than upon judicial protection; and twenty-seven years later, it acknowledged that it was reversing its course and was returning to the constitutional proposition enunciated in Munn *v.* Illinois; namely, "that courts do not substitute their social and economic beliefs for the judgment of legislative bodies."[73]

In contrast to this withdrawal, however, has been the Court's projection of another segment of "liberty" into new territory. In Gitlow *v.* New York,[74] decided in 1925, even in sustaining an antisyndicalist statute, the Court adopted *arguendo* the proposition which it had previously rejected, that "liberty" in Amendment 14 renders available against the States the restraints which Amendment 1 imposes on Congress. For fifteen years little happened. Then in 1940, the Court supplemented its ruling in the Gitlow case with the so-called "Clear and Present Danger" rule, an expedient which was designed to divest state enactments restrictive of freedom of speech, of press, of religion, and so forth, of their presumed validity, just as, earlier, statutes restrictive of freedom of contract had been similarly disabled. By certain of the Justices, this result was held to be required by "the preferred position" of some of these freedoms in the hierarchy of constitutional values; an idea to which certain other Justices demurred. The result to date has been a series of holdings the net product of which for our Constitional Law is at this juncture difficult to estimate; and the decisions in Dennis *v.* United States under Amendment 1 augments the difficulty.[75]

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[69] Twiss, *Lawyers and the Constitution, How Laissez-Faire Came to the Supreme Court*, 141-173 (1942).

[70] *See* especially Lochner *v.* New York, 198 U.S. 45 (1905); and Adkins *v.* Children's Hospital, 261 U.S. 525 (1923).

[71] Smyth *v.* Ames, 169 U.S. 466; Holden *v.* Hardy, 169 U.S. 366.

[72] *See* Collins, *The Fourteenth Amendment and the States*, 188-206 (1912).

[73] Labor Board *v.* Jones & Laughlin, 301 U.S. 1, 33-34 (1937); West Coast Hotel Co. *v.* Parrish, 300 U.S. 379, 391-392 (1937).

[74] 268 U.S. 652, 666; *cf.* Prudential Ins. Co. *v.* Cheek, 259 U.S. 530, 543 (1922).

[75] The subject can be pursued in detail in connection with Amendment 1.

A passing glance will suffice for the operation of the due process clause of Amendment 5 in the domain of foreign relations and the war power. The reader has only to consult in these pages such holdings as those in Belmont *v.* United States, Yakus *v.* United States, Korematsu *v.* United States, to be persuaded that even the Constitution is no exception to the maxim, *inter arma silent leges.*[76]

In short, the substantive doctrine of due process of law no longer supports judicial intervention in the field of social and economic legislation as it previously did, first in the States, and later through the Supreme Court on the basis of Amendment 14. Whereas the period, 1885–1935, was marked by the concept of the priority of the rights of property, the decades immediately following have been distinguished by a restoration of emphasis on the rights of persons and an increasing disposition on the part of the Court to invalidate legislation, not on substantive grounds, but rather in terms of governmental infringement with the basic liberties protected by the Constitution. As recent decisions have shown, the Court often can act more effectively on the basis of legislative enactments implementing the Amendment than when operating directly on the basis of the Amendment itself.[77]

**Résumé**

Considered for the two fundamental subjects of the powers of government and the liberties of individuals, interpretation of the Constitution by the Supreme Court falls into four tolerably distinguishable periods. The first, which reaches to the death of Marshall, is the period of the dominance of the Constitutional Document. The tradition concerning the original establishment of the Constitution was still fresh, and in the person and office of the great Chief Justice the intentions of the framers enjoyed a renewed vitality. This is not to say that Marshall did not have views of his own to advance; nor is it to say that the historicity of a particular theory concerning the Constitution is necessarily a matter of critical concern save to students of history. It is only to say that the theories which Marshall urged in support of his preferences were, in fact, frequently verifiable as theories of the framers of the Constitution.

The second period is a lengthy one, stretching from the accession of Chief Justice Taney in 1835 to, say, 1895. It is the period *par excellence* of Constitutional Theory. More and more the constitutional text fades into the background, and the testimony of *The Federalist*, Marshall's sole book of precedents, ceases to be cited. Among the theories which in one way or other received the Court's approval during this period were the Motion of Dual Federalism, the doctrine of the Police Power, the taboo on delegation of legislative power, the derived doctrine of Due Process of Law, the conception of liberty as Freedom of Contract, and still others. The sources of some of these doctrines and the nature of the interests benefited by them have been indicated earlier in these pages. Their net result was to put the national lawmaking power into a strait-jacket so far as the regulation of business was concerned.

The third period was that of Judicial Review pure and simple. The Court, as heir to the accumulated doctrines of its predecessors, found itself for the time being in possession of such a variety of instruments of constitutional exegesis that it was often able to achieve almost any result in the field of constitutional interpretation which it considered desirable, and that without flagrant departure from judicial good form. Indeed, it is altogether apparent that the Court was in actual possession and in active exercise of what Justice Holmes once termed "the sovereign prerogative of choice." It was early in the period that Governor Hughes, soon to ascend the Bench, said, without perhaps intending all that his words literally conveyed, "We are under a Constitution, but the Constitution is what the judges say it is." A decade later it was suggested by an eminent law teacher that attorneys arguing "due process cases" before the Court ought to address the Justices not as "Your Honors" but as "Your Lordships"; and Senator Borah, in the Senate debate on Mr. Hughes' nomination for Chief Justice, in 1930, declared

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[76] These cases are treated in the text, *see* Table of Cases.

[77] Swisher, *The Supreme Court in Modern Role*, 43-65 (1958); Williams *v.* United States, 341 U.S. 97 (1951).

that the Supreme Court had become "economic dictator in the United States." Some of the Justices concurred in these observations, especially Justices Holmes and Brandeis. Asserted the latter, the Court has made itself "a super-legislature" and Justice Holmes could discover "hardly any limit but the sky" to the power claimed by the Court to disallow State acts "which may happen to strike a majority [of its members] as for any reason undesirable."[78]

The fourth period is still with us. It was ushered in by World War I, but its results were consolidated and extended during the 1930's, and have been subsequently still further enlarged and confirmed by World War II and the "cold war." Many of these results have been treated above. Others can be searched out in the pages of this volume. What they sum up to is this: that what was once vaunted as a Constitution of Rights, both State rights and private rights, has been replaced to a great extent by a Constitution of Powers. The Federal System has shifted base in the direction of a consolidated national power; within the National Government itself there has been an increased flow of power in the direction of the President; even judicial enforcement of the Bill of Rights has faltered at times, in the presence of national emergency.

In this situation judicial review as exercised by the Supreme Court does not cease being an important technique of government under the Constitution, but its field of operation has contracted. The purpose which it serves more and more exclusively is the purpose for which it was originally created to serve, the maintenance of the principle of National Supremacy. But in fact, this is the purpose which it has always served predominantly, even in the era when it was cutting its widest swathe in the field of national legislative policy, the period from 1895 to 1935. Even then there was a multiplicity of state legislatures and only one Congress, so that the legislative grist that found its way to the Court's mill was overwhelmingly of local provenience. And since then several things have happened to confirm this predominance: first, the annexation to Amendment 14 of much of the Federal Bill of Rights; secondly, the extension of national legislative power, especially along the route of the commerce clause, into the field of industrial regulation, with the result of touching state legislative power on many more fronts than ever before; thirdly, the integration of the Nation's industrial life, which has brought to the National Government a major responsibility for the maintenance of a functioning social order.

Forty years ago the late Justice Holmes said:

> I do not think the United States would come to an end if we [the Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States".[78]

By and large, this still sizes up the situation.

EDWARD S. CORWIN.

*January, 1953.*

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[78] *See* Holmes, *Collected Legal Papers*, 239, 295–296 (1920); 1 Pusey, *Charles Evans Hughes*, 203–207 (1951); Burns Baking Co. *v.* Bryan, 264 U.S. 504, 534 (1924); Baldwin *v.* Missouri, 281 U.S. 586, 595 (1930); Kales, *New Methods in Due Process Cases*, 12 Am. Pol. Sci. Rev. 241 (1918); New York Times, February 12, 1930. It was also during the same period that Judge Andrew A. Bruce of North Dakota wrote: "We are governed by our judges and not by our legislatures . . . It is our judges who formulate our public policies and our basic law." Bruce, *The American Judge*, 6, 8 (1924). *See also* Boudin, *Government by Judiciary* (1932).

[78] Holmes, *Collected Legal Papers*, 295–296.

# HISTORICAL NOTE ON FORMATION OF THE CONSTITUTION

In June 1774, the Virginia and Massachusetts assemblies independently proposed an intercolonial meeting of delegates from the several colonies to restore union and harmony between Great Britain and her American Colonies. Pursuant to these calls there met in Philadelphia in September of that year the first Continental Congress, composed of delegates from 12 colonies. On October 14, 1774, the assembly adopted what has become to be known as the Declaration and Resolves of the First Continental Congress. In that instrument, addressed to his Majesty and to the people of Great Britain, there was embodied a statement of rights and principles, many of which were later to be incorporated in the Declaration of Independence and the Federal Constitution.[1]

This Congress adjourned in October with a recommendation that another Congress be held in Philadelphia the following May. Before its successor met, the battle of Lexington had been fought. In Massachusetts the colonists had organized their own government in defiance of the royal governor and the Crown. Hence, by general necessity and by common consent, the second Continental Congress assumed control of the "Twelve United Colonies", soon to become the "Thirteen United Colonies" by the cooperation of Georgia. It became a *de facto* government; it called upon the other colonies to assist in the defense of Massachusetts; it issued bills of credit; it took steps to organize a military force, and appointed George Washington commander in chief of the Army.

While the declaration of the causes and necessities of taking up arms of July 6, 1775,[2] expressed a "wish" to see the union between Great Britian and the colonies "restored", sentiment for independence was growing. Finally, on May 15, 1776, Virginia instructed her delegates to the Continental Congress to have that body "declare the united colonies free and independent States." [3] Accordingly on June 7 a resolution was introduced in Con-

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[1] The colonists, for example, claimed the right "to life, liberty, and property", "the rights, liberties, and immunities of free and natural-born subjects within the realm of England"; the right to participate in legislative councils; "the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of [the common law of England]"; "the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws"; "a right peaceably to assemble, consider of their grievances, and petition the king." They further declared that the keeping of a standing army in the colonies in time of peace without the consent of the colony in which the army was kept was "against law"; that it was "indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legisiature be independent of each other"; that certain acts of Parliament in contravention of the foregoing principles were "infringement and violations of the rights of the colonists." Text in C. Tansill (ed.), *Documents Illustrative of the Formation of the Union of the American States*, H. Doc. No. 358, 69th Congress, 1st sess. (1927), 1. *See also* H. Commager (ed.), *Documents of American History* (New York; 8th ed. 1964), 82.

[2] Text in Tansill, *op. cit.*, 10.

[3] Id., 19.

gress declaring the union with Great Britain dissolved, proposing the formation of foreign alliances, and suggesting the drafting of a plan of confederation to be submitted to the respective colonies.[4] Some delegates argued for confederation first and declaration afterwards. This counsel did not prevail. Independence was declared on July 4, 1776; the preparation of a plan of confederation was postponed. It was not until November 17, 1777, that the Congress was able to agree on a form of government which stood some chance of being approved by the separate States. The Articles of Confederation were then submitted to the several States, and on July 9, 1778, were finally approved by a sufficient number to become operative.

Weaknesses inherent in the Articles of Confederation became apparent before the Revolution out of which that instrument was born had been concluded. Even before the thirteenth State (Maryland) conditionally joined the "firm league of friendship" on March 1, 1781, the need for a revenue amendment was widely conceded. Congress under the Articles lacked authority to levy taxes. She could only request the States to contribute their fair share to the common treasury, but the requested amounts were not forthcoming. To remedy this defect, Congress applied to the States for power to lay duties and secure the public debts. Twelve States agreed to such an amendment, but Rhode Island refused her consent, thereby defeating the proposal.

Thus was emphasized a second weakness in the Articles of Confederation, namely, the *liberum veto* which each each State possessed whenever amendments to that instrument were proposed. Not only did all amendments have to be ratified by each of the 13 States, but all important legislation needed the approval of 9 States. With several delegations often absent, one or two States were able to defeat legislative proposals of major importance.

Other imperfections in the Articles of Confederation also proved embarrassing. Congress could, for example, negotiate treaties with foreign powers, but all treaties had to be ratified by the several States. Even when a treaty was approved, Congress lacked authority to secure obedience to its stipulations. Congress could not act directly upon the States or upon individuals. Under such circumstances foreign nations doubted the value of a treaty with the new Republic.

Furthermore, Congress had no authority to regulate foreign or interstate commerce. Legislation in this field, subject to unimportant exceptions, was left to the individual States. Disputes between States with common interests in the navigation of certain rivers and bays were inevitable. Discriminatory regulations were followed by reprisals.

Virginia, recognizing the need for an agreement with Maryland respecting the navigation and jurisdiction of the Potomac River, appointed in June 1784, four commissioners to "frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two

[4] Id., 21.

States." Maryland in January 1785 responded to the Virginia resolution by appointing a like number of commissioners [5] "for the purpose of settling the navigation and jurisdiction over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke" with full power on behalf of Maryland "to adjudge and settle the jurisdiction to be exercised by the said State, respectively, over the waters and navigations of the same."

At the invitation of Washington the commissioners met at Mount Vernon, in March 1785, and drafted a compact which, in many of its details relative to the navigation and jurisdiction of the Potomac, is still in force.[6] What is more important, the commissioners submitted to their respective States a report in favor of a convention of all the States "to take into consideration the trade and commerce" of the Confederation. Virginia, in January 1786, advocated such a convention, authorizing its commissioners to meet with those of other States, at a time and place to be agreed on, "to take into consideration the trade of the United States; to examine the relative situations and trade of the said State; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several State, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same." [7]

This proposal for a general trade convention seemingly met with general approval; nine States appointed commissioners. Under the leadership of the Virginia delegation, which included Randolph and Madison, Annapolis was accepted as the place and the first Monday in September 1786 as the time for the convention. The attendance at Annapolis proved disappointing. Only five States—Virginia, Pennsylvania, Delaware, New Jersey, and New York—were represented; delegates from Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Because of the small representation, the Annapolis convention did not deem "it advisable to proceed on the business of their mission." After an exchange of views, the Annapolis delegates unanimously submitted to their respective States a report in which they suggested that a convention of representatives from all the States meet at Philadelphia on the second Monday in May 1787 to examine the defects in the existing system of government and formulate "a plan for supplying such defects as may be discovered." [8]

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[5] George Mason, Edmund Randolph, James Madison, and Alexander Henderson were appointed commissioners for Virginia; Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer for Maryland.

[6] Text of the resolution and details of the compact may be found in *Wheaton* v. *Wise*, 153 U.S. 155 (1894).

[7] Transill, *op. cit.*, 38.

[8] Id., 39.

The Virginia legislature acted promptly upon this recomendation and appointed a delegation to go to Philadelphia. Within a few weeks New Jersey, Pennsylvania, North Carolina, Delaware, and Georgia also made appointments. New York and several other States hesitated on the ground that, without the consent of the Continental Congress, the work of the convention would be extra-legal; that Congress alone could propose amendments to the Articles of Confederation. Washington was quite unwilling to attend an irregular convention. Congressional approval of the proposed convention became, therefore, highly important. After some hesitancy Congress approved the suggestion for a convention at Philadelphia "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

Thereupon, the remaining States, Rhode Island alone excepted, appointed in due course delegates to the Convention, and Washington accepted membership on the Virginia delegation.

Although scheduled to convene on May 14, 1787, it was not until May 25 that enough delegates were present to proceed with the organization of the Convention. Washington was elected as presiding officer. It was agreed that the sessions were to be strictly secret.

On May 29 Randolph, on behalf of the Virginia delegation, submitted to the convention 15 propositions as a plan of government. Despite the fact that the delegates were limited by their instructions to a revision of the Articles, Virginia had really recommended a new instrument of government. For example, provision was made in the Virginia plan for the separation of the three branches of government; under the Articles executive, legislative, and judicial powers were vested in the Congress. Furthermore the legislature was to consist of two houses rather than one.

On May 30 the Convention went into a committee of the whole to consider the 15 propositions of the Virginia plan *seriatim*. These discussion continued until June 13, when the Virginia resolutions in amended form were reported out of committee. They provided for proportional representation in both houses. The small States were dissatisfied. Therefore, on June 14 when the Convention was ready to consider the report on the Virginia plan, Paterson of New Jersey requested an adjournment to allow certain delegations more time to prepare a substitute plan. The request was granted, and on the next day Paterson submitted nine resolutions embodying important changes in the Articles of Confederation, but strictly amendatory in nature. Vigorous debate followed. On June 19 the States rejected the New Jersey plan and voted to proceed with a discussion of the Virginia plan. The small States became more and more discontented; there were threats of withdrawal. On July 2, the Convention was deadlocked over giving each State an

equal vote in the upper house—five States in the affirmative, five in the negative, one divided.[9]

The problem was referred to a committee of 11, there being 1 delegate from each State, to effect a compromise. On July 5 the committee submitted its report, which became the basis for the "great compromise" of the Convention. It was recommended that in the upper house each State should have an equal vote, that in the lower branch each State should have one representative for every 40,000 inhabitants, counting three-fifths of the slaves, that money bills should originate in the lower house (not subject to amendment by the upper chamber). When on July 12 the motion of Gouverneur Morris of Pennsylvania that direct taxation should also be in proportion to representation was adopted, a crisis had been successfully surmounted. A compromise spirit began to prevail. The small States were not willing to support a strong national government.

Debates on the Virginia resolutions continued. The 15 original resolutions had been expanded into 23. Since these resolutions were largely declarations of principles, on July 24 a committee of five [10] was elected to draft a detailed constitution embodying the fundamental principles which had thus far been approved. The Convention adjourned from July 26 to August 6 to await the report of its committee of detail. This committee, in preparing its draft of a Constitution, turned for assistance to the State constitutions, to the Articles of Confederation, to the various plans which had been submitted to the Convention and other available material. On the whole the report of the committee conformed to the resolutions adopted by the Convention, though on many clauses the members of the committee left the imprint of their individual and collective judgments. In a few instances the committee avowedly exercised considerable discretion.

From August 6 to September 10 the report of the committee of detail was discussed, section by section, clause by clause. Details were attended to, further compromises were effected. Toward the close of these discussions, on September 8, another committee of five [11] was appointed "to revise the style of and arrange the articles which had been agreed to by the house."

On Wednesday, September 12, the report of the committee of style was ordered printed for the convenience of the delegates. The Convention for 3 days compared this report with the proceedings of the Convention. The Constitution was ordered engrossed on Saturday, September 15.

The Convention met on Monday, September 17, for its final session. Several of the delegates were disappointed in the result. A few deemed the new Constitution a mere makeshift, a series of unfortunate compromises. The advocates of the Constitution, realizing the impending difficulty of obtaining

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[9] The New Hampshire delegation did not arrive until July 23, 1787.

[10] Rutledge of South Carolina, Randolph of Virginia, Gorham of Massachusetts, Ellsworth of Connecticut, and Wilson of Pennsylvania.

[11] William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts.

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the consent of the States to the new instrument of Government, were anxious to obtain the unanimous support of the delegations from each State. It was feared that many of the delegates would refuse to give their individual assent to the Constitution. Therefore, in order that the action of the Convention would appear to be unanimous, Gouverneur Morris devised the formula "Done in Convention, by the unanimous consent of the States present the 17th of September . . . In witness whereof we have hereunto subscribed our names." Thirty-nine of the forty-two delegates present thereupon "subscribed" to the document.[12]

The convention had been called to revise the Articles of Confederation. Instead, it reported to the Continental Congress a new Constitution. Furthermore, while the Articles specified that no amendments should be effective until approved by the legislatures of all the States, the Philadelphia Convention suggested that the new Constitution should supplant the Articles of Confederation when ratified by conventions in nine States. For these reasons, it was feared that the new Constitution might arouse opposition in Congress.

Three members of the Convention—Madison, Gorham, and King—were also Members of Congress. They proceeded at once to New York, where Congress was in session, to placate the expected opposition. Aware of their vanishing authority, Congress on September 28, after some debate, decided to submit the Constitution to the States for action. It made no recommendation for or against adoption.

Two parties soon developed, one in opposition and one in support of the Constitution, and the Constitution was debated, criticized, and expounded clause by clause. Hamilton, Madison, and Jay wrote a series of commentaries, now known as the *Federalist Papers,* in support of the new instrument of government.[13] The closeness and bitterness of the struggle over ratification and the conferring of additional powers on the central government can scarcely be exaggerated. In some States ratification was effected only after a bitter struggle in the State convention itself.

Delaware, on December 7, 1787, became the first State to rafify the new Constitution, the vote being unanimous. Pennsylvania ratified on December 12, 1787, by a vote of 46 to 23, a vote scarcely indicative of the struggle which had taken place in that State. New Jersey ratified on December 19, 1787, and

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[12] At least 65 persons had received appointments as delegates to the Convention; 55 actually attended at different times during the course of the proceedings; 39 signed the document. It has been estimated that generally fewer than 30 delegates attended the daily sessions.

[13] These commentaries on the Constitution, written during the struggle for ratification, have been frequently cited by the Supreme Court as an authoritative contemporary interpretation of the meaning of its provisions.

Georgia on January 2, 1788, the vote in both States being unanimous. Connecticut ratified on January 9, 1788; yeas 128, nays 40. On Februry 6, 1788, Massachusetts, by a narrow margin of 19 votes in a convention with a membership of 355, endorsed the new Constitution, but recommended that a bill of rights be added to protect the States from federal encroachment on individual liberties. Maryland ratified on April 28, 1788; yeas 63, nays 11. South Carolina ratified on May 23, 1788; yeas 149, nays 73. On June 21, 1788, by a vote of 57 to 46, New Hampshire became the ninth State to ratify, but like Massachusetts she suggested a bill of rights.

By the terms of the Constitution nine States were sufficient for its establishment among the States so ratifying. The advocates of the new Constitution realized, however, that the new Government could not succeed without the addition of New York and Virginia, neither of which had ratified. Madison, Marshall, and Randolph led the struggle for ratification in Virginia. On June 25, 1788, by a narrow margin of 10 votes in a convention of 168 members, that State ratified over the objection of such delegates as George Mason and Patrick Henry. In New York an attempt to attach conditions to ratification almost succeeded. But on July 26, 1788, New York ratified, with a recommendation that a bill of rights be appended. The vote was close—yeas 30, nays 27.

Eleven States having thus ratified the Constitution,[14] the Continental Congress—which still functioned at irregular intervals—passed a resolution on September 13, 1788, to put the new Constitution into operation. The first Wednesday of January 1789 was fixed as the day for choosing presidential electors, the first Wednesday of February for the meeting of electors, and the first Wednesday of March (i.e. March 4, 1789) for the opening session of the new Congress. Owing to various delays, Congress was late in assembling, and it was not until April 30, 1789, that George Washington was inaugurated as the first President of the United States.

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[14] North Carolina added her ratification on November 21, 1789; yeas 184, nays 77. Rhode Island did not ratify until May 29, 1790; yeas 34, nays 32.

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# THE CONSTITUTION OF THE UNITED STATES OF AMERICA

## LITERAL PRINT

## CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

### Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have [the] Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the

first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the

Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at

any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Ses-

sion of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a

Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under

them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the

whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain

two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, pre-

serve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and

expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the

several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest WILLIAM JACKSON
Secretary

G°. WASHINGTON—Presidt.
and deputy from Virginia

| | |
|---|---|
| New Hampshire | JOHN LANGDON<br>NICHOLAS GILMAN |
| Massachusetts | NATHANIEL GORHAM<br>RUFUS KING |
| Connecticut | WM SAML JOHNSON<br>ROGER SHERMAN |
| New York . . . . | ALEXANDER HAMILTON |
| New Jersey | WIL: LIVINGSTON<br>DAVID BREARLEY.<br>WM PATTERSON.<br>JONA: DAYTON |

| | |
|---|---|
| Pennsylvania | B FRANKLIN<br>THOMAS MIFFLIN<br>ROB$^{T}$ MORRIS<br>GEO. CLYMER<br>THO$^{S}$ FITZSIMONS<br>JARED INGERSOL<br>JAMES WILSON<br>GOUV MORRIS |
| Delaware | GEO: READ<br>GUNNING BEDFORD jun<br>JOHN DICKINSON<br>RICHARD BASSETT<br>JACO: BROOM |
| Maryland | JAMES M$^{c}$HENRY<br>DAN OF S$^{T}$ THO$^{S}$ JENIFER<br>DAN$^{L}$ CARROLL |
| Virginia | JOHN BLAIR—<br>JAMES MADISON Jr. |
| North Carolina | W$^{M}$ BLOUNT<br>RICH$^{D}$ DOBBS SPAIGHT<br>HU WILLIAMSON<br>J. RUTLEDGE |
| South Carolina | CHARLES COTESWORTH PINCKNEY<br>CHARLES PINCKNEY<br>PIERCE BUTLER |
| Georgia | WILLIAM FEW<br>ABR BALDWIN |

In Convention Monday, September 17th 1787.
Present
The States of
New Hampshire, Massachusetts, Connecticut, MR Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Sena-

tors should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

G°: WASHINGTON—Presid$^{t}$.

W. JACKSON Secretary.

# AMENDMENTS

TO THE

# CONSTITUTION OF THE UNITED STATES OF AMERICA

# ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION [1]

## AMENDMENT [I.] [2]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[1] In *Dillon* v. *Gloss*, 256 U.S. 368 (1921), the Supreme Court stated that it would take judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State journals to determine the dates on which each house of the legislature of certain States ratified the Eighteenth Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given State certified the ratification, or the date on which the Secretary of State of the United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following notes is the date on which the legislature of a given State approved the particular amendment (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the "legislature"). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular State. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

[2] Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment. It will be seen, accordingly, that only the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments were thus technically ratified by number. The first ten amendments along with two others which failed of ratification were proposed by Congress on September 25, 1789, when they passed the Senate, having previously passed the House on September 24 (1 *Annals of Congress* 88, 913). They appear officially in 1 Stat. 97. Ratification was completed on December 15, 1791, when the eleventh State (Virginia) approved these amendments, there being then 14 States in the Union.

The several state legislatures ratified the first ten amendments to the Constitution on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments which failed of ratification prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of members of Congress should be effective until after an intervening election of Representatives. The first was ratified by ten States (one short of the requisite number) and the second, by six States. Connecticut, Georgia, and Massachusetts ratified the first ten amendments in 1939.

AMENDMENT [II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT [III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the

State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT [IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT [XI.] [3]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

[3] The Eleventh Amendment was proposed by Congress on March 4, 1794, when it passed the House, 4 *Annals of Congress* 477, 478, having previously passed the Senate on January 14, *Id.*, 30, 31. It appears officially in 1 Stat. 402. Ratification was completed on February 7, 1795, when the twelfth State (North Carolina) approved the amendment, there being then 15 States

prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT [XII.] [4]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they

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in the Union. Official announcement of ratification was not made until January 8, 1798, when President John Adams in a message to Congress stated that the Eleventh Amendment had been adopted by three-fourths of the States and that it "may now be deemed to be a part of the Constitution." In the interim South Carolina had ratified, and Tennessee had been admitted into the Union as the sixteenth State.

The several state legislatures ratified the Eleventh Amendment on the following dates: New York, March 27, 1794; Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between October 9 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; North Carolina, February 7, 1795; South Carolina, December 4, 1797.

[4] The Twelfth Amendment was proposed by Congress on December 9, 1803, when it passed the House, 13 *Annals of Congress* 775, 776, having previously passed the Senate on December 2. *Id.*, 209. It was not signed by the presiding officers of the House and Senate until December 12. It appears officially in 2 Stat. 306. Ratification was probably completed on June 15, 1804, when the legislature of the thirteenth State (New Hampshire) approved the amendment, there being then 17 States in the Union. The Governor of New Hampshire, however, vetoed this act of the legislature on June 20, and the act failed to pass again by two-thirds vote then required by the state constitution. Inasmuch as Article V of the Federal Constitution specifies that amendments shall become effective "when ratified by legislatures of three-fourths of the several States or by conventions in three-fourths thereof," it has been generally believed that an approval or veto by a governor is without significance. If the ratification by New Hampshire be deemed ineffective, then the amendment became operative by Tennessee's ratification on July 27, 1804. On September 25, 1804, in a circular letter to the Governors of the several States, Secretary of State Madison declared the amendment ratified by three-fourths of the States.

The several state legislatures ratified the Twelfth Amendment on the following dates: North Carolina, December 22, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, between December 5 and December 30, 1803; Virginia, between December 20, 1803 and February 3, 1804; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, between February 27 and March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804; and Tennessee, July 27, 1804. The amendment was rejected by Delaware on January 18, 1804, and by Connecticut at its session begun May 10, 1804. Massachusetts ratified this amendment in 1961.

shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the

office of President shall be eligible to that of Vice-President of the United States.

### AMENDMENT XIII.[5]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

### AMENDMENT XIV.[6]

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

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[5] The Thirteenth Amendment was proposed by Congress on January 31, 1865, when it passed the House, *Cong. Globe* (38th Cong., 2d Sess.) 531, having previously passed the Senate on April 8, 1964. *Id.* (38th cong., 1st Sess.), 1940. It appears officially in 13 Stat. 567 under the date of February 1, 1865. Ratification was completed on December 6, 1865, when the legislature of the twenty-seventh State (Georgia) approved the amendment, there being then 36 States in the Union. On December 18, 1865, Secretary of State Seward certified that the Thirteenth Amendment had become a part of the Constitution, 13 Stat. 774.

The several state legislatures ratified the Thirteenth Amendment on the following dates: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Pennsylvania, February 8, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Louisiana, February 15 or 16, 1865; Indiana, February 16, 1865; Nevada, February 16, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865 (date on which it was "approved" by Governor); Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, June 30, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865 (date on which it was "approved" by Provisional Governor); North Carolina, December 4, 1865; Georgia, December 6, 1865; Oregon, December 11, 1865; California, December 15, 1865; Florida, December 28, 1865 (Florida again ratified this amendment on June 9, 1868, upon its adoption of a new constitution); Iowa, January 17, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 17, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865). The amendment was rejected by Kentucky on February 24, 1865, and by Mississippi on December 2, 1865.

[6] The Fourteenth Amendment was proposed by Congress on June 13, 1866, when it passed the House, *Cong. Globe* (39th Cong., 1st Sess.) 3148, 3149, having previously passed the Senate on June 8. *Id.*, 3042. It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth State (South Carolina or Louisiana) approved the amendment, there being then 37 States in the Union. However, Ohio and New Jersey had prior to that date "withdrawn" their earlier assent to this amendment. Accordingly, Secretary of State Seward on July 20, 1868, certified that the amendment had become a part of the Constitution if the said withdrawals were ineffective. 15

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State,

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Stat. 706–707. Congress on July 21, 1868, passed a joint resolution declaring the amendment a part of the Constitution and directing the Secretary to promulgate it as such. On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution. In the interim, two other States, Alabama on July 13 and Georgia on July 21, 1868, had added their ratifications.

The several state legislatures ratified the Fourteenth Amendment on the following dates: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (the New Jersey Legislature on February 20, 1868 "withdrew" its consent to the ratification; the Governor vetoed that bill on March 5, 1868; and it was repassed over his veto on March 24, 1868); Oregon, September 19, 1866 (Oregon "withdrew" its consent on October 15, 1868); Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11, 1867 (Ohio "withdrew" its consent on January 15, 1868); Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867 (date on which it was certified by the Missouri secretary of state); Rhode Island, February 7, 1867; Pennsylvania, February 12, 1867; Wisconsin, February 13, 1867 (actually passed February 7, but not signed by legislative officers until February 13); Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 9, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868 (after having rejected the amendment on December 13, 1866); Louisiana, July 9, 1868 (after having rejected the amendment on February 6, 1867); South Carolina, July 8, 1868 (after having rejected the amendment on December 20, 1866); Alabama, July 13, 1868 (date on which it was "approved" by the Governor); Georgia, July 21, 1868 (after having rejected the amendment on November 9, 1866—Georgia ratified again on February 2, 1870); Virginia, October 8, 1869 (after having rejected the amendment on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected the amendment on October 27, 1866); Delaware, February 12, 1901 (after having rejected the amendment on February 7, 1867). The amendment was rejected (and not subsequently ratified) by Kentucky on January 8, 1867. Maryland and California ratified this amendment in 1959.

being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## AMENDMENT XV.[7]

SECTION. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XVI.[8]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

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[7] The Fifteenth Amendment was proposed by Congress on February 26, 1869, when it passed the Senate, *Cong. Globe* (40th Cong., 3rd Sess.) 1641, having previously passed the House on February 25. *Id.*, 1563, 1564. It appears officially in 15 Stat. 346 under the date of February 27, 1869. Ratification was probably completed on February 3, 1870, when the legislature of the twenty-eighth State (Iowa) approved the amendment, there being then 37 States in the Union. However, New York had prior to that date "withdrawn" its earlier assent to this amendment. Even if this withdrawal were effective, Nebraska's ratification on February 17, 1870, authorized Secretary of State Fish's certification of March 30, 1870, that the Fifteenth Amendment had become a part of the Constitution. 16 Stat. 1131.

The several state legislatures ratified the Fifteenth Amendment on the following dates: Nevada, March 1, 1869; West Virginia, March 3, 1869; North Carolina, March 5, 1869; Louisiana, March 5, 1869 (date on which it was "approved" by the Governor); Illinois, March 5, 1869; Michigan, March 5, 1869; Wisconsin, March 5, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; South Carolina, March 15, 1869; Arkansas, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York "withdrew" its consent to the ratification on January 5, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had ratified the first section of the 15th Amendment on March 1, 1869; it failed to include in its ratification the second section of the amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the amendment on March 18, 1869). The amendment was rejected (and not subsequently ratified) by Kentucky, Maryland, and Tennessee. California ratified this amendment in 1962 and Oregon in 1959.

[8] The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House, 44 *Cong. Rec.* (61st Cong., 1st Sess.) 4390, 4440, 4441, having previously passed the Senate on July 5. *Id.*, 4121. It appears officially in 36 Stat. 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or New Mexico) approved the amendment, there being then 48 States in the Union. On February 25, 1913, Secretary of State Knox certified that this amendment had become a part of the Constitution. 37 Stat. 1785.

among the several States, and without regard to any census or enumeration.

AMENDMENT [XVII.] [9]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue

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The several state legislatures ratified the Sixteenth Amendment on the following dates: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 27, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 1, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Kansas, March 2, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected the amendment at the session begun January 9, 1911); Wisconsin, May 16, 1911; New York, July 12, 1911; Arizona, April 3, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Mexico, February 3, 1913; New Jersey, February 4, 1913; Vermont, February 19, 1913; Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected the amendment on March 2, 1911). The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

[9] The Seventeenth Amendment was proposed by Congress on May 13, 1912, when it passed the House, 48 *Cong. Rec.* (62d Cong., 2d Sess.) 6367, having previously passed the Senate on June 12, 1911. 47 *Cong. Rec.* (62d Cong., 1st Sess.) 1925. It appears officially in 37 Stat. 646. Ratification was completed on April 8, 1913, when the thirty-sixth State (Connecticut) approved the amendment, there being then 48 States in the Union. On May 31, 1913, Secretary of State Bryan certified that it had become a part of the Constitution. 38 Stat 2049.

The several state legislatures ratified the Seventeenth Amendment on the following dates: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Maine, February 20, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913; Louisiana, June 5, 1914. The amendment was rejected by Utah on February 26, 1913.

writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT [XVIII.] [10]

SECTION. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

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[10] The Eighteenth Amendment was proposed by Congress on December 18, 1917, when it passed the Senate, *Cong. Rec.* (65th Cong. 2d Sess.) 478, having previously passed the House on December 17. *Id.*, 470. It appears officially in 40 Stat. 1059. Ratification was completed on January 16, 1919, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On January 29, 1919, Acting Secretary of State Polk certified that this amendment had been adopted by the requisite number of States. 40 Stat. 1941. By its terms this amendment did not become effective until 1 year after ratification.

The several state legislatures ratified the Eighteenth Amendment on the following dates: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 28, 1918 (date on which approved by Governor); South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 9, 1918 (date on which approved by Governor); Florida, November 27, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Illinois, January 14, 1919; Indiana, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919; Minnesota, January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; Pennsylvania, February 25, 1919; Connecticut, May 6, 1919; New Jersey, March 9, 1922; New York, January 29, 1919; Vermont, January 29, 1919.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

## AMENDMENT [XIX.] [11]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT [XX.] [12]

SECTION. 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of

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[11] The Nineteenth Amendment was proposed by Congress on June 4, 1919, when it passed the Senate, *Cong. Rec.* (66th Cong., 1st Sess.) 635, having previously passed the house on May 21. *Id.*, 94. It appears officially in 41 Stat. 362. Ratification was completed on August 18, 1920, when the thirty-sixth State (Tennessee) approved the amendment, there being then 48 States in the Union. On August 26, 1920, Secretary of Colby certified that it had become a part of the Constitution. 41 Stat. 1823.

The several state legislatures ratified the Nineteenth Amendment on the following dates: Illinois, June 10, 1919 (readopted June 17, 1919); Michigan, June 10, 1919; Wisconsin, June 10, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Ohio, June 16, 1919; Pennsylvania, June 24, 1919; Massachusetts, June 25, 1919; Texas, June 28, 1919; Iowa, July 2, 1919 (date on which approved by Governor); Missouri, July 3, 1919; Arkansas, July 28, 1919; Montana, August 2, 1919 (date on which approved by governor); Nebraska, August 2, 1919; Minnesota, September 8, 1919; New Hampshire, September 10, 1919 (date on which approved by Governor); Utah, October 2, 1919; California, November 1, 1919; Maine, November 5, 1919; North Dakota, December 1, 1919; South Dakota, December 4, 1919 (date on which certified); Colorado, December 15, 1919 (date on which approved by Governor); Kentucky, January 6, 1920; Rhode Island, January 6, 1920; Oregon, January 13, 1920; Indiana, January 16, 1920; Wyoming, January 27, 1920; Nevada, February 7, 1920; New Jersey, February 9, 1920; Idaho, February 11, 1920; Arizona, February 12, 1920; New Mexico, February 21, 1920 (date on which approved by govrnor); Oklahoma, February 28, 1920; West Virginia, March 10, 1920 (confirmed September 21, 1920); Vermont, February 8, 1921. The amendment was rejected by Georgia on July 24, 1919; by Alabama on September 22, 1919; by South Carolina on January 29, 1920; by Virginia on February 12, 1920; by Maryland on February 24, 1920; by Mississippi on March 29, 1920; by Louisiana on July 1, 1920. This amendment was subsequently ratified by Virginia in 1952, Alabama in 1953, Florida in 1969, and Georgia and Louisiana in 1970.

[12] The Twentieth Amendment was proposed by Congress on March 2, 1932, when it passed the Senate, *Cong. Rec.* (72d Cong., 1st Sess.) 5086, having previously passed the House on March 1. *Id.*, 5027. It appears officially in 47 Stat. 745. Ratification was completed on January 23, 1933, when the thirty-sixth State approved the amendment, there being then 48 States in the

Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

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Union. On February 6, 1933, Secretary of State Stimson certified that it had become a part of the Constitution. 47 Stat. 2569.

The several state legislatures ratified the Twentieth Amendment on the following dates: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 4, 1933; North Carolina, January 5, 1933; North Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933; Colorado, January 24, 1933; Massachusetts, January 24, 1933; Wisconsin, January 24, 1933; Nevada, January 26, 1933; Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.

SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

## AMENDMENT [XXI.] [13]

SECTION. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

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[13] The Twenty-first Amendment was proposed by Congress on February 20, 1933, when it passed the House, *Cong. Rec.* (72d Cong., 2d Sess.) 4516, having previously passed the Senate on February 16. *Id.*, 4231. It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth State (Utah) approved the amendment, there being then 48 States in the Union. On December 5, 1933, Acting Secretary of State Phillips certified that it had been adopted by the requisite number of States. 48 Stat. 1749.

The several state conventions ratified the Twenty-first Amendment on the following dates: Michigan, April 10, 1933; Wisconsin, April 25, 1933; Rhode Island, May 8, 1933; Wyoming, May 25, 1933; New Jersey, June 1, 1933; Delaware, June 24, 1933; Indiana, June 26, 1933; Massachusetts, June 26, 1933; New York, June 27, 1933; Illinois, July 10, 1933; Iowa, July 10, 1933; Connecticut, July 11, 1933; New Hampshire, July 11, 1933; California, July 24, 1933; West Virginia, July 25, 1933; Arkansas, August 1, 1933; Oregon, August 7, 1933; Alabama, August 8, 1933; Tennessee, August 11, 1933; Missouri, August 29, 1933; Arizona, September 5, 1933; Nevada, September 5, 1933; Vermont, September 23, 1933; Colorado, September 26, 1933; Washington, October 3, 1933; Minnesota, October 10, 1933; Idaho, October 17, 1933; Maryland, October 18, 1933; Virginia, October 25, 1933; New Mexico, November 2, 1933; Florida, November 14, 1933; Texas, November 24, 1933; Kentucky, November 27, 1933; Ohio, December 5, 1933; Pennsylvania, December 5, 1933; Utah, December 5, 1933; Maine, December 6, 1933; Montana, August 6, 1934. The amendment was rejected by a convention in the State of South Carolina, on December 4, 1933. The electorate of the State of North Carolina voted against holding a convention at a general election held on November 7, 1933.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT [XXII.] [14]

SECTION. 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding

[14] The Twenty-second Amendment was proposed by Congress on March 24, 1947, having passed the House on March 21, 1947, *Cong. Rec.* (80th Cong., 1st Sess.) 2392, and having previously passed the Senate on March 12, 1947. *Id.*, 1978. It appears officially in 61 Stat. 959. Ratification was completed on February 27, 1951, when the thirty-sixth State (Minnesota) approved the amendment, there being then 48 States in the Union. On March 1, 1951, Jess Larson, Administrator of General Services, certified that it had been adopted by the requisite number of States. 16 *Fed. Reg.* 2019.

A total of 41 state legislatures ratified the Twenty-second Amendment on the following dates: Maine, March 31, 1947; Michigan, March 31, 1947; Iowa, April 1, 1947; Kansas, April 1, 1947; New Hampshire, April 1, 1947; Delaware, April 2, 1947; Illinois, April 3, 1947; Oregon, April 3, 1947; Colorado, April 12, 1947; California, April 15, 1947; New Jersey, April 15, 1947; Vermont, April 15, 1947; Ohio, April 16, 1947; Wisconsin, April 16, 1947; Pennsylvania, April 29, 1947; Connecticut, May 21, 1947; Missouri, May 22, 1947; Nebraska, May 23, 1947; Virginia, January 28, 1948; Mississippi, February 12, 1948; New York, March 9, 1948; South Dakota, January 21, 1949; North Dakota, February 25, 1949; Louisiana, May 17, 1950; Montana, January 25, 1951; Indiana, January 29, 1951; Idaho, January 30, 1951; New Mexico, February 12, 1951; Wyoming, February 12, 1951; Arkansas, February 15, 1951; Georgia, February 17, 1951; Tennessee, February 20, 1951; Texas, February 22, 1951; Utah, February 26, 1951; Nevada, February 26, 1951; Minnesota, February 27, 1951; North Carolina, February 28, 1951; South Carolina, March 13, 1951; Maryland, March 14, 1951; Florida, April 16, 1951; and Alabama, May 4, 1951.

the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SEC. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT [XXIII.] [15]

SECTION. 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and

[15] The Twenty-third Amendment was proposed by Congress on June 16, 1960, when it passed the Senate, *Cong. Rec.* (86th Cong., 2d Sess.) 12858, having previously passed the House on June 14. *Id.*, 12571. It appears officially in 74 Stat. 1057. Ratification was completed on March 29, 1961, when the thirty-eighth State (Ohio) approved the amendment, there being then 50 States in the Union. On April 3, 1961, John L. Moore, Administrator of General Services, certified that it had been adopted by the requisite number of States. 26 *Fed. Reg.* 2808.

The several state legislatures ratified the Twenty-third Amendment on the following dates: Hawaii, June 23, 1960; Massachusetts, August 22, 1960; New Jersey, December 19, 1960; New York, January 17, 1961; California, January 19, 1961; Oregon, January 27, 1961; Maryland, January 30, 1961; Idaho, January 31, 1961; Maine, January 31, 1961; Minnesota, January 31, 1961; New Mexico, February 1, 1961; Nevada, February 2, 1961; Montana, February 6, 1961; Colorado, February 8, 1961; Washington, February 9, 1961; West Virginia, February 9, 1961; Alaska, February 10, 1961; Wyoming, February 13, 1961; South Dakota, February 14, 1961; Delaware, February 20, 1961; Utah, February 21, 1961; Wisconsin, February 21, 1961; Pennsylvania, February 28, 1961; Indiana, March 3, 1961; North Dakota, March 3, 1961; Tennessee, March 6, 1961; Michigan, March 8, 1961; Connecticut, March 9, 1961; Arizona, March 10, 1961; Illinois, March 14, 1961; Nebraska, March 15, 1961; Vermont, March 15, 1961; Iowa, March 16, 1961; Missouri, March 20, 1961; Oklahoma, March 21, 1961; Rhode Island, March 22, 1961; Kansas, March 29, 1961; Ohio, March 29, 1961, and New Hampshire, March 30, 1961.

Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT [XXIV.] [16]

SECTION. 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

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[16] The Twenty-fourth Amendment was proposed by Congress on September 14, 1962, having passed the House on August 27, 1962. *Cong. Rec.* (87th Cong., 2d Sess.) 17670 and having previously passed the Senate on March 27, 1962. *Id.*, 5105. It appears officially in 76 Stat. 1259. Ratification was completed on January 23, 1964, when the thirty-eighth State (South Dakota) approved the Amendment, there being then 50 States in the Union. On February 4, 1964, Bernard L. Boutin, Administrator of General Services, certified that it had been adopted by the requisite number of States. 25 *Fed. Reg.* 1717. President Lyndon B. Johnson signed this certificate.

Thirty-eight state legislatures ratified the Twenty-fourth Amendment on the following dates: Illinois, November 14, 1962; New Jersey, December 3, 1962; Oregon, January 25, 1963; Montana, January 28, 1963; West Virginia, February 1, 1963; New York, February 4, 1963; Maryland, February 6, 1963; California, February 7, 1963; Alaska, February 11, 1963; Rhode Island, February 14, 1963; Indiana, February 19, 1963; Michigan, February 20, 1963; Utah, February 20, 1963; Colorado, February 21, 1963; Minnesota, February 27, 1963; Ohio, February 27, 1963; New Mexico, March 5, 1963; Hawaii, March 6, 1963; North Dakota, March 7, 1963; Idaho, March 8, 1963; Washington, March 14, 1963; Vermont, March 15, 1963; Nevada, March 19, 1963; Connecticut, March 20, 1963; Tennessee, March 21, 1963; Pennsylvania, March 25, 1963; Wisconsin, March 26, 1963; Kansas, March 28, 1963; Massachusetts, March 28, 1963; Nebraska, April 4, 1963; Florida, April 18, 1963; Iowa, April 24, 1963; Delaware, May 1, 1963; Missouri, May 13, 1963; New Hampshire, June 16, 1963; Kentucky, June 27, 1963; Maine, January 16, 1964; South Dakota, January 23, 1964.

## AMENDMENT [XXV.] [17]

SECTION. 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

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[17] This Amendment was proposed by the Eighty-ninth Congress by Senate Joint Resolution No. 1, which was approved by the Senate on February 19, 1965, and by the House of Representatives, in amended form, on April 13, 1965. The House of Representatives agreed to a Conference Report on June 30, 1965, and the Senate agreed to the Conference Report on July 6, 1965. It was declared by the Administrator of General Services, on February 23, 1967, to have been ratified.

This Amendment was ratified by the following States:

Nebraska, July 12, 1965; Wisconsin, July 13, 1965; Oklahoma, July 16, 1965; Massachusetts, August 9, 1965; Pennsylvania, August 18, 1965; Kentucky, September 15, 1965; Arizona, September 22, 1965; Michigan, October 5, 1965; Indiana, October 20, 1965; California, October 21, 1965; Arkansas, November 4, 1965; New Jersey, November 29, 1965; Delaware, December 7, 1965; Utah, January 17, 1966; West Virginia, January 20, 1966; Maine, January 24, 1966; Rhode Island, January 28, 1966; Colorado, February 3, 1966; New Mexico, February 3, 1966; Kansas, February 8, 1966; Vermont, February 10, 1966; Alaska, February 18, 1966; Idaho, March 2, 1966; Hawaii, March 3, 1966; Virginia, March 8, 1966; Mississippi, March 10, 1966; New York, March 14, 1966; Maryland, March 23, 1966; Missouri, March 30, 1966; New Hampshire, June 13, 1966; Louisiana, July 5, 1966; Tennessee, January 12, 1967; Wyoming, January 25, 1967; Washington, January 26, 1967; Iowa, January 26, 1967; Oregon, February 2, 1967; Minnesota, February 10, 1967; Nevada, February 10, 1967; Connecticut, February 14, 1967; Montana, February 15, 1967; South Dakota, March 6, 1967; Ohio, March 7, 1967; Alabama, March 14, 1967; North Carolina, March 22, 1967 Illinois, March 22, 1967; Texas, April 25, 1967; Florida, May 25, 1967.

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on February 25, 1967, F.R. Doc. 67-2208, 32 *Fed. Reg.* 3287.

SECTION. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

## AMENDMENT [XXVI] [18]

SECTION. 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

---

[18] The Twenty-sixth Amendment was proposed by Congress on March 23, 1971, upon passage by the House of Representatives, the Senate having previously passed an identical resolution on March 10, 1971. It appears officially in 85 Stat. 825. Ratification was completed on July 1, 1971, when action by the legislature of the 38th State, North Carolina, was concluded, and the Administrator of the General Services Administration officially certified it to have been duly ratified on July 5, 1971. 36 *Fed. Reg.* 12725.

As of the publication of this volume, 42 States had ratified this Amendment:

Connecticut, March 23, 1971; Delaware, March 23, 1971; Minnesota, March 23, 1971; Tennessee, March 23, 1971; Washington, March 23, 1971; Hawaii, March 24, 1971; Massachusetts, March 24, 1971; Montana, March 29, 1971; Arkansas, March 30, 1971; Idaho, March 30, 1971; Iowa, March 30, 1971; Nebraska, April 2, 1971; New Jersey, April 3, 1971; Kansas, April 7, 1971; Michigan, April 7, 1971; Alaska, April 8, 1971; Maryland, April 8, 1971; Indiana, April 8, 1971; Maine, April 9, 1971; Vermont, April 16, 1971; Louisiana, April 17, 1971; California, April 19, 1971; Colorado, April 27, 1971; Pennsylvania, April 27, 1971; Texas, April 27, 1971; South Carolina, April 28, 1971; West Virginia, April 28, 1971; New Hampshire, May 13, 1971; Arizona, May 14, 1971; Rhode Island, May 27, 1971; New York, June 2, 1971; Oregon, June 4, 1971; Missouri, June 14, 1971; Wisconsin, June 22, 1971; Illinois, June 29, 1971; Alabama, June 30, 1971; Ohio, June 30, 1971; North Carolina, July 1, 1971; Oklahoma, July 1, 1971; Virginia, July 8, 1971; Wyoming, July 8, 1971; Georgia, October 4, 1971.

# PROPOSED AMENDMENT PENDING BEFORE THE STATES

## PROPOSED AMENDMENT XXVII

### House Joint Resolution 554 [19]

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE

"SECTION 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.

"SEC. 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

"SEC. 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

"SEC. 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

---

[19] This amendment was proposed by Congress on August 22, 1978, when the Senate passed unamended the resolution adopted by the House of Representatives on March 2, 1978. As of December 31, 1982, ten States had ratified:

New Jersey, September 11, 1978; Ohio, November 30, 1978; Michigan, December 12, 1978; Massachusetts, March 19, 1979; Minnesota, March 28, 1979; Connecticut, April 11, 1979; Wisconsin, November 12, 1979; Maryland, March 19, 1980; Hawaii, April 18, 1980; Oregon, June 20, 1981.

# PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES

## PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES

During the course of our history, in addition to the 26 amendments which have been ratified by the required three-fourths of the States, five other amendments have been submitted to the States but have not been ratified by them.

Beginning with the proposed Eighteenth Amendment, Congress has customarily included a provision requiring ratification within seven years from the time of the submission to the States. The Supreme Court in *Coleman* v. *Miller*, 307 U.S. 433 (1939), declared that the question of the reasonableness of the time within which a sufficient number of States must act is a political question to be determined by the Congress.

In 1789, at the time of the submission of the Bill of Rights, twelve proposed amendments were submitted to the States. Of these, Articles III–XII were ratified and became the first ten amendments to the Constitution. Proposed Articles I and II were not ratified. The following is the text of those articles:

> ARTICLE I. After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.
>
> ARTICLE II. No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

---

Thereafter, in the 2d session of the 11th Congress, the Congress proposed the following amendment to the Constitution relating to acceptance by citizens of the United States of titles of nobility from any foreign government.

The proposed amendment which was not ratified by three-fourths of the States reads as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring).* That the following section be submitted to the legislatures of the several states, which, when ratified by the legislatures of three fourths of the states, shall be valid and binding, as a part of the constitution of the United States.
>
> If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

During the second session of the 36th Congress on March 2, 1861, the following proposed amendment to the Constitution relating to slavery was signed by the President. It is interesting to note in this connection that this is the only proposed amendment to the Constitution ever signed by the President. The President's signature is considered unnecessary because of the constitutional provision that upon the concurrence of two-thirds of both Houses of Congress the proposal shall be submitted to the States and shall be ratified by three-fourths of the States.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Constitution, viz:

"ARTICLE THIRTEEN

"No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."

---

In more recent times only two proposed amendments have not been ratified by three-fourths of the States. The first is the proposed child-labor amendment, which was submitted to the States during the 1st session of the 68th Congress in June 1924, as follows:

JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

ARTICLE———

SECTION 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

SECTION 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

The second proposed amendment to have failed of ratification is the equal rights amendment, which formally died on June 30, 1982, after a disputed congressional extension of the original seven-year period for ratification.

HOUSE JOINT RESOLUTION 208

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"Section 3. This amendment shall take effect two years after the date of ratification."

# THE CONSTITUTION OF THE UNITED STATES OF AMERICA
# WITH ANNOTATIONS

## THE PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

### PURPOSE AND EFFECT OF THE PREAMBLE

Although the preamble is not a source of power for any department of the Federal Government,[1] the Supreme Court has often referred to it as evidence of the origin, scope, and purpose of the Constitution.[2] "Its true office," wrote Joseph Story in his Commentaries, "is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'to provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?" [3]

---

[1] *Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905).

[2] E.g., the Court has read the preamble as bearing witness to the fact that the Constitution emanated from the people and was not the act of sovereign and independent States, *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 403 (1819); *Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 419, 471 (1793); *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 324 (1816), and that it was made for, and is binding only in, the United States of America. *Downes* v. *Bidwell*, 182 U.S. 244, 251 (1901); *In re Ross*, 140 U.S. 453, 464 (1891).

[3] 1 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 462. For a lengthy exegesis of the preamble phrase by phrase, see M. Adler & W. Gorman, *The American Testament* (New York: 1975), 63–118.

# ARTICLE I

## LEGISLATIVE DEPARTMENT

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# LEGISLATIVE DEPARTMENT

## Article I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

### ENUMERATED, IMPLIED, RESULTING, AND INHERENT POWERS

Two important doctrines of constitutional law—that the Federal Government is one of enumerated powers and that legislative powers may not be delegated—are derived in part from this section. The classical statement of the former is that by Chief Justice Marshall in *McCulloch* v. *Maryland:* "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted." [1]

That, however, "the executive power" is not confined to the items of it which are enumerated in Article II was asserted early in the history of the Constitution by Madison and Hamilton alike and is found in decisions of the Court; [2] and a similar latitudinarian conception of "the judicial power of the United States" was voiced in Justice Brewer's opinion for the Court in *Kansas* v. *Colorado.*[3] But even when confined to "the legislative powers herein granted," the doctrine is severely strained by Marshall's conception of some of these as set forth in his *McCulloch* v. *Maryland* opinion. He asserts that "the sword and the purse, all the external relations and no inconsiderable portion of the industry of the nation, are intrusted to its government;" [4] he characterizes "the power of making war," of "levying taxes," and of "regulating commerce" as "great, substantive and independent powers;" [5] and the power con-

[1] 4 Wheat. (17 U.S.) 316, 405 (1819).
[2] *Infra, pp.* 445–452.
[3] 206 U.S. 46, 82 (1907).
[4] 4 Wheat. (17 U.S.), 407.
[5] Id., 411.

ferred by the "necessary and proper" clause embraces, he declares, all legislative "means which are appropriate" to carry out the legitimate ends of the Constitution, unless forbidden by "the letter and spirit of the Constitution." [6]

Nine years later, Marshall introduced what Story in his *Commentaries* labels the concept of "resulting powers," those which "rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specially enumerated." [7] Story's reference is to Marshall's opinion in *American Insurance Co.* v. *Canter*,[8] where the latter said, that "the Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty." [9] And from the power to acquire territory, he continues arises as "the inevitable consequence" the right to govern it.[10]

Subsequently, powers have been repeatedly ascribed to the National Government by the Court on grounds which ill accord with the doctrine of enumerated powers: the power to legislate in effectuation of the "rights expressly given, and duties expressly enjoined" by the Constitution; [11] the power to impart to the paper currency of the Government the quality of legal tender in the payment of debts; [12] the power to acquire territory by discovery; [13] the power to legislate for the Indian tribes wherever situated in the United States; [14] the power to exclude and deport aliens; [15] and to require that those who are admitted be registered and fingerprinted; [16] and finally the complete powers of sovereignty, both those of war and peace, in the conduct of foreign relations. In the words of Justice Sutherland in *United States* v. *Curtiss-Wright Corp.*,[17] de-

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[6] Id., 421.

[7] 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1256. *See also* id., §§ 1286 and 1330.

[8] 1 Pet. (26 U.S.) 511 (1828).

[9] Id., 542.

[10] Id., 543.

[11] *Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539, 616, 618–619 (1842).

[12] *Juilliard* v. *Greenman*, 110 U.S. 421, 449–450 (1884). *See also* Justice Bradley's concurring opinion in *Knox* v. *Lee*, 12 Wall. (79 U.S.) 457, 565 (1871).

[13] *United States* v. *Jones*, 109 U.S. 513 (1883).

[14] *United States* v. *Kagama*, 118 U.S. 375 (1886).

[15] *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893).

[16] *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

[17] 299 U.S. 304 (1936).

cided in 1936: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. . . . The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." [18]

Yet for the most part, these holdings do not, as Justice Sutherland suggests, directly affect "the internal affairs" of the nation; they touch principally its peripheral relations, as it were. The most serious inroads on the doctrine of enumerated powers are, in fact, those which have taken place under cover of the doctrine—the vast expansion in recent years of national legislative power in the regulation of commerce among the States and in the expenditure of the national revenues. Verbally at least Marshall laid the ground for these developments in some of the phraseology above quoted from his opinion in *McCulloch* v. *Maryland*.

## DELEGATION OF LEGISLATIVE POWER

### Origin of the Doctrine of Nondelegability

"That the legislative power of Congress cannot be delegated is, of course, clear." [1] This 1932 statement has never been literally true, the delegation at issue in the very case in which the statement was made was upheld, and the Court in recent years has not felt constrained so much as to bow in the direction of the doctrine.

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[18] Id., 315, 316-317, 318 *passim*. For anticipations of this conception of the powers of the National Government in the field of foreign relations, *see Penhallow* v *Doane*, 3 Dall. (3 U.S.) 53, 80, 81 (1795); *also* id., 74 and 76 (argument of counsel); and Chief Justice Taney's opinion in *Holmes* v. *Jennison*, 14 Pet. (39 U.S.) 540, 575-576 (1840). The Sutherland formulation appears, however, not to be historically grounded and its present viability as doctrine of the Court is questionable. *See infra*, *pp.* 448-450.

[1] *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

Yet the doctrine of nondelegation of legislative powers and the permissible exception of delegation accompanied by standards have so settled a place in constitutional jurisprudence that notice must be given at some length.[2]

At least three distinct ideas contributed to the development of the doctrine that legislative power cannot be delegated. The first idea is the doctrine of separation of powers, the idea that the law-making power is vested in the legislative branch, the law-executing power in the executive branch, and the law-interpreting power in the judicial branch.[3] Is it not a violation of the doctrine to permit the law-making branch to divest itself of some of its power and confer it on one or the other of the other branches or to particular offices in the other branch?

The second idea is a due process conception precluding the transfer of regulatory functions to private persons, a distinct specie of the delegation doctrine not relevant usually in the field of administration, of delegation to another public agency.[4]

The third idea concerns the maxim *"delegata potestas non potest delegari"* which John Locke borrowed from agency and offered as a principle of political science.[5] In *J. W. Hampton, Jr., & Co.* v. *United States,*[6] Chief Justice Taft explained the origin and limitations of this phrase as a postulate of constitutional law. "The well-known maxim *'delegata potestas non potest delegari,'* applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. . . . [I]n carrying out that constitutional division . . . it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive

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[2] For particularly useful discussions of delegations, *see* 1 K. Davis, *Administrative Law Treatise* (St. Paul: 2d ed., 1978), Ch. 3; L. Jaffe, *Judicial Control of Administrative Action* (Boston: 1965), ch. 2.

[3] *Field* v. *Clark,* 143 U.S. 649, 692 (1892); *Wayman* v. *Southard,* 10 Wheat. (23 U.S.) 1, 42 (1825).

[4] *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 310–312 (1936). Since the separation of powers doctrine is inapplicable to the States as a requirement of federal constitutional law, *Dreyer* v. *Illinois,* 187 U.S. 71, 83–84 (1902), it is the due process clause to which federal courts must look for authority to review the delegation by state legislatures of power to others which the legislature might have exercised directly. E.g., *Eubank* v. *City of Richmond,* 226 U.S. 137 (1912); *Embree* v. *Kansas City Road District,* 240 U.S. 242 (1916).

[5] J. Locke, *Second Treatise on Government* (London: 1691), Ch. 11, § 141.

[6] 276 U.S. 394, 405–406 (1928).

power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."

But whatever the source or combination of sources of the doctrine, decisions of the Court accepting without comment delegations of vast powers to administrative or executive agencies constitute a *de facto* recognition that Congress in the exercise of its granted powers, in conjunction with its necessary and proper power, often cannot either foresee or resolve problems of application of general laws to specific situations. Thus, "[d]elegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." [7]

**Delegation Which Is Permissible**

"It will not be contended," wrote Chief Justice Marshall in 1925, "that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." [1] The Chief Justice frankly noted "that there is some difficulty in discerning the exact limits" on the legislative power to delegate. "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." [2]

Two theories suggested themselves to the Court at this early time to justify the results of sustaining delegations. The Chief Justice alluded to the first in *Wayman* v. *Southard*.[3] He distinguished between "important" subjects, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are

[7] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398 (1940).
[1] *Wayman* v. *Southard*, 10 Wheat. (23 U.S.) 1, 41 (1825).
[2] Id., 42.
[3] Id., 41.

to act under such general provisions, to fill up the details." While his distinction may be lost, the theory of the power "to fill up the details" is impressively modern law.

A second theory, formulated even earlier, is that Congress may legislate contingently, leaving to others the task of ascertaining the facts which bring its declared policy into operation.[4]

***Issuance of Rules and Regulations.***—At issue in *Wayman* v. *Southard*[5] was the contention that Congress had unconstitutionally delegated power to the federal courts to establish rules of practice, provided such rules were not repugnant to the laws of the United States.[6] Chief Justice Marshall agreed that the rule-making power was a legislative function and that Congress could have formulated the rules itself, but he denied that the delegation was impermissible. Since then, of course, Congress has authorized the Supreme Court to prescribe rules of procedure for the lower federal courts,[7] an authority which Justices Black and Douglas rejected at least insofar as they believed the rules touch on substantive matters.[8]

Authority to issue regulations to implement congressional policy expressed in statutes is one of the hallmarks of the administrative state and the most common form of delegation of power to "fill in the details" of the statute. It has long been sustained. Thus, when Congress required the manufacturers of oleomargarine to have their packages "marked, stamped and branded as the Commissioner of Internal Revenue . . . shall prescribe", the Court sustained the conviction of one selling his goods without the markings against his objection that he was prosecuted not for violation of law but for violation of a regulation.[9] "The criminal offence," said

[4] *The Brig Aurora*, 7 Cr. (11 U.S.) 382 (1813).

[5] 10 Wheat. (23 U.S.) 1 (1825).

[6] Act of May 8, 1792, § 2, 1 Stat. 275, 276.

[7] The power to promulgate rules of civil procedure was conferred by the Act of June 19, 1934, 48 Stat. 1064, now 28 U.S.C. § 2072; the power to promulgate rules of criminal procedure was conferred by the Act of June 29, 1940, 54 Stat. 688, now 18 U.S.C. § 3771. In both instances Congress provided for submission of the rules to it with the power presumably to change or to veto the rules. Additionally, Congress has occasionally legislated rules itself. E.g., 82 Stat. 197 (1968), 18 U.S.C. §§ 3501-02 (admissibility of confessions in federal courts).

[8] 400 U.S. 1031 (1971); 383 U.S. 1032 (1966); 374 U.S. 865 (1963); 368 U.S. 1012 (1961). Justices Black and Douglas also dissented in *United States* v. *Sharpnack*, 355 U.S. 286 (1958), which upheld the Assimilative Crimes Act of 1948, 18 U.S.C. § 13, making applicable to federal enclaves subsequently enacted criminal laws of the State in which the enclave is situated as a reasonable exercise of congressional legislative delegation which entailed no invalid surrender of legislative power to the States.

[9] *In re Kollock*, 165 U.S. 526 (1897).

Chief Justice Fuller, "is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail." [10] *Kollock* was not the first such case,[11] but it was to be followed by a multitude of delegations and the sustaining of them. Soon thereafter the Court upheld an act directing the Secretary of the Treasury to promulgate minimum standards of quality and purity for tea imported into the United States.[12]

It has approved the delegation to executive or administrative officials of authority to make rules governing the use of forest reservations; [13] permitting reasonable variations and tolerances in the marking of food packages to disclose their contents; [14] designating tobacco markets at which grading of tobacco would be compulsory; [15] establishing priorities for the transportation of freight during a period of emergency; [16] prescribing price schedules for the distribution of milk,[17] or for all commodities,[18] and for rental housing [19] in time of war; regulating wages and prices in the production and distribution of coal; [20] imposing a curfew to protect military resources in designated areas from espionage and sabotage; [21] providing for the appointment of receivers or conservators for Federal Savings and Loan Associations; [22] allotting market quotas for tobacco, [23] and prescribing methods of accounting for carriers in interstate commerce.[24]

***Orders Directed to Particular Persons.***—The now familiar pattern of regulation of important segments of the economy by boards or commissions which combine in varying proportions the functions of all three departments of government was first established by the States in the field of railroad rate regulation. Discovering that direct action was impracticable, the state legislatures created com-

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[10] Id., 533.

[11] *United States* v. *Bailey*, 9 Pet. (34 U.S.) 238 (1835); *Caha* v. *United States*, 152 U.S. 211 (1894).

[12] *Buttfield* v. *Stranahan*, 192 U.S. 470 (1904).

[13] *United States* v. *Grimaud*, 220 U.S. 506 (1911).

[14] *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

[15] *Currin* v. *Wallace*, 306 U.S. 1 (1939).

[16] *Avent* v. *United States*, 266 U.S. 127 (1924).

[17] *United States* v. *Rock Royal Co-operative*, 307 U.S. 533 (1939).

[18] *Yakus* v. *United States*, 321 U.S. 414 (1944).

[19] *Bowles* v. *Willingham*, 321 U.S. 503 (1944).

[20] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 397 (1940).

[21] *Hirabayashi* v. *United States*, 320 U.S. 81, 104 (1943); *Korematsu* v. *United States*, 323 U.S. 214 (1944).

[22] *Fahey* v. *Mallonee*, 332 U.S. 245 (1947).

[23] *Mulford* v. *Smith*, 307 U.S. 38 (1939).

[24] *ICC* v. *Goodrich Transit Co.*, 224 U.S. 194, 214 (1912).

missions to deal with the problem. One of the pioneers in this development was Minnesota, whose supreme court justified the practice in an opinion which, with the implied [1] and later the explicit,[2] endorsement of the United States Supreme Court, practically settled the law on this point: "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic." [3] Contemporaneously, Congress created the Interstate Commerce Commission to regulate the rates and practices of railroads with respect to interstate commerce. Although the Supreme Court has never had occasion to render a direct decision on the delegation of rate-making power to the Commission, it has repeatedly affirmed rate orders issued by that agency.[4]

Likewise it has sustained the power of the Secretary of War to order the removal or alteration of bridges which unreasonably obstructed navigation over navigable waters; [5] the power of the Federal Reserve Board to authorize national banks to act as fiduciaries; [6] the authority of the Secretary of Labor to deport aliens of certain enumerated classes, if after hearing he found such aliens to be "undesirable residents"; [7] the responsibility of the Interstate Commerce Commission to approve railroad consolidations found to be in the "public interest"; [8] and the powers of the Federal Radio Commission [9] and the Federal Communications Commission [10] to

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[1] The Court reversed the decision of the state supreme court on the grounds that the rates fixed by the commission were not subject to judicial review, a due process violation, but the opinion implicitly sanctioned the exercise of ratemaking powers by such bodies. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota,* 134 U.S. 418 (1890).

[2] *J. W. Hampton, Jr. & Co.* v. *United States,* 276 U.S. 394, 409 (1928).

[3] *State* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 38 Minn. 288, 301, 37 N.W. 782, 788 (1888), *rev'd on other grounds,* 134 U.S. 418 (1890).

[4] *ICC* v. *Louisville & Nashville R.R.,* 227 U.S. 88 (1913); *New York* v. *United States,* 331 U.S. 284, 340–350 (1947), and cases cited. *See also New York* v. *United States,* 342 U.S. 882 (1951); *American Trucking Assns.* v. *Atchison, Topeka & Santa Fe Ry.,* 387 U.S. 397 (1967).

[5] *Union Bridge Co.* v. *United States,* 204 U.S. 364 (1907).

[6] *First National Bank* v. *Union Trust Co.,* 244 U.S. 416 (1917).

[7] *Mahler* v. *Eby,* 264 U.S. 32 (1924); *Tisi* v. *Tod,* 264 U.S. 131 (1924).

[8] *New York Central Securities Co.* v. *United States,* 287 U.S. 12, 25 (1932).

[9] *Federal Radio Comm.* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266 (1933).

[10] *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943).

license broadcasting stations as "public convenience, interest and necessity" may require.

The terms, however, in which a statute delegates authority to an administrative agent are subject to judicial review; and in one case [11] the Court disallowed, as *ultra vires,* an order of the Secretary of Agriculture purporting to rest on § 8 of the Agricultural Marketing Agreement Act of 1937.[12]

***Standards.***—Before an agency or official can "fill up the details" Congress must enact something to be supplemented. And the enactment must tell the agency or the official something of what Congress expects to be done. As in the instance of the propriety of delegation itself, the Court has often been explicit with regard to the permissible and the impermissible, but here too there has been a divergence between rhetoric and reality.

"Congress cannot delegate any part of its legislative power except under a limitation of a prescribed standard." [13] And indeed the only two instances in which the Court has found an unconstitutional delegation to another governmental agency have involved grants of discretion to administrators which the Court found to be unbounded. Thus, in *Panama Refining Co.* v. *Ryan,*[14] the President was authorized to prohibit the shipment in interstate commerce of "hot oil"—oil produced in excess of state quotas. The statute was silent with regard to when and under what circumstances he should exercise the power and the Court, only Justice Cardozo dissenting, found that the stated policy of the legislation contained contrary directives.[15] While the grant of power in *Panama Refining* was narrow, the grant, in *A.L.A. Schechter Poultry Corp.* v. *United States,*[16] was sweeping The National Industrial Recovery Act devolved on the executive branch the power to formulate codes of "fair competition" for all industry in order to promote "the policy of this title." The policy was "to eliminate unfair competitive practices, to promote the fullest possible utilization of the

[11] *Brannan* v. *Stark,* 342 U.S. 451 (1952).

[12] 50 Stat. 246; *see* note to 7 U.S.C. § 674.

[13] *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 282 U.S. 311, 324 (1931).

[14] 293 U.S. 388 (1935).

[15] It is not without note that the Court, in the view of many observers, was influenced heavily by the fact that the President's orders were nowhere published and notice of regulations bearing criminal penalties for their violations was spotty at best. *Cf.* E. Corwin, *The President—Office and Powers* 1787–1957 (New York: 4th ed. 1958), 394–395. The result of the Government's discomfiture in Court was enactment of the Federal Register Act, 49 Stat. 500 (1935), 44 U.S.C. § 301, providing for publication of Executive Orders and agency regulations in the daily *Federal Register.*

[16] 295 U.S. 495 (1935).

present productive capacity of industries, . . . and otherwise to rehabilitate industry. . . ." [17] Though much of the opinion is written in terms of the failure of these policy statements to provide meaningful standards, it seems more likely the Court was in fact concerned with the "virtually unfettered" discretion conferred on the President of "enacting laws for the government of trade and industry throughout the country." [18]

This conclusion is bolstered by the Court's reversal of a lower federal court which had literally applied the *Schechter* language to void a delegation to the Federal Home Loan Bank Commissioner of power to issue regulations for the appointment of conservators or receivers to take charge of banking associations.[19] The Act contained no standards, no declarations of policy, no guidance to the Commissioner. Nevertheless, the Court unanimously sustained the delegation. "It may be," said Justice Jackson, "that explicit standards . . . would have been a desirable assurance of responsible administration." [20] But while desirable, standards were not a constitutional necessity, since "[t]he provisions are regulatory" and deal with but one enterprise, banking, the problems of which are well known and the remedies authorized are as equally well known. "A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields." [21]

Where the Court has determined that standards are necessary, it has been diligent in seeking them out. The current formulation of the rule is that laid down by Chief Justice Taft in 1928. "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." [22] The "intelligible principle" has been held, however, to include such formulations as "just and reasonable," [23] "public interest," [24] "public convenience, interest, or necessity," [25]

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[17] 48 Stat. 195 (1933), Tit. I, § 1.

[18] 295 U.S., 541-542.

[19] *Fahey* v. *Mallonee*, 332 U.S. 245 (1947).

[20] Id., 250.

[21] Ibid.

[22] *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928). See also *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (quoting and applying this language).

[23] *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420 (1930).

[24] *New York Central Securities Corp.* v. *United States*, 287 U.S. 12 (1932).

[25] *Federal Radio Comm.* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).

and "unfair methods of competition." [1] Thus, in *National Broadcasting Co.* v. *United States,*[2] the Court found that the discretion conferred on the Federal Communications Commission to license broadcasting stations to promote the "public interest, convenience, or necessity" conveyed a standard "as complete as the complicated factors for judgment in such a field of delegated authority permit." [3] Yet the regulations upheld were directed to the contractual relations between networks and stations and were designed to reduce the effect of monopoly in the industry, a policy on which the statute was silent.[4]

On the other hand, the standards may be set out in greater detail and with greater relevancy to the action taken but may in fact limit discretion not at all. In *United States* v. *Rock Royal Cooperatives,*[5] the Court sustained the delegation to the Secretary of Agriculture of the power to fix the prices of six commodities if and when he chose to exercise the power with regard to all or some of the commodities. The Act [6] provided that the price to be fixed should afford farmers purchasing power equivalent to that they had enjoyed in a base period, but the Secretary was also to protect the interest of the consumer by a gradual increase in prices in accordance with the public interest and current consumption. The majority of the Court thought that the Act stated the purposes which Congress had hoped to achieve and set out standards by which it hoped the purposes could be realized.

Administrative implementation of the congressional enactment may well provide the intelligible standard. Thus, in *Lichter* v. *United States,*[7] the Court sustained the delegation of power to the War Department to recover "excessive profits" earned on war contracts. The first Act contained no definition, but the second defined "excessive profits" as meaning "any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." [8] The definition was essayed in the light of

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[1] *FTC* v. *Gratz,* 253 U.S. 421 (1920).

[2] 319 U.S. 190 (1943).

[3] Id., 216.

[4] Similarly, the promulgation by the FCC of rules creating a "fairness doctrine" and a "right to reply" rule has been sustained, *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), as well as a rule requiring the carrying of anti-smoking commercials. *Banzhaf* v. *FCC,* 405 F.2d 1082 (C.A.D.C. 1968), *cert. den. sub nom., Tobacco Institute* v. *FCC,* 396 U.S. 842 (1969).

[5] 307 U.S. 533 (1939).

[6] Act of May 12, 1933, 48 Stat. 31, as amended, 49 Stat. 750 (1935).

[7] 334 U.S. 742 (1948).

[8] § 403(a)(4) of the Act, as added by Tit. 8 of the Act of October 21, 1942, 56 Stat. 798, 982.

standards for determining "excessiveness" worked out by the War Department and in 1944 [9] Congress specifically adopted these standards. Yet, the Court upheld the validity of the delegation as to proceeds earned prior to this 1944 adoption. "The statutory term 'excessive profits,' in its context, was a sufficient expression of legislative policy and standards to render it constitutional." [10]

Numerous delegations have been sustained by the Court in both war and peacetime which have vested in administrative agencies and executive officers vast powers over the economic life of the country.[11] By and large, however, the Court has in recent years paid scant attention to delegation as a constitutional issue. An exception is *Arizona* v. *California,*[12] in which a divided Court sustained the delegation of total discretion to the Secretary of the Interior to apportion water among the southwestern States in times of shortage. The statute prescribed no formula or standards and the majority agreed that he was entirely free "to choose among the recognized methods of apportionment or to devise reasonable methods of his own",[13] the Secretary being required to reach "an informed judgment in harmony with the Act, the best interests of the Basin States, and the welfare of the Nation." [14] Three dissenters noted they had "the gravest constitutional doubts" about the delegation.[15]

But in other recent cases, the delegation has gone unmentioned while the exercise of the power conferred has been reviewed. Thus, in *United States* v. *Southwestern Cable Co.,*[16] the extensive

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[9] § 403(a)(4) of the Act, as amended by Tit. 7 of the Act of February 25, 1944, 58 Stat. 21, 78.

[10] 334 U.S., 783.

[11] *Intermountain Rate Cases,* 234 U.S. 476 (1914); *American Trucking Assns.* v. *United States,* 344 U.S. 298 (1953); *FCC* v. *RCA Communications,* 346 U.S. 86 (1953); *Yakus* v. *United States,* 321 U.S. 414 (1944). Significant is the fact that the sustaining by the district court of President Nixon's imposition of price, rent, wage, and salary controls under legislative delegation was not even appealed to the Supreme Court. *Amalgamated Meat Cutters & Butcher Workmen* v. *Connally,* 337 F. Supp. 737 (D.C.D.C. 1971) (three-judge court). Judge Levanthal's opinion is an excellent statement of delegation law.

[12] 373 U. S. 546 (1963).

[13] Id., 593.

[14] Id., 594.

[15] Id., 625. And see *National Cable Television* v. *United States,* 415 U.S. 336 (1974), in which the Court, expressing concern about a *Schechter* problem if it construed a statute as delegating a taxing power, adopted an alternative reading. In *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972), five Justices expressed considerable concern about the delegation. See also *Industrial Union Dept.* v. *American Petroleum Inst.,* 448 U.S. 607, 671 (1980) (concurring opinion); *American Textile Mfgrs. Inst.* v. *Donovan,* 452 U.S. 490, 543 (1981) (dissenting opinion).

[16] 392 U.S. 157 (1968).

regulation by the Federal Communications Commission of community antenna television (CATV) under its general authorizing statute was sustained, although Congress has expressed no judgment at all whether this industry is to be restricted, encouraged, or controlled in some manner. In *Red Lion Broadcasting Co.* v. *FCC*,[17] Commission rules on the "fairness doctrine" and "right to reply" privileges were affirmed without reference to congressional standards, although to be sure analogous congressional enactments were of assistance. The Federal Power Commission's development of a system of area price fixing for natural gas and the Interstate Commerce Commission's formulation of "piggyback" rules requiring railroads to carry the trailers or containers of motor carriers were sustained through in each instance the agency concerned had initially denied it had the power, had unsuccessfully sought authority from Congress, and had finally acted without congressional guidance.[18]

It seems therefore reasonably clear that the Court does not really require much in the way of standards from Congress. The minimum which the Court seems, but only sometimes, to insist on is that Congress employ a delegation which "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." [19] Where the congressional standards are combined with requirements of notice and hearing and such statements of findings and considerations by the administrators, so that judicial review under due process standards is possible, the constitutional requirements of delegation have been fulfilled.[20] It may well be, then, though the cases supporting the concept are from the lower courts, that the requirement of legislative standards is being shifted to a requirement of administrative standards and safeguards.[21]

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[17] 395 U.S. 367 (1969).

[18] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *American Trucking Assns.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967).

[19] *Yakus* v. *United States*, 321 U.S. 414, 425 (1944).

[20] Id., 426; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 144 (1941); *American Power Co.* v. *SEC*, 329 U.S. 90, 107, 108 (1946). It should be remembered that the Court has renounced strict review of economic regulation wholly through legislative enactment, forsaking substantive due process, so that review of the exercise of delegated power by the same relaxed standard forwards a consistent policy. E.g., *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

[21] *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (C.A. 2, 1968); *Hornsby* v. *Allen*,. 326 F. 2d 605 (C.A. 5, 1964). *Cf.* K. Davis, *Administrative Law Treatise* (St. Paul: 2d ed., 1978), § 3:15.

This requirement is basically met by the provisions of the Administrative Procedure Act,[22] but where the Act is inapplicable or where the Court sees the necessity for exceeding the provisions, due process can supply the safeguards of required hearing, notice, supporting statements, and the like.[23]

**Power to Give Effect to Contingent Legislation**

An entirely different problem arises when, instead of directing another department of government to apply a general statute to individual cases, or to supplement it by detailed regulation, Congress commands that a previously enacted statute be revived, suspended, or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer. Since the delegated function in such cases is not that of "filling up the details" of a statute, authority for it must be sought elsewhere than in *Wayman* v. *Southard* and its progeny. It is to be found in an even earlier case—*The Brig Aurora* [1]—where the revival of a law upon the issuance of a presidential proclamation was upheld in 1813. After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices which violated the neutral commerce of the United States. To the objection that this was an invalid delegation of legislative power, the Court answered briefly that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct." [2]

***Modification of Tariff Laws.***—This point was raised again in *Field* v. *Clark*,[3] where the Tariff Act of 1890 was assailed as unconstitutional because it directed the President to suspend the free importation of enumerated commodities "for such time as he shall deem just" if he found that other countries imposed upon agricultural or other products of the United States duties or other exac-

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[22] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. §§ 551-559. In *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), six Justices agreed that a Board proceeding had been in fact rule-making and not adjudication and that the APA should have been complied with. The Board won the particular case, however, because of a coalescence of divergent views of the Justices, but the Board has since reversed a policy of not resorting to formal rule-making.

[23] E.g., *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Wisconsin* v *Constantineau*, 400 U.S. 433 (1971).

[1] 7 Cr. (11 U.S.) 382 (1813).

[2] Id., 388.

[3] 143 U.S. 649 (1892).

tions which "he may deem to be reciprocally unequal and unjust." In sustaining this statute the Court relied heavily upon two factors: (1) legislative precedents which demonstrated that "in the judgment of the legislative branch of the government, it is often desirable, if not essential, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations;" [4] (2) that the act did "not, in any real sense, invest the President with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, . . . while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered." [5] By similar reasoning, the Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as such differences were ascertained and proclaimed by the President.[6]

***Foreign Affairs.***—That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was clearly indicated in *United States* v. *Curtiss-Wright Corp.*[7] There the Court upheld a joint resolution of Congress which made it unlawful to sell arms to certain warring countries "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace . . . , and if . . . he makes proclamation to that effect. . . ." Said Justice Sutherland for the Court: "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . Congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." [8]

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[4] Id., 691.

[5] Id., 692, 693.

[6] *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928).

[7] 299 U.S. 304, 312 (1936).

[8] Id., 319–322. For a particularly strong, recent assertion of the point, see *Haig* v. *Agee*, 453 U.S. 280, 291–292 (1981). This view also informs the Court's analysis in

***Internal Affairs.***—*Panama Refining Co.* v. *Ryan* [9] was the first case in which the President had been authorized to put into effect by proclamation, a new and independent rule pertaining to internal affairs. One section of the National Industrial Recovery Act authorized the President to forbid the shipment in interstate commerce of oil produced or withdrawn from storage in violation of state law. Apart from the purposes broadly stated in the first section—economic recovery and conservation of natural resources—the measure contained no standard or statement of policy by which the President should be guided in determining whether or when to issue the order. Nor did it require him to make any findings of fact to disclose the basis of his action. By a vote of eight-to-one the Court held the delegation invalid.

The only case in which the power of an administrative official to modify a rule enacted by Congress relating to domestic affairs has been sustained is *Opp Cotton Mills* v. *Administrator.*[10] That case involved the provisions of the Fair Labor Standards Act which authorized the appointment of Industry Advisory Committees to investigate conditions in particular industries, with notice and opportunity to be heard afforded to interested parties. Upon consideration of factors enumerated in the law and upon finding that the conditions specified in the law were fulfilled, such Committees were empowered to recommend, and the Administrator to adopt, higher minimum wage rates for particular industries. Emphasizing the procedure which the agency was directed to follow and the fact that it would be impossible for Congress to prescribe specific minimum wages for particular industries, a unanimous court sustained the law on the ground that the sole function of the Administrator was to put into effect the definite policy adopted by the legislators.

***Emergency Statutes.***—Occupying a middle ground between legislation dealing with foreign affairs and with purely domestic matters are those laws which may be termed "emergency statutes." These are largely the outgrowth of world war, cold war, and military actions taken abroad without declarations of war. For example, President Truman in 1950 issued a proclamation declaring "the existence of a national emergency", and by so doing activated a large number of statutes which applied to or during "a condition of emergency," "in time of war or national emergency," or similar phrasing.[11] This proclamation remained in effect for 27 years, and

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*Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). *See also United States* v. *Chemical Foundation*, 272 U.S. 1 (1926).

[9] 293 U.S. 388 (1935).

[10] 312 U.S. 126 (1941).

[11] Proclamation No. 2914, December 16, 1950, 15 Fed. Reg. 9029.

no accurate count was ever made of all the statutes in which provision was made for such national emergencies. Finally, as part of its effort to curtail excessive presidential discretion in foreign affairs, Congress enacted legislation terminating existing declarations of emergencies pending congressional review,[12] and then put into place a comprehensive statute which gave the President emergency powers in peacetime provided the President both declares a national emergency—in response to an "unusual or extraordinary threat" to the nation's security—and consults with Congress.[13] Experience with the Act will indicate whether the congressional purpose can be fulfilled.

***Delegation to Private Persons.***—Statutory delegations to private persons in the nature of contingency legislation have passed Court tests. Thus, statutes providing that restrictions upon the production or marketing of agricultural commodities are to become operative only upon a favorable vote by a prescribed majority of those persons affected have been upheld.[14] The rationale of the Court is that such a provision does not involve any delegation of legislative authority, since Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.[15]

Less consistency has been displayed with regard to the kind of delegation which we have called "filling in the details." The *Schechter* case condemned the involvement of private trade groups in the drawing up of binding codes of competition in conjunction with governmental agencies.[16] In *Carter* v. *Carter Coal Co.*,[17] the Court struck down the Bituminous Coal Conservation Act in part because the statute penalized persons who failed to observe minimum wage and maximum hour regulations drawn up by prescribed majorities of coal producers and coal employees. But earlier the Court had upheld a statute which delegated to the American Railway Association, a trade group, the authority to determine the

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[12] National Emergencies Act, 90 Stat. 1255 (1976), 50 U.S.C. §§ 1601–1651.

[13] International Emergency Economic Powers Act (IEEPA), 91 Stat. 1625, 1626–1629, 50 U.S.C. §§ 1701–1706. See *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Many presidential declarations of emergency had been pursuant to § 5(b) of the Trading With the Enemy Act of 1917, originally applicable only during wartime but extended to peacetime in 1933, 48 Stat. 1, giving the President a broad range of powers over international trade. By the Act of December 28, 1977, § 101(a), 91 Stat. 1625, 50 U.S.C. app. § 5(b), as amended, Congress again limited the Act to wartime.

[14] *Currin* v. *Wallace*, 306 U.S. 1 (1939); *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, 577 (1939).

[15] *Currin* v. *Wallace*, 306 U.S. 1, 15, 16 (1939).

[16] *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

[17] 298 U.S. 238 (1936).

standard height of draw bars for freight cars and to certify the figure to the Interstate Commerce Commission which was required to accept it.[18] The Court simply cited *Buttfield* v. *Stranahan*,[19] in which it had sustained a delegation to the Secretary of the Treasury to promulgate minimum standards of quality and purity for imported tea, as a case "completely in point" and resolving the issue without need of further consideration.[20] Similarly, the Court had earlier still enforced statutes which gave legal effect to local customs of miners with respect to claims on public lands.[21]

The issue has remained muddled since *Carter Coal*, the Court having had no opportunity to attempt to reconcile the two lines of cases.

***Delegation and Individual Liberties.***—It has been argued in separate opinions by some Justices that delegations by Congress of power to affect the exercise of "fundamental freedoms" by citizens must particularly be scrutinized to require the exercise of a congressional judgment about meaningful standards.[22] The only pronouncement in a majority opinion, however, is that even with regard to the regulation of liberty the standards of the delegation "must be adequate to pass scrutiny by the accepted tests."[23] The standard practice, indeed, of the majority has been to interpret narrowly the delegation so as to avoid constitutional problems.[24]

Perhaps refining the delegation doctrine, at least in cases where Fifth Amendment due process interests are implicated, the Court held that a government agency charged with the efficient administration of the executive branch could not assert the broader interests that Congress or the President might have in barring lawfully resident aliens from government employment. The agency could assert only its own interests and if the action could be justified by other interests the office with responsibility for promoting those interests must take the action.[25]

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[18] *St. Louis, Iron Mt. & Southern Ry. Co.* v. *Taylor*, 210 U.S. 281 (1988).

[19] 192 U.S. 470 (1904).

[20] 210 U.S. 287.

[21] *Jackson* v. *Roby*, 109 U.S. 440 (1883); *Erhardt* v. *Boaro*, 113 U.S. 527 (1885); *Butte City Water Co.* v. *Baker*, 196 U.S. 119 (1905).

[22] *United States* v. *Robel*, 389 U.S. 258, 269 (1967) (Justice Brennan concurring). The view was specifically rejected by Justices White and Harlan in dissent, id., 288–289 and ignored by the majority.

[23] *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958).

[24] *Kent* v. *Dulles*, 357 U.S. 116 (1958), *Schneider* v. *Smith*, 390 U.S. 17 (1968). More recently, the Court has eschewed even this limited mode of construction. *Haig* v. *Agee*, 453 U. S. 280 (1981).

[25] *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976) (5-to-4 decision). The regulation was reissued by the President, E. O. 11935, 3 C.F.R. 146 (1976), reprinted in 5 U.S.C. § 3301 (app.), sustained in *Vergara* v. *Hampton*, 581 F. 2d 1281 (C. A. 7, 1978).

### Punishment of Violations

If Congress so provides, violations of valid administrative regulations may be punished as crimes.[26] But the penalties must be provided in the statute itself; additional punishment cannot be imposed by administrative action.[27] In an early case, the Court held that a section prescribing penalties for any violation of a statute did not warrant a prosecution for wilful disobedience of regulations authorized by, and lawfully issued pursuant to, the act.[28] Without disavowing this general proposition, the Court, in 1944, upheld a suspension order issued by the OPA whereby a dealer in fuel oil who had violated rationing regulations was forbidden to receive or deal in that commodity.[29] Although such an order was not explicitly authorized by statute, it was sustained as being a reasonable measure for effecting a fair allocation of fuel oil, rather than as a means of punishment of an offender. In another OPA case, the Court ruled that in a criminal prosecution, a price regulation was subject to the same rule of strict construction as a statute, and that omissions from, or indefiniteness in, such a regulation, could not be cured by the Administrator's interpretation thereof.[30]

## CONGRESSIONAL INVESTIGATIONS

### Source of the Power to Investigate

No provision of the Constitution expressly authorizes either House of Congress to make investigations and exact testimony to the end that it may exercise its legislative functions effectively and advisedly. But such a power had been frequently exercised by the British Parliament and by the Assemblies of the American Colonies prior to the adoption of the Constitution.[1] It was asserted by

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The decision, Justice Stevens' first opinion for the Court, may be explainable not solely in terms of the delegation doctrine but as an aspect of "due process of lawmaking," *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 98 n. 11 (1977) (Justice Stevens dissenting), borrowed from Linde, "Due Process of Lawmaking," 55 Nebr. L. Rev. 197 (1976), and applied in several contexts, *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668, 680 (1976) (Justice Stevens dissenting); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 (1977) (Justice Stevens concurring). A similar concept may underlay Chief Justice Burger's plurality opinion in *Fullilove* v. *Klutznick*, 448 U.S. 448, 472-473, 480-484 (1980), and may inform Justice Powell's opinion in *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 307-315 (1978).

[26] *United States* v. *Grimaud*, 220 U.S. 506 (1911).

[27] *L. P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398, 404 (1944).

[28] *United States* v. *Eaton*, 144 U.S. 677 (1892).

[29] *L.P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398 (1944).

[30] *M. Kraus & Bros.* v. *United States*, 327 U.S. 614 (1946).

[1] Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 Harv. L. Rev. 153, 159-166 (1926); M. Dimock, *Congressional Investigating Committees* (Baltimore: 1929), ch. 2.

the House of Representatives as early as 1792 when it appointed a committee to investigate the defeat of General St. Clair and his army by the Indians in the Northwest and empowered it to "call for such persons, papers, and records, as may be necessary to assist their inquiries." [2]

The Court has long since accorded its agreement with Congress that the investigatory power is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. "We are of the opinion," wrote Justice Van Devanter, for a unanimous Court, "that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised." [3]

And in a 1957 opinion generally hostile to the *exercise* of the investigatory power in the post-War years, Chief Justice Warren did not question the basic power. "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." [4] Justice

[2] 3 *Annals of Congress* 490–494 (1792); 3 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 1725.

[3] *McGrain* v. *Daugherty*, 273 U.S. 135, 174–175 (1927).

[4] *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).

Harlan summarized the matter in 1959. "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." [5]

Broad as the power of inquiry is, it is not unlimited. The power of investigation may properly be employed only "in aid of the legislative function." [6] Its outermost boundaries are marked, then, by the outermost boundaries of the power to legislate. In principle, the Court is clear on the limitations, clear "that neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'; that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action; that if the inquiry relates to 'a matter wherein relief or redress could be had only by a judicial proceeding' it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse must be had to the resolution or order under which it is made." [7]

In practice, much of the litigated dispute has been about the reach of the power to inquire into the activities of private citizens; inquiry into the administration of laws and departmental corruption, while of substantial political consequence, has given rise to fewer judicial precedents.

**Investigations of Conduct of Executive Department**

For many years the investigating function of Congress was limited to inquiries into the administration of the Executive Department or of instrumentalities of the Government. Until the administration of Andrew Jackson this power was not seriously challenged.[1] During the controversy over renewal of the charter of the

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[5] *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959). *See also Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503–507 (1975).

[6] *Kilbourn* v. *Thompson*, 103 U.S. 168, 189 (1881).

[7] *McGrain* v. *Daugherty*, 273 U.S. 135, 170 (1927). The internal quotations are from *Kilbourn* v. *Thompson*, 103 U.S. 168, 190, 193 (1881).

[1] In 1800, Secretary of the Treasury, Oliver Wolcott, Jr., addressed a letter to the House of Representatives advising them of his resignation from office and inviting an investigation of his office. Such an inquiry was made. 10 *Annals of Congress* 786–788 (1800).

Bank of the United States, John Quincy Adams contended that an unlimited inquiry into the operations of the bank would be beyond the power of the House.[2] Four years later the legislative power of investigation was challenged by the President. A committee appointed by the House of Representatives "with power to send for persons and papers, and with instructions to inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted, . . ." [3] called upon the President and the heads of departments for lists of persons appointed without the consent of the Senate and the amounts paid to them. Resentful of this attempt "to invade the just rights of the Executive Departments" the President refused to comply and the majority of the committee acquiesced.[4] Nevertheless, congressional investigations of Executive Departments have continued to the present day. Shortly before the Civil War, contempt proceedings against a witness who refused to testify in an investigation of John Brown's raid upon the arsenal at Harper's Ferry occasioned a thorough consideration by the Senate of the basis of this power. After a protracted debate, which cut sharply across sectional and party lines, the Senate voted overwhelmingly to imprison the contumacious witness.[5] Notwithstanding this firmly established legislative practice, the Supreme Court took a narrow view of the power in the case of *Kilbourn* v. *Thompson*.[6] It held that the House of Representatives had overstepped its jurisdiction when it instituted an investigation of losses suffered by the United States as a creditor of Jay Cooke and Company, whose estate was being administered in bankruptcy by a federal court.[7] But nearly half a century later, in *McGrain* v. *Daugherty*,[8] it ratified in sweeping terms, the power of Congress to inquire into the administration of an executive department and to sift charges of malfeasance in such administration.[9]

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[2] 8 *Cong. Deb.* 2160 (1832).

[3] 13 *Cong. Deb.* 1057–1067 (1836).

[4] H.R. Rep. No. 194, 24th Congress, 2d sess., 1, 12, 31 (1837).

[5] *Cong. Globe*, 36th Congress, 1st sess., 1100–1109 (1860).

[6] 103 U.S. 168 (1881).

[7] The Court held that inasmuch as the entire proceedings arising out of the bankruptcy were pending in court, as the authorizing resolution contained no suggestion of contemplated legislation, as in fact no valid legislation could be enacted on the subject, and as the only relief which the United States could seek was judicial relief in the bankruptcy proceeding, the House had exceeded its powers in authorizing the inquiry. *But see Hutcheson* v *United States*, 369 U.S. 599 (1962).

[8] 273 U.S. 135, 177, 178 (1927).

[9] We do not here consider the topic of executive privilege, the claimed right of the President and at least some of his executive branch officers to withhold from Congress information desired by it or by one of its committees. Although the issue has been one of contention between the two branches of Government since Washington's refusal in 1796 to submit certain correspondence to the House of Representa-

### Investigations of Members of Congress

When either House exercises a judicial function, as in judging of elections or determining whether a member should be expelled, it is clearly entitled to compel the attendance of witnesses to disclose the facts upon which its action must be based. Thus, the Court held that since a House had a right to expel a member for any offense which it deemed incompatible with his trust and duty as a member, it was entitled to investigate such conduct and to summon private individuals to give testimony concerning it.[10] The decision in *Barry* v. *United States ex rel. Cunningham* [11] sanctioned the exercise of a similar power in investigating a senatorial election.

### Investigations in Aid of Legislation

***Purpose.***—Beginning with the resolution adopted by the House of Representatives in 1827, which vested its Committee on Manufactures "with the power to send for persons and papers with a view to ascertain and report to this House in relation to a revision of the tariff duties on imported goods," [1] the two Houses have asserted the right to collect information from private persons as well as from governmental agencies when necessary to enlighten their judgment on proposed legislation. The first case to review the assertion saw a narrow view of the power taken and the Court held that the purpose of the inquiry was to pry improperly into private affairs without any possibility of legislating on the basis of what might be learned and further that the inquiry overstepped the bounds of legislative jurisdiction and invaded the provinces of the judiciary.[2]

Subsequent cases, however, have given the Congress the benefit of a presumption that its object is legitimate and related to the possible enactment of legislation. Shortly after *Kilbourn*, the Court declared that "it was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded" in order that the inquiry be under a lawful exercise of power.[3] Similarly, in *McGrain* v. *Daugh-*

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tives relating to treaty negotiations, it has only recently become a judicial issue. For discussion, *see infra, pp.* 552–560.

[10] *In re Chapman*, 166 U.S. 661 (1897).

[11] 279 U.S. 597 (1929).

[1] 4 *Cong. Deb.* 862, 868, 888, 889 (1827).

[2] *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881).

[3] *In re Chapman*, 166 U.S. 661, 670 (1897).

*erty* [4] the investigation was presumed to have been undertaken in good faith to aid the Senate in legislating. Then, in *Sinclair* v. *United States*,[5] on its facts presenting a close parallel to *Kilbourn*, the Court affirmed the right of the Senate to carry out investigations of fraudulent leases of government property after suit for recovery had been instituted. The president of the lessee corporation had refused to testify on the ground that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, asserting that the inquiry was not actually in aid of legislation. The Senate had prudently directed the investigating committee to ascertain what, if any, legislation might be advisable. Conceding "that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits," the Court declared that the authority "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." [6]

While *Sinclair* and *McGrain* involved inquiries into the activities and dealings of private persons, these activities and dealings were in connection with property belonging to the United States Government, so that it could hardly be said that the inquiries concerned the merely personal or private affairs of any individual.[7] But where the business, the activities and conduct, the behavior of individuals are subject to congressional regulation, there exists the power of inquiry [8] and in practice the areas of any individual's life immune from inquiry is probably fairly limited. "In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens." [9]

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[4] 273 U.S. 135, 178 (1927).

[5] 279 U.S. 263 (1929).

[6] Id., 295.

[7] Id., 294.

[8] The first case so holding is *ICC* v. *Brimson*, 154 U.S. 447 (1894), which asserts that inasmuch as Congress could itself have made the inquiry to appraise its regulatory activities it could delegate the power of inquiry to the agency to which it had delegated the regulatory function.

[9] *Watkins* v. *United States*, 354 U.S. 178, 195 (1957).

Inasmuch as Congress clearly has power to legislate to protect the Nation and its citizens from subversion, espionage, and sedition,[10] it has power to inquire into the existence of the dangers of domestic or foreign-based subversive activities in many areas of American life—in education,[11] in labor and industry,[12] and other areas.[13] Because its powers to regulate interstate commerce afford Congress the power to regulate corruption in labor-management relations, congressional committees may inquire into the extent of corruption in labor unions.[14] Because of its powers to legislate to protect the civil rights of its citizens, Congress may investigate organizations which allegedly act to deny those civil rights.[15] It is difficult in fact to conceive of areas into which congressional inquiry might not be carried, which is not the same, of course, as saying that the exercise of the power is unlimited.

One limitation on the power of inquiry which has been much discussed in the cases concerns the contention that congressional investigations often have no legislative purpose but rather are aimed at achieving results through "exposure" of disapproved persons and activities: "We have no doubt," wrote Chief Justice Warren, "that there is no congressional power to expose for the

[10] *See Dennis* v. *United States*, 341 U.S. 494 (1951); *Barenblatt* v. *United States*, 360 U.S. 109, 127 (1959); *American Communications Assn.* v. *Douds*, 339 U.S. 382 (1950).

[11] *Barenblatt* v. *United States*, 360 U.S. 109, 129–132 (1959); *Deutch* v. *United States*, 367 U.S. 456 (1961); *cf. Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957) (state inquiry).

[12] *Watkins* v. *United States*, 354 U.S. 178 (1957); *Flaxer* v. *United States*, 358 U.S. 147 (1958); *Wilkinson* v. *United States*, 365 U.S. 399 (1961).

[13] *McPhaul* v. *United States*, 364 U.S. 372 (1960).

[14] *Hutcheson* v. *United States*, 369 U.S. 599 (1962).

[15] *Shelton* v. *United States*, 404 F. 2d 1292 (C.A.D.C. 1968), *cert. den.*, 393 U.S. 1024 (1969).

sake of exposure."[16] Although some Justices, always in dissent, have attempted to assert limitations in practice based upon this concept, the majority of Justices has adhered to the traditional precept that courts will not inquire into legislators' motives but will[17] look only to the question of power.[18] "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[19]

***Protection of Witnesses; Pertinency and Related Matters.***—A witness appearing before a congressional committee is entitled to require of the committee a demonstration of its authority to inquire with regard to his activities and a showing that the questions asked of him are pertinent to the committee's area of inquiry. A congressional committee possesses only those powers delegated to it by its parent body. The enabling resolution which has given it life also contains the grant and limitations of the committee's power.[20]

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[16] *Watkins* v. *United States*, 354 U.S. 178, 200 (1957). The Chief Justice, however, noted: "We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in *Congressional Government* when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id., at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." Id., 200 n. 33.

In his book, Wilson continued, following the sentence quoted by the Chief Justice: "The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. . . . It would be hard to conceive of there being too much talk about the practical concerns . . . of government." *Congressional Government* (Boston: 1885), 303-304. For contrasting views of the reach of this statement, compare *United States* v. *Rumely*, 345 U.S. 41, 43 (1953), with *Russell* v. *United States*, 369 U.S. 749, 777-778 (1962) (Justice Douglas dissenting).

[17] *Barenblatt* v. *United States*, 360 U.S. 109, 153-162, 166 (1959); *Wilkinson* v. *United States*, 365 U.S. 399, 415, 423 (1961); *Braden* v. *United States*, 365 U.S. 431, 446 (1961); *but see DeGregory* v. *Attorney General*, 383 U.S. 825 (1966) (a state investigative case).

[18] "Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindicative motives are readily attributable to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney* v. *Brandhove*, 341 U.S. 367, 377-378 (1951). For a statement of the traditional unwillingness to inquire into congressional motives in the judging of legislation, *see United States* v. *O'Brien*, 391 U.S. 367, 382-386 (1968). But note that in *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969), in which the legislation establishing a state crime investigating commission clearly authorized the commission to designate individuals as law violators, due process was violated by denying witnesses the rights existing in adversary criminal proceedings.

[19] *Barenblatt* v. *United States*, 360 U.S. 109, 132 (1959).

[20] *United States* v. *Rumely*, 345 U.S. 41, 44 (1953).

In *Watkins* v. *United States,*[21] Chief Justice Warren cautioned that "[b]roadly drafted and loosely worded . . . resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress." Speaking directly of the authorizing resolution which created the House Un-American Activities Committee,[22] the Chief Justice thought it "difficult to imagine a less explicit authorizing resolution." [23] But the far-reaching implications of these remarks were circumscribed by *Barenblatt* v. *United States* [24] in which the Court, "[g]ranting the vagueness of the Rule," noted that Congress had long since put upon it a persuasive gloss of legislative history through practice and interpretation which, read with the enabling resolution, showed that "the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country." [25] "[W]e must conclude that [the Committee's] authority to conduct the inquiry presently under consideration is unassailable, and that . . . the Rule cannot be said to be constitutionally infirm on the score of vagueness." [1]

Because of the usual precision with which authorizing resolutions have generally been drafted, few controversies have arisen about whether a committee has projected its inquiry into an area not sanctioned by the parent body.[2] But in *United States* v. *Rumely,*[3] the Court held that the House of Representatives, in authorizing a select committee to investigate lobbying activities devoted to the promotion or defeat of legislation, did not thereby intend to empower the committee to probe activities of a lobbyist which were unconnected with his representations directly to Congress but rather designed to influence public opinion by distribution of literature. Consequently the committee was without authority to compel the representative of a private organization to dis-

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[21] 354 U.S. 178, 201 (1957).

[22] The Committee has since been denominated the Committee on Internal Security, H. Res. 89, 91st Congress, 1st sess. (1969).

[23] *Watkins* v. *United States,* 354 U.S. 178, 202 (1957).

[24] 360 U.S. 109 (1959).

[25] Id., 117–118.

[1] Id., 122–123. But note that in *Stamler* v. *Willis,* 415 F. 2d 1365 (C.A. 7, 1969), *cert. den.,* 399 U.S. 929 (1970), the court ordered to trial a civil suit contesting the constitutionality of the Rule establishing the Committee on allegations of overbreadth and overbroad application, holding that *Barenblatt* did not foreclose the contention.

[2] *But see Tobin* v. *United States,* 306 F. 2d 270 (C.A.D.C.), *cert. den.,* 371 U.S. 902 (1962).

[3] 345 U.S. 41 (1953).

close the names of all who had purchased such literature in quantity.[4]

Still another example of lack of proper authority is *Gojack* v. *United States* [5] in which the Court reversed a contempt citation because there was no showing that the parent committee had delegated to the subcommittee before whom the witness had appeared the authority to make the inquiry and neither had the full committee specified the area of inquiry.

*Watkins* v. *United States* [6] remains the leading case on pertinency, although it has not the influence on congressional investigations which some hoped and some feared in the wake of its announcement. When questioned by a Subcommittee of the House Un-American Activities Committee, Watkins refused to supply the names of past associates, who, to his knowledge, had terminated their membership in the Communist Party and supported his noncompliance by, *inter alia,* contending that the questions were unrelated to the work of the Committee. Sustaining the witness, the Court emphasized that inasmuch as a witness by his refusal exposes himself to a criminal prosecution for contempt, he is entitled to be informed of the relation of the question to the subject of the investigation with the same precision as the due process clause requires of statutes defining crimes.[7]

For ascertainment of the subject matter of an investigation, the witness might look, noted the Court, to several sources, including (1) the authorizing resolution, (2) the resolution by which the full committee authorized the subcommittee to proceed, (3) the introductory remarks of the chairman or other members, (4) the nature of the proceedings, (5) the chairman's response to the witness when the witness objects to the line of question on grounds of pertinency.[8] Whether a precise delineation of the subject matter of the investigation in but one of these sources would satisfy the requirements of due process was left unresolved, since the Court ruled that in this case all of them were deficient in providing Watkins with the guidance to which he was entitled. The sources had informed Watkins that the questions were asked in a course of in-

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[4] The Court intimated that if the authorizing resolution did confer such power upon the committee, the validity of the resolution would be subject to doubt on First Amendment principles. Justices Black and Douglas would have construed the resolution as granting the authority and would have voided it under the First Amendment. Id., 48 (concurring opinion).

[5] 384 U.S. 702 (1966).

[6] 354 U.S. 178 (1957).

[7] Id., 208–209.

[8] Id., 209–215.

vestigation of something that ranged from a narrow inquiry into Communist infiltration into the labor movement to a vague and unlimited inquiry into "subversion and subversive propaganda." [9]

By and large the subsequent cases demonstrated that *Watkins* did not represent a determination by the Justices to restrain broadly the course of congressional investigations, though several contempt citations were reversed on narrow holdings. But with regard to pertinency, the implications of *Watkins* were held in check and, without amending its rules or its authorizing resolution, the Un-American Activities Committee was successful in convincing a majority of the Court that its subsequent investigations were authorized and that the questions asked of recalcitrant witnesses were pertinent to the inquiries.[10]

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[9] Ibid. *See also Sacher* v. *United States*, 356 U.S. 576 (1958), a *per curiam* reversal of a contempt conviction on the ground that the questions did not relate to a subject "within the subcommittee's scope of inquiry", arising out of a hearing pertaining to a recantation of testimony by a witness in which the inquiry drifted into a discussion of legislation barring Communists from practice at the federal bar, the unanswered questions being asked then; and *Flaxer* v. *United States*, 358 U.S. 147 (1958), a reversal for refusal to produce membership lists because of an ambiguity in the committee's ruling on the time of performance; and *Scull* v. *Virginia ex rel. Committee*, 359 U.S. 344 (1959), a reversal on a contempt citation before a state legislative investigating committee on pertinency grounds.

[10] Notice should be taken, however, of two cases which, though decided four and five years after *Watkins*, involved persons who were witnesses before the Un-American Activities Committee either shortly prior to or shortly following Watkins' appearance and who were cited for contempt before the Supreme Court decided Watkins' case.

In *Deutch* v. *United States*, 367 U.S. 456 (1961), involving an otherwise cooperative witness who had refused to identify certain persons with whom he had been associated at Cornell in Communist Party activities, the Court agreed that Deutch had refused on grounds of moral scruples to answer the questions and had not challenged them as not pertinent to the inquiry, but the majority ruled that the Government had failed to establish *at trial* the pertinency of the questions, thus vitiating the conviction. Justices Frankfurter, Clark, Harlan, and Whittaker dissented, arguing that any argument on pertinency had been waived but in any event thinking it had been established. Id., 472, 475.

In *Russell* v. *United States*, 369 U.S. 749 (1962), the Court struck down contempt convictions for insufficiency of the indictments. Indictments which merely set forth the offense in the words of the contempt statute, the Court asserted, in alleging that the unanswered questions were pertinent to the subject under inquiry but not identifying the subject in detail, are defective because they do not inform defendants what they must be prepared to meet and do not enable courts to decide whether the facts alleged are sufficient to support convictions. Justice Stewart for the Court noted that the indicia of subject matter under inquiry were varied and contradictory, thus necessitating a precise governmental statement of particulars. Justices Harlan and Clark in dissent contended that it was sufficient for the Government to establish pertinency at trial and noted that no objections relating to pertinency had been made at the hearings. Id., 781, 789–793. *Russell* was cited in the *per curiam* reversals in *Grumman* v. *United States*, 370 U.S. 288 (1962), and *Silber* v. *United States*, 370 U.S. 717 (1962).

Thus, in *Barenblatt* v. *United States,*[11] the Court concluded that the history of the Un-American Activities Committee's activities, viewed in conjunction with the Rule establishing it, evinced clear investigatory authority to inquire into Communist infiltration in the field of education, an authority with which the witness had shown familiarity. Additionally, the opening statement of the chairman had pinpointed that subject as the nature of the inquiry that day and the opening witness had testified on the subject and had named Barenblatt as a member of the Communist Party at the University of Michigan. Thus, pertinency and the witness' knowledge of the pertinency of the questions asked him was shown. Similarly, in *Wilkinson* v. *United States,*[12] the Court held that when the witness was apprised at the hearing that the Committee was empowered to investigate Communist infiltration of the textile industry in the South, that it was gathering information with a view to ascertaining the manner of administration and need to amend various laws directed at subversive activities, that Congress hitherto had enacted many of its recommendations in this field, and that it was possessed of information about his Party membership, he was notified effectively that a question about that affiliation was relevant to a valid inquiry. A companion case was held to be controlled by *Wilkinson* [13] and in both cases the majority rejected the contention that the Committee inquiry was invalid because both Wilkinson and Braden when they were called, were engaged in organizing activities against the Committee.[14]

Related to the cases discussed in this section are those cases requiring that congressional committees observe strictly their own rules. Thus, in *Yellin* v. *United States,*[15] a contempt conviction was

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[11] 360 U.S. 109 (1959).

[12] 365 U.S. 399 (1961).

[13] *Braden* v. *United States,* 365 U.S. 431 (1961).

[14] The majority denied that the witness' participation in a lawful and protected course of action, such as petitioning Congress to abolish the Committee, limited the Committee's right of inquiry. "[W]e cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. The subcommittee had reasonable ground to suppose that the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation. As the *Barenblatt* opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest." *Wilkinson* v. *United States,* 365 U.S. 399, 414 (1961).

In both cases, the dissenters, Chief Justice Warren and Justices Black, Douglas, and Brennan argued that the Committee action was invalid because it was intended to harass persons who had publicly criticized committee activities. Id., 415, 423, 429.

[15] 374 U.S. 109 (1963).

reversed because the Committee had failed to observe its rule providing for a closed session if a majority of the Committee believed that a witness' appearance in public session might unjustly injure his reputation. The Court ruled that the Committee had ignored the rule when it subpoenaed the witness for a public hearing and then in failing to consider as a Committee his request for a closed session.[16]

Finally, it should be noted that the Court has blown hot and cold on the issue of a quorum as a prerequisite to a valid contempt citation and that no firm statement of a rule is possible, although it seems probable that ordinarily no quorum is necessary.[17]

***Protection of Witnesses; Constitutional Guarantees.***—"[T]he Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights." [18] Just as the Constitution places limitations on Congress' power to legislate, so it limits the power to investigate. In this section, we are concerned with the limitations the Bill of Rights places on the scope and nature of the congressional power to inquire.

The most extensive amount of litigation in this area has involved the privilege against self-incrimination guaranteed against governmental abridgment by the Fifth Amendment. Observance of the privilege by congressional committees has been so uniform that no Court holding has ever held that it must be observed, though the dicta is plentiful.[19] Thus, the cases have explored not the issue of the right to rely on the privilege but rather the manner and extent of its application.

There is no prescribed form in which one must plead the privilege. When a witness refused to answer a question about Communist Party affiliations and based his refusal upon the assertion by a prior witness of "the first amendment supplemented by the fifth,"

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[16] Failure to follow its own rules was again an issue in *Gojack* v. *United States*, 384 U.S. 702 (1966), in which the Court noted that while a committee rule required the approval of a majority of the Committee before a "major" investigation was initiated, such approval had not been sought before a Subcommittee proceeded.

[17] In *Christoffel* v. *United States*, 338 U.S. 84 (1949), the Court held that a witness can be found guilty of perjury only where a quorum of the committee is present at the time the perjury is committed; it is not enough to prove that a quorum was present when the hearing began. But in *United States* v. *Bryan*, 339 U.S. 323 (1950), the Court ruled that a quorum was not required under the statute punishing refusal to honor a valid subpoena issued by an authorized committee.

[18] *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959).

[19] Id., 126; *Watkins* v. *United States*, 354 U.S. 178, 196 (1957); *Quinn* v. *United States*, 349 U.S. 155, 161 (1955).

the Court held that he had sufficiently invoked the privilege, at least in the absence of committee inquiry seeking to force him to adopt a more precise stand.[20] If the committee suspected that the witness was being purposely vague, in order perhaps to avoid the stigma attached to a forthright claim of the privilege, it should have requested him to state specifically the ground of his refusal to testify. Another witness, who was threatened with prosecution for his Communist activities, could claim the privilege even to some questions the answers to which he might have been able to explain away as unrelated to criminal conduct; if an answer might tend to be incriminatory, the witness is not deprived of the privilege merely because he might have been able to refute inferences of guilt.[21] In still another case, the Court held that the Committee had not clearly overruled the claim of privilege and directed an answer.[22]

The privilege against self-incrimination is not available as a defense to an organizational officer who refuses to turn over organization documents and records to an investigating committee.[23]

In *Hutcheson* v. *United States,*[24] the Court rejected a challenge to a Senate Committee inquiry into union corruption on the part of a witness who was under indictment in state court on charges relating to the same matters about which the Committee sought to interrogate him. The witness did not plead his privilege against self-incrimination but contended that by questioning him about matters which would aid the state prosecutor the Committee had denied him due process. The plurality opinion of the Court rejected his ground for refusing to answer, noting that if the Committee's public hearings rendered the witness' state trial unfair, then he could properly raise that issue on review of his state conviction.[25]

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[20] *Quinn* v. *United States,* 349 U.S. 155 (1955).

[21] *Emspak* v. *United States,* 349 U.S. 190 (1955).

[22] *Bart* v. *United States,* 349 U.S. 219 (1955).

[23] *McPhaul* v. *United States,* 364 U.S. 372 (1960).

[24] 369 U.S. 599 (1962).

[25] Justice Harlan wrote the opinion of the Court which Justices Clark and Stewart joined. Justice Brennan concurred solely because the witness had not claimed the privilege against self-incrimination but he would have voted to reverse the conviction had there been a claim. Chief Justice Warren and Justice Douglass dissented on due process grounds. Justices Black, Frankfurter, and White did not participate. At the time of the decision, the self-incrimination clause did not restrain the States through the Fourteenth Amendment so that it was no violation of the clause for either the Federal Government or the States to compel testimony which would incriminate the witness in the other jurisdiction. *Cf. United States* v. *Murdock,* 284 U.S. 141 (1931); *Knapp* v. *Schweitzer,* 357 U.S. 371 (1958). The Court has since reversed itself, *Malloy* v. *Hogan,* 378 U.S. 1 (1964); *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), thus leaving the vitality of *Hutcheson* open to question.

Following behind the privilege against self-incrimination, claims relating to the First Amendment have been frequently asserted and as frequently denied. It is not that the First Amendment is inapplicable to congressional investigations, it is that under the prevailing Court interpretation the First Amendment does not bar all legislative restrictions of the rights guaranteed by it.[1] "[T]he protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." [2]

Thus, the Court has declined to rule that under the circumstances of the cases investigating committees are precluded from making inquiries simply because the subject area was education [3] or because the witnesses at the time they were called were engaged in protected activities such as petitioning Congress to abolish the inquiring committee.[4] However, in an earlier case, the Court intimated that it was taking a narrow view of the committee's authority because a determination that authority existed would raise a serious First Amendment issue.[5] And in a state legislative investigating committee case, the majority of the Court held that an inquiry seeking the membership lists of the National Association for the Advancement of Colored People was so lacking in a "nexus" between the organization and the Communist Party that the inquiry infringed the First Amendment.[6]

Dicta in the Court's opinions acknowledge that the Fourth Amendment guarantees against unreasonable searches and seizures are applicable to congressional committees.[7] The issue would

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[1] The matter is discussed fully in the section on the First Amendment but a good statement of the balancing rule may be found in *Younger* v. *Harris*, 401 U.S. 37, 51 (1971), by Justice Black, supposedly an absolutist on the subject: "Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

[2] *Barenblatt* v. *United States*, 360 U.S. 109, 126 (1959).

[3] *Barenblatt* v. *United States*, 360 U.S. 109 (1959).

[4] *Wilkinson* v. *United States*, 365 U.S. 399 (1961); *Braden* v. *United States*, 365 U.S. 431 (1961).

[5] *United States* v. *Rumely*, 345 U.S. 41 (1953).

[6] *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). *See also DeGregory* v. *Attorney General*, 383 U.S. 825 (1966).

[7] *Watkins* v. *United States*, 354 U.S. 178, 188 (1957).

most often arise in the context of subpoenas, inasmuch as that procedure is the usual way by which committees obtain documentary material and inasmuch as Fourth Amendment standards apply as well to subpoenas as to search warrants.[8] But there are no cases in which a holding turns on this issue.[9]

Other issues of the constitutional rights of witnesses have been raised at various times, but none has been successfully asserted or have even gained substantial minority strength.

**Sanctions of the Investigatory Power: Contempt**

Explicit judicial recognition of the right of either House of Congress to commit for contempt a witness who ignores its summons or refuses to answer its inquiries dates from *McGrain* v. *Daugherty.*[1] But the principle there applied had its roots in an early case, *Anderson* v. *Dunn,*[2] which stated in broad terms the right of either branch of the legislature to attach and punish a person other than a member for contempt of its authority.[3] The right to punish a contumacious witness was conceded in *Marshall* v. *Gordon,*[4] although the Court there held that the implied power to deal with contempt did not extend to the arrest of a person who published matter defamatory of the House.

The cases emphasize that the power to punish for contempt rests upon the right of self-preservation. That is, in the words of Chief Justice White, "the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed" necessitates the contempt power.[5] Thus, in *Jurney* v. *Mac-*

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[8] *See Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186 (1946), and cases cited.

[9] *Cf. McPhaul* v. *United States,* 364 U.S. 372 (1960).

[1] 273 U.S. 135 (1927).

[2] 6 Wheat (19 U.S.) 204 (1821).

[3] The contempt consisted of an alleged attempt to bribe a Member of the House for his assistance in passing a claims bill. The case was a civil suit brought by Anderson against the Sergeant at Arms of the House for assault and battery and false imprisonment. *Cf. Kilbourn* v. *Thompson,* 103 U.S. 168 (1881). The power of a legislative body to punish for contempt one who disrupts legislative business was reaffirmed in *Groppi* v. *Leslie,* 404 U.S. 496 (1972), but a unanimous Court there held that due process required a legislative body to give a contemnor notice and an opportunity to be heard prior to conviction and sentencing. Although this case dealt with a state legislature, there is no question it would apply to Congress as well.

[4] 243 U.S. 521 (1917).

[5] Id., 542.

*Cracken*,[6] the Court turned aside an argument that the Senate had no power to punish a witness who, having been commanded to produce papers, destroyed them after service of the subpoena. The punishment would not be efficacious in obtaining the papers in this particular case, but the power to punish for a past contempt is an appropriate means of vindicating "the established and essential privilege of requiring the production of evidence." [7]

Under the rule laid down by *Anderson* v. *Dunn*,[8] imprisonment by one of the Houses of Congress could not extend beyond the adjournment of the body which ordered it. Because of this limitation and because contempt trials before the bar of the House charging were time consuming, in 1857 Congress enacted a statute providing for criminal process in the federal courts with prescribed penalties for contempt of Congress.[9]

The Supreme Court has held that the purpose of this statute is merely supplementary of the power retained by Congress and all constitutional objections to it were overruled. "We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved." [10]

Because Congress has invoked the aid of the federal judicial system in protecting itself against contumacious conduct, the consequence, the Court has asserted numerous times, is that the duty has been conferred upon the federal courts to accord a person prosecuted for his statutory offense every safeguard which the law accords in all other federal criminal cases [11] and the discussion in

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[6] 294 U.S. 125 (1935).

[7] Id., 150.

[8] 6 Wheat. (19 U.S.) 204 (1821).

[9] Act of January 24, 1857, 11 Stat. 155. With only minor modification, this statute is now 2 U.S.C. § 192.

[10] *In re Chapman*, 166 U.S. 661, 671–672 (1897).

[11] *Sinclair* v. *United States*, 279 U.S. 263, 296–297 (1929); *Watkins* v. *United States*, 354 U.S. 178, 207 (1957); *Sacher* v. *United States*, 356 U.S. 576, 577 (1958); *Flaxer* v. *United States*, 358 U.S. 147, 151 (1958); *Deutch* v. *United States*, 367 U.S. 456, 471 (1961); *Russell* v. *United States*, 369 U.S. 749, 755 (1962). Protesting the Court's reversal of several contempt convictions over a period of years, Justice Clark was moved to suggest that "[t]his continued frustration of the Congress in the use of the judicial process to punish those who are contemptuous of its committees indicates to me that the time may have come for Congress to revert to 'its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House [affected].'" *Russell* v. *United States*, *supra*, 781; *Watkins* v. *United States*, *supra*, 225.

previous sections of many reversals of contempt convictions bears witness to the assertion in practice. What constitutional protections ordinarily necessitated by due process requirements, such as notice, right to counsel, confrontation, and the like, prevail in a contempt trial before the bar of one House or the other is an open question.[12]

It has long been settled that the courts may not intervene directly to restrain the carrying out of an investigation or the manner of an investigation and that a witness who believes the inquiry to be illegal or otherwise invalid in order to raise the issue must place himself in contempt and raise his beliefs as affirmative defenses on his criminal prosecution. This understanding was sharply reinforced when the Court held that the speech or debate clause utterly foreclosed judicial interference with the conduct of a congressional investigation, through review of the propriety of subpoenas or otherwise.[13] It is only with regard to the trial of contempts that the courts may review the carrying out of congressional investigations and may impose constitutional and other constraints.

SECTION 2. Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

## CONGRESSIONAL DISTRICTING

A major innovation in constitutional law in recent years has been the development of a requirement that election districts be so structured that each elected representative should represent substantially equal populations.[1] While this requirement has generally

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[12] *Cf. Groppi* v. *Leslie*, 404 U.S. 496 (1972).

[13] *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). On the speech or debate clause, *see infra, pp.* 123–130.

[1] The phrase "one man, one vote" which came out of this litigation might well seem to refer to election districts drawn to contain equal numbers of voters rather than equal numbers of persons. But it seems clear from a consideration of all the Court's opinions and the results of its rulings that the statement in the text accurately reflects the constitutional requirement. Note that no problem arises with regard to single-member districts, as all congressional districts are, but conceptual difficulties arise in multimember districting. *Infra, pp.* 1788–1795.

been gleaned from the equal protection clause of the Fourteenth Amendment,[2] in *Wesberry* v. *Sanders*,[3] the Court held that "construed in its historical context, the command of Art. 1, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." [4]

Court involvement in this issue developed slowly. In our early history, state congressional delegations were generally elected at-large instead of by districts and even when Congress required single-member districting [5] and later added a provision for equally populated districts [6] the relief sought by voters was action by the House refusing to seat Members-elect selected under systems not in compliance with the federal laws.[7] The first series of cases did not reach the Supreme Court, in fact, until the States began redistricting through the 1930 Census and these were resolved without reaching constitutional issues and indeed without resolving the issue whether such voter complaints were justiciable at all.[8] In the late 1940s and the early 1950s, the Court utilized the "political question" doctrine to decline to adjudicate districting and apportionment suits,[9] a position changed in *Baker* v. *Carr*.[10]

For the Court in *Wesberry*,[11] Justice Black argued that a reading of the debates of the Constitutional Convention conclusively demonstrated that the Framers had meant, in using the phrase "by the People," to guarantee equality of representation in the election of Members of the House of Representatives.[12] Justice Harlan in dissent argued contrarily that the statements relied on by the majority had uniformly been in the context of the Great Compromise—Senate representation of the States with Members elected by the state legislatures, House representation according to the population of the States, qualified by the guarantee of at least one

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[2] *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (legislative apportionment and districting); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970) (local governmental units).

[3] 376 U.S. 1 (1964). *See also Martin* v. *Bush*, 376 U.S. 222 (1964).

[4] 376 U.S., 7.

[5] Act of June 25, 1842, 5 Stat. 491.

[6] Act of February 2, 1872, 17 Stat. 28.

[7] The House uniformly refused to grant any such relief. 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 310. *See* L. Schmeckebier, *Congressional Apportionment* (Washington: 1941), 135–138.

[8] *Smiley* v. *Holm*, 285 U.S. 355 (1932); *Koenig* v. *Flynn*, 285 U.S. 375 (1932); *Carroll* v. *Becker*, 285 U.S. 380 (1932); *Wood* v. *Broom*, 287 U.S. 1 (1932); *Mahan* v. *Hume*, 287 U.S. 575 (1932).

[9] The "political question" doctrine is considered *infra*, *pp.* 703–713.

[10] 369 U.S. 186 (1962).

[11] *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

[12] Id., 7–18.

Member per State and the counting of slaves as three-fifths of persons—and not at all in the context of intrastate districting. Further, he thought the Convention debates clear to the effect that Article I, § 4, had vested exclusive control over state districting practices in Congress and that the Court action overrode a congressional decision not to require equally-populated districts.[13]

*Wesberry* contained little guidance by which the constitutionality of state districting acts could be judged. The majority opinion had said only that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" [14] while elsewhere Justice Black agreed that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." [15] While the various statements of the principle left open the possibility that some standard other than total population might be the measure of equality, it seemed clear then and has been settled subsequently that the States are to adhere to a total population measure, save only the exclusion of a few persons who may be considered transients.[16]

Once this question was settled, the most important issue was how strict a standard of equality the Court would adhere to. At first, the Justices seemed inclined to some form of *de minimis* rule with a requirement that the State present a principled justification for the deviations from equality which any districting plan presented.[17] But in *Kirkpatrick* v. *Preisler,*[18] a sharply divided Court announced the rule that a State must make a "good-faith effort to achieve precise mathematical equality." [19] Therefore, "[u]nless population variances among congressional districts are shown to have resulted despite such [good-faith] effort [to achieve precise mathematical equality], the State must justify each variance, no matter how small." [20] The strictness of the test was revealed not only by

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[13] Id., 20–49.

[14] Id., 7.

[15] Id., 18.

[16] Justice Black for the majority compared only the total population deviations among the districts. Id., 2. This was to continue as the standard practice. The case establishing that total population or the minimal exclusion of transients is the standard is *Burns* v. *Richardson,* 384 U.S. 73 (1966), a legislative apportionment case.

[17] *Kirkpatrick* v. *Preisler,* 385 U.S. 450 (1967), and *Duddleston* v. *Grills,* 385 U.S. 455 (1967), relying on the rule set out in *Swann* v. *Adams,* 385 U.S. 440 (1967), a state legislative case.

[18] 394 U.S. 526 (1969). *See also Wells* v. *Rockefeller,* 394 U.S. 542 (1969).

[19] *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 530 (1969).

[20] Id., 531.

the phrasing of the test but by the fact that the majority rejected every proffer of a justification which the State had made and which could likely be made. Thus, it was not an adequate justification that deviations resulted from (1) an effort to draw districts to maintain intact areas with distinct economic and social interests,[21] (2) the requirements of legislative compromise,[22] (3) a desire to maintain the integrity of political subdivision lines,[23] (4) the exclusion from total population figures of certain military personnel and students not residents of the areas in which they were found,[24] (5) an attempt to compensate for population shifts since the last census,[25] or (6) an effort to achieve geographical compactness.[1]

Illustrating the strictness of the standard, the Court upheld a lower court voiding of a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[2] However, the Court set aside the district court's choice of a districting plan which had been drawn up without reference to the plan the legislature had enacted, instructing the court instead to adopt an alternative plan which followed more closely the legislators' desires.[3]

Since *Wesberry* was decided in 1964, no State with two or more Congressmen has been unaffected. Whether the strict standard will be maintained in light of membership changes in the Court is, of course, a substantial question. Additionally, whether judicial review of gerrymandering practices will be developed appears to be the major unsettled question in this area.[4]

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[21] Id., 533. People vote as individuals, Justice Brennan said for the Court, and it is the equality of individual voters which is protected.

[22] Ibid. Political "practicality" may not interfere with a rule of "practicable" equality.

[23] Id., 533–534. The argument is not "legally acceptable."

[24] Id., 534–535. Justice Brennan questioned whether anything less than a total population basis was permissible but noted that the legislature in any event had made no consistent application of the rationale.

[25] Id., 535. This justification would be acceptable if an attempt to establish shifts with reasonable accuracy had been made.

[1] Id., 536. Justifications based upon "the unaesthetic appearance" of the map will not be accepted.

[2] *White* v. *Weiser*, 412 U.S. 783 (1973). Concurring. Justices Powell and Rehnquist and Chief Justice Burger noted that they would have decided *Preisler* differently but so long as the Court did not choose to reconsider it they agreed this case was controlled by it. Id., 798.

[3] The plan chosen by the district court had a slightly larger population variance than the alternative plan, but this point was not the basis of decision. Id., 795. Justice Marshall disagreed with this rationale. Id., 798.

[4] The issue of gerrymandering in congressional districting, *cf. Wright* v. *Rockefeller*, 376 U.S. 52 (1964), conceptually belongs to Fourteenth and Fifteenth Amendment considerations and will be discussed there.

## ELECTOR QUALIFICATIONS

It was the original constitutional scheme to vest the determination of qualifications for electors in congressional elections [1] solely in the discretion of the States, save only for the express requirement that the States could prescribe no qualifications other than those provided for voters for the more numerous branch of the legislature.[2] This language has never been expressly changed, but the discretion of the States, and not only with regard to the qualifications of congressional electors, has long been circumscribed by express constitutional limitations [3] and by judicial decisions.[4] Further, beyond the limitation of discretion on the part of the States, Congress has assumed the power, with judicial acquiescence, to legislate itself to provide qualifications at least with regard to some elections.[5] Thus, in the Voting Rights Act of 1965 [6] Congress legislated changes of a limited nature in the literacy laws of some of the States [7] and in the Voting Rights Act Amendments of 1970 [8] Congress successfully lowered the minimum voting age in federal elections [9] and prescribed residency qualifications for presidential elections,[10] the Court striking down an attempt to lower the minimum voting age for all elections.[11] These developments greatly limited the discretion granted in Article I, § 2, cl. 1, and are more fully dealt with subsequently in the treatment of § 5 of the Fourteenth Amendment.[12]

[1] The clause refers only to elections to the House of Representatives, of course, and inasmuch as Senators were originally chosen by state legislatures and presidential electors as the States would provide it was only with the qualifications for these voters with which the Constitution was originally concerned.

[2] *Minor* v. *Happersett*, 21 Wall. (88 U.S.) 162, 171 (1875); *Breedlove* v. *Suttles*, 302 U.S. 277, 283 (1937). *See* 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 576–585.

[3] The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments limited the States in the setting of qualifications in terms of race, sex, payment of poll taxes, and age.

[4] The Supreme Court's interpretation of the equal protection clause has excluded certain qualifications. E.g., *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970). The excluded qualifications were in regard to all elections.

[5] The power has been held to exist under § 5 of the Fourteenth Amendment. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

[6] § 4(e), 79 Stat. 437, 439, 42 U.S.C. § 1973b(e), as amended.

[7] Upheld in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

[8] Titles 2 and 3, 84 Stat. 314, 42 U.S.C. § 1973bb.

[9] *Oregon* v. *Mitchell*, 400 U.S. 112, 119–131, 135–144, 239–281 (1970).

[10] *Oregon* v. *Mitchell*, 400 U.S. 112, 134, 147–150, 236–239, 285–292 (1970).

[11] *Oregon* v. *Mitchell*, 400 U.S. 112, 119–131, 152–213, 293–296 (1970).

[12] *Infra*, *pp.* 1812–1820.

Notwithstanding the vesting of discretion to prescribe voting qualifications in the States, conceptually the right to vote for United States Representatives is derived from the Federal Constitution [13] and Congress has had the power under Article I, § 4, to legislate to protect that right against both official [14] and private denial.[15]

Clause 2. No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

## QUALIFICATIONS OF MEMBERS OF CONGRESS

### When the Qualifications Must Be Possessed

A question much disputed but now seemingly settled is whether a condition of eligibility must exist at the time of the election or whether it is sufficient that eligibility exist when the Member-elect presents himself to take the oath of office. While the language of the clause expressly makes residency in the State a condition at the time of election, it now appears established in congressional practice that the age and citizenship qualifications need only be met when the Member-elect is to be sworn.[1] Thus, persons elected to either the House of Representatives or the Senate before attaining the required age or term of citizenship have been admitted as soon as they became qualified.[2]

### Exclusivity of Constitutional Qualifications

***Congressional Additions.***—Writing in *The Federalist* with reference to the election of Members of Congress, Hamilton firmly stated that "[t]he qualifications of the persons who may . . . be

[13] "The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884). *See also Wiley* v. *Sinkler*, 179 U.S. 58, 62 (1900); *Swafford* v. *Templeton*, 185 U.S. 487, 492 (1902); *United States* v. *Classic*, 313 U.S. 299, 315, 321 (1941).

[14] *United States* v. *Mosley*, 238 U.S. 383 (1915).

[15] *United States* v. *Classic*, 313 U.S. 299, 315 (1941).

[1] *See* S. Rept. No. 904, 74th Congress, 1st sess. (1935), reprinted in 79 *Cong. Rec.* 9651–9653 (1935).

[2] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 418; 79 *Cong. Rec.* 9841–9842 (1935); cf. Hinds' *Precedents*, *supra*, § 429.

chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." [3] Until the Civil War the issue was not raised, the only actions taken by either House conforming to the idea that the qualifications for membership could not be enlarged by statute or practice.[4] But in the passions aroused by the fratricidal conflict Congress enacted a law requiring its members to take an oath that they had never been disloyal to the National Government.[5] Several persons were refused seats by both Houses because of charges of disloyalty [6] and thereafter House practice, and Senate practice as well, was erratic.[7] But in *Powell* v. *McCormack* [8] it was conclusively established that the qualifications listed in cl. 2 were exclusive [9] and that Congress could not add to them by excluding Members-elect not meeting the additional qualifications.[10]

Powell was excluded from the 90th Congress on grounds that he had asserted an unwarranted privilege and immunity from the process of a state court, that he had wrongfully diverted House funds for his own uses, and that he had made false reports on the expenditures of foreign currency.[11] The Court determination that

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[3] No. 60 (Modern Library ed. 1937), 394. *See also* 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 623–627 (relating to the power of the States to add qualifications).

[4] All the instances appear to be, however, cases in which the contest arose out of a claimed additional state qualification.

[5] Act of July 2, 1862, 12 Stat. 502. Note also the disqualification written into § 3 of the Fourteenth Amendment.

[6] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), §§ 451, 449, 457.

[7] In 1870, the House excluded a Member-elect who had been re-elected after resigning earlier in the same Congress when expulsion proceedings were instituted against him for selling appointments to the Military Academy. 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 464. A Member-elect was excluded in 1899 because of his practice of polygamy, id., §§ 474–480, but the Senate refused, after adopting a rule requiring a two-thirds vote, to exclude a Member-elect on those grounds. Id., §§ 481–483. The House twice excluded a socialist Member-elect in the wake of World War I on allegations of disloyalty. 6 C. Cannon's *Precedents of the House of Representatives* (Washington: 1935), §§ 56–58. *See also,* S. Rept. No. 1010, 77th Congress 2d sess. (1942), and R. Hupman, *Senate Election, Expulsion and Censure Cases From 1789 to 1960,* S. Doc. No. 71, 87th Congress, 2d sess. (1962), 140 (dealing with the effort to exclude Senator Langer of North Dakota).

[8] 395 U.S. 486 (1969). The Court divided eight to one, Justice Stewart dissenting on the ground the case was moot.

[9] The Court declined to reach the question whether the Constitution in fact does impose other qualifications. 395 U.S., 520 n. 41 (possibly Article I, § 3, cl. 7, disqualifying persons impeached, Article I, § 6, cl. 2, incompatible offices, and § 3 of the Fourteenth Amendment). It is also possible that the oath provision of Article VI, cl. 3, could be considered a qualification. *See Bond* v. *Floyd,* 385 U.S. 116, 129–131 (1966).

[10] 395 U.S., 550.

[11] H. Rept. No. 27, 90th Congress, 1st sess. (1967); 395 U.S., 489–493.

he had been wrongfully excluded proceeded in the main from the Court's analysis of historical developments, the Convention debates, and textual considerations. This process led the Court to conclude that Congress' power under Article I, § 5 to judge the qualifications of its Members was limited to ascertaining the presence or absence of the standing qualifications prescribed in Article I, § 2, cl. 2, and perhaps in other express provisions of the Constitution.[12] The conclusion followed because the English parliamentary practice and the colonial legislative practice at the time of the drafting of the Constitution, after some earlier deviations, had settled into a policy that exclusion was a power exercisable only when the Member-elect failed to meet a standing qualifications,[13] because in the Constitutional Convention the Framers had defeated provisions allowing Congress by statute either to create property qualifications or to create additional qualifications without limitation,[14] and because both Hamilton and Madison in the *Federalist Papers* and Hamilton in the New York ratifying convention had strongly urged that the Constitution prescribed exclusive qualifications for Members of Congress.[15]

Further, the Court observed that the early practice of Congress, with many of the Framers serving, was consistently limited to the view that exclusion could be exercised only with regard to a Member-elect failing to meet a qualification expressly prescribed in the Constitution. Not until the Civil War did contrary precedents appear and later practice was mixed.[16] Finally, even were the intent of the Framers less clear, said the Court, it would still be compelled to interpret the power to exclude narrowly. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them' 2 *Elliot's Debates* 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Congress' own post-Civil War exclusion cases, against 'vesting an improper and dangerous power in the Legislature.' 2 Farrand 249." [17] Thus, the Court appears to say, to

[12] *Powell* v. *McCormack*, 395 U.S. 486, 518–547 (1969).
[13] Id., 522–531.
[14] Id., 532–539.
[15] Id., 539–541.
[16] Id., 541–547.
[17] Id., 547–548.

allow the House to exclude Powell on this basis of qualifications of its own choosing would impinge on the interests of his constituents in effective participation in the electoral process, an interest which could be protected by a narrow interpretation of Congressional power.[18]

The result in the *Powell* case had been foreshadowed earlier when the Court held that the exclusion of a Member-elect by a state legislature because of objections he had uttered to certain national policies constituted a violation of the First Amendment and was void.[19] In the course of that decision, the Court denied state legislators the power to look behind the willingness of any legislator to take the oath to support the Constitution of the United States, prescribed by Article VI, cl. 3, to test his sincerity in taking it.[20] The unanimous Court noted the views of Madison and Hamilton on the exclusivity of the qualifications set out in the Constitution and alluded to Madison's view that the unfettered discretion of the legislative branch to exclude members could be abused in behalf of political, religious or other orthodoxies.[21] The First Amendment holding and the holding with regard to testing the sincerity with which the oath of office is taken is no doubt as applicable to the United States Congress as to state legislatures.

***State Additions.***—However much Congress may have deviated from the principle that the qualifications listed in the Constitution are exclusive when the issue has been congressional enlargement of those qualifications, it has been uniform in rejecting efforts by the States to enlarge the qualifications. Thus, the House in 1807 seated a Member-elect who was challenged as not being in compliance with a state law imposing a twelve-month durational residency requirement in the district, rather than the federal requirement of being an inhabitant of the State at the time of election; the state requirement, the House resolved, was unconstitutional.[22] Similar-

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[18] The protection of the voters' interest in being represented by the person of their choice is thus analogized to their constitutionally secured right to cast a ballot and have it counted in general elections, *Ex parte Yarbrough*, 110 U.S. 651 (1884), and in primary elections, *United States* v. *Classic*, 313 U.S. 299 (1941), to cast a ballot undiluted in strength because of unequally populated districts, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and to cast a vote for candidates of their choice unfettered by onerous restrictions on candidate qualification for the ballot. *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

[19] *Bond* v. *Floyd*, 385 U.S. 116 (1966).

[20] Id., 129–131, 132, 135.

[21] Id., 135 n. 13.

[22] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), § 414.

ly, both the House and Senate have seated other Members-elect who did not meet additional state qualifications or who suffered particular state disqualifications on eligibility, such as running for Congress while holding particular state offices.[23]

Clause 3. [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons].* The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut, five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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[23] Id., §§ 415–417. The court holdings, predominantly state courts, appear almost uniformly to be that the States may not add to the qualifications. E.g., *Shub* v. *Simpson*, 196 Md. 177, 76 A. 2d 332, *appeal dism'd.* 340 U.S. 881 (1950); *Odegard* v. *Olson*, 264 Minn, 439, 119 N.W. 2d 717 (1963); *State ex rel. Johnson* v. *Crane*, 65 Wyo. 189, 197 P. 2d 864 (1948); *Florida ex rel. Davis* v. *Adams*, 238 So. 2d 415 (Fla. 1970), *stay granted*, 400 U.S. 1203 (1970) (Justice Black in Chambers); *Stack* v. *Adams*, 315 F. Supp. 1295 (D.C. N.D. Fla. 1970), *interim relief granted*, 400 U.S. 1205 (1970) (Justice Black in Chambers).

* The part of this clause relating to the mode of apportionment of representatives among the several States, was changed by the Fourteenth Amendment, § 2 and as to taxes on incomes without apportionment, by the Sixteenth Amendment.

## APPORTIONMENT OF SEATS IN THE HOUSE

### The Census Requirement

While section 2 expressly provides for an enumeration of persons, Congress has repeatedly directed an enumeration not only of the free persons in the States, but also of those in the territories, and has required all persons over eighteen years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court; [1] it is one of the methods whereby the national legislature exercises its inherent power to obtain the information necessary for intelligent legislative action. Although taking an enlarged view of its power in making the enumeration of persons called for by this section, Congress has not always complied with its positive mandate to reapportion representatives among the States after the census is taken.[2] It failed to make such a reapportionment after the census of 1920, being unable to reach agreement for allotting representation without further increasing the size of the House. Ultimately, by the act of June 18, 1929,[3] it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the States by the so-called "method of major fractions" which had been earlier employed in the apportionment of 1911 and which has now been replaced with the "method of equal proportions."

While requiring the election of Representatives by districts, Congress has left it to the States to define the areas from which members should be chosen. This has occasioned a number of disputes concerning the validity of action taken by the States. In *Ohio ex rel. Davis* v. *Ohio*,[4] a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several States produced a series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to state legislatures by the Constitution, the Court decided that it was legislative in character and

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[1] *Knox* v. *Lee (Legal Tender Cases)*, 12 Wall. (79 U.S.) 457, 536 (1971).

[2] For an extensive history of the subject, *see* L. Schmeckebier, *Congressional Apportionment* (Washington: 1941).

[3] 46 Stat. 26, § 22, as amended by 55 Stat. 761 (1941), 2 U.S.C. § 2a.

[4] 241 U.S. 565 (1916).

subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the state constitution.[5]

Clause 4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Clause 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. Clause 1. [The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six Years; and each Senator shall have one vote].*

Clause 2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year,* [and if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].**

Clause 3. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citi-

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[5] *Smiley* v. *Holm*, 285 U.S. 355 (1932); *Koenig* v. *Flynn*, 285 U.S. 375 (1932); *Carroll* v. *Becker*, 285 U.S. 380 (1932).

* *See* Seventeenth Amendment.

** *See* Seventeenth Amendment.

zen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Clause 4. The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

Clause 5. The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of the President of the United States.

Clause 6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Clause 7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

## FEDERAL LEGISLATION PROTECTING ELECTORAL PROCESS

Not until 1842 did Congress undertake to exercise the power to regulate the "times, places and manner of holding elections for Senators and Representatives." In that year it passed a law requiring the election of Representatives by districts.[1] In subsequent years, Congress expanded on the requirements, successively adding contiguity, compactness, and substantial equality of population to the districting requirements.[2] However, no challenge to the seating of Members-elect selected in violation of these requirements was ever successful [3] and Congress deleted the standards from the 1929 apportionment act.[4] More success attended a congressional resolution in 1866 of deadlocks in state legislatures over the election of Senators, often resulting in vacancies for months. The act required the two houses of each legislature to meet in joint session on a specified day and to meet every day thereafter until a Senator was selected.[5]

The first comprehensive federal statute dealing with elections was adopted in 1870 as a means of enforcing the Fifteenth Amendment's guarantee against racial discrimination in granting suffrage rights.[6] Under the Enforcement Act of 1870, and subsequent laws,

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[1] 5 Stat. 491 (1842). The requirement was omitted in 1850, 9 Stat. 428, but was adopted again in 1862. 12 Stat. 572.

[2] The 1872 Act, 17 Stat. 28, provided that districts should contain "as nearly as practicable" equal numbers of inhabitants, a provision thereafter retained. In 1901, 31 Stat. 733, a requirement that districts be composed of "compact territory" was added. These provisions were repeated in the next Act, 37 Stat. 13 (1911), there was no apportionment following the 1920 Census, and the permanent 1929 Act omitted the requirements. 46 Stat. 13. *Cf. Wood* v. *Broom*, 287 U.S. 1 (1932).

[3] The first challenge was made in 1843. The committee appointed to inquire into the matter divided, the majority resolving that Congress had no power to bind the States in regard to their manner of districting, the minority contending to the contrary. H. Rept. No. 60, 28th Congress, 1st sess. (1843). The basis of the majority view was that while Article I, § 4 might give Congress the power to lay off the districts itself, the clause did not authorize Congress to tell the state legislatures how to do it if the legislatures were left the task of drawing the lines. L. Schmeckebier, *Congressional Apportionment* (Washington: 1941), 135–138. This argument would not appear to be maintainable in light of the language in *Ex parte Siebold*, 100 U.S. 371, 383–386 (1880).

[4] 46 Stat. 13 (1929). In 1967, Congress restored the single-member district requirement. 81 Stat. 581, 2 U.S.C. § 2c.

[5] 14 Stat. 243 (1866). Still another such regulation was the congressional specification of a common day for the election of Representatives in all the States. 17 Stat. 28 (1872), 2 U.S.C. § 7.

[6] Article I, § 4, and the Fifteenth Amendment have had quite different applications. The Court insisted that under the latter, while Congress could legislate to protect the suffrage in all elections, it could do so only against state interference based on race, color, or previous condition of servitude, *James* v. *Bowman*, 190 U.S. 127 (1903); *United States* v. *Reese*, 92 U.S. 214 (1876), whereas under the former it could

false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or federal law were made federal offenses.[7] Provision was made for the appointment by federal judges of persons to attend at places of registration and at elections with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election talley sheets.[8] When the Democratic Party regained control of Congress, these pieces of Reconstruction legislation dealing specifically with elections were repealed,[9] but other statutes prohibiting interference with civil rights generally were retained and these were utilized in later years. More recently, Congress has enacted, in 1957, 1960, 1964, 1965, 1968, 1970, 1975, and 1980, legislation to protect the right to vote in all elections, federal, state, and local, through the assignment of federal registrars and poll watchers, suspension of literacy and other tests, and the broad proscription of intimidation and reprisal, whether with or without state action.[10]

Another chapter was begun in 1907 when Congress passed the Tillman Act, prohibiting national banks and corporations from making contributions in federal elections.[11] The Corrupt Practices Act, first enacted in 1910 and replaced by another law in 1925, extended federal regulation of campaign contributions and expendi-

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legislate against private interference as well for whatever motive but only in federal elections. *Ex parte Siebold*, 100 U.S. 371 (1880); *Ex parte Yarbrough*, 110 U.S. 651 (1884).

[7] The Enforcement Act of May 31, 1870, 16 Stat. 140; The Force Act of February 28, 1871, 16 Stat. 433; The Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. The text of these and other laws and the history of the enactments and subsequent developments are set out in R. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: 1947).

[8] The constitutionality of sections pertaining to federal elections was sustained in *Ex parte Siebold*, 100 U.S. 371 (1880), and *Ex parte Yarbrough*, 110 U.S. 651 (1884). The legislation pertaining to all elections was struck down as going beyond Congress' power to enforce the Fifteenth Amendment. *United States* v. *Reese*, 92 U.S. 214 (1876).

[9] 28 Stat. 144 (1894).

[10] P.L. 85-315, Part IV, § 131, 71 Stat. 634, 637 (1957); P.L. 86-449, Title III, § 301, Title VI, § 601, 74 Stat. 86, 88, 90 (1960); P.L. 88-352, Title I, § 101, 78 Stat. 241 (1964); P.L. 89-110, 79 Stat. 437 (1965); P.L. 90-284, Title I, § 101, 82 Stat. 73 (1968); P.L. 91-285, 84 Stat. 314 (1970). Most of these statutes are codified in 42 U.S.C. § 1971 *et seq.* The penal statutes are in 18 U.S.C. §§ 241-245.

[11] Act of January 26, 1907, 34 Stat. 864, now a part of 18 U.S.C. § 610.

tures in federal elections [12] and other acts have similarly provided other regulations.[13]

As we have noted above,[14] although § 2, cl. 1, of this Article vests in the States the responsibility, now limited, to establish voter qualifications for congressional elections, the Court has held that the right to vote for Members of Congress is derived from the Federal Constitution [15] and that Congress therefore may legislate under this section of the Article to protect the integrity of this right. Congress may protect the right of suffrage against both official and private abridgment.[16] Where a primary election is an integral part of the procedure of choice, the right to vote in that primary election is subject to congressional protection.[17] The right embraces, of course, the opportunity to cast a ballot and to have it counted honestly.[18] Freedom from personal violence and intimidation may be secured.[19] The integrity of the process may be safeguarded against a failure to count ballots lawfully cast [20] or the dilution of their value by the stuffing of the ballot box with fraudulent ballots.[21] But the bribery of voters, although within reach of congressional power under other clauses of the Constitution, has been held not to be an interference with the rights guaranteed by this section to other qualified voters.[22]

To accomplish the ends under this clause, Congress may adopt the statutes of the States and enforce them by its own sanctions.[23]

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[12] Act of February 28, 1925, 43 Stat. 1070, 2 U.S.C. §§ 241–256. Comprehensive regulation is now provided by the Federal Election Campaign Act of 1971, 86 Stat. 3, and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, as amended, 90 Stat. 475, found in titles 2, 5, 18, and 26 of the U.S. Code. See *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[13] E.g., the Hatch Act, relating principally to federal employees and state and local governmental employees engaged in programs at least partially financed with federal funds, 5 U.S.C. §§ 7324–7327.

[14] *Supra*, pp. 106–107.

[15] *United States* v. *Classic*, 313 U.S. 299, 314–315 (1941), and cases cited.

[16] Id., 315; *Buckley* v. *Valeo* 424 U. S. 1, 13 n. 16 (1976).

[17] *United States* v. *Classic*, 313 U.S. 299, 315–321 (1941). The authority of *Newberry* v. *United States*, 256 U.S. 232 (1921), to the contrary has been vitiated. *Cf. United States* v. *Wurzbach*, 280 U.S. 396 (1930).

[18] *United States* v. *Mosley*, 238 U.S. 383 (1915); *United States* v. *Saylor*, 322 U.S. 385, 387 (1944).

[19] *Ex parte Yarbrough*, 110 U.S. 651 (1884).

[20] *United States* v. *Mosley*, 238 U.S. 383 (1915).

[21] *United States* v. *Saylor*, 322 U.S. 385 (1944).

[22] *United States* v. *Bathgate*, 246 U.S. 220 (1918); *United States* v. *Gradwell*, 243 U.S. 476 (1917).

[23] *Ex parte Siebold*, 100 U.S. 371 (1880); *Ex parte Clarke*, 100 U.S. 399 (1880); *United States* v. *Gale*, 109 U.S. 65 (1883); *In re Coy*, 127 U.S. 731 (1888).

It may punish a state election officer for violating his duty under a state law governing congressional elections.[24] It may, in short, utilize its power under this clause, combined with the necessary and proper clause, to regulate the times, places, and manner of electing Members of Congress so as to fully safeguard the integrity of the process; it may not, however, under this clause, provide different qualifications for electors than those provided by the States.[25]

Clause 2. [The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by law appoint a different Day].

SECTION 5. Clause 1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Clause 2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Clause 3. Each House shall keep a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[24] Ibid.

[25] But in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), Justice Black grounded his vote to uphold the age reduction in federal elections and the presidential voting residency provision sections of the Voting Rights Act Amendments of 1970 on this clause. Id., 119–135. Four Justices specifically rejected this construction, id., 209–212, 288–292, and the other four implicitly rejected it by relying on totally different sections of the Constitution in coming to the same conclusions as did Justice Black.

Clause 4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

## POWERS AND DUTIES OF THE HOUSES

### Power To Judge Elections

Each House, in judging of elections under this clause acts as a judicial tribunal, with like power to compel attendance of witnesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming.[1] It may punish perjury committed in testifying before a notary public upon a contested election.[2] The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election.[3] Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the Senate to inquire into the legality of the election.[4] Nor does such refusal unlawfully deprive the State which elected such person of its equal suffrage in the Senate.[5]

### "A Quorum To Do Business"

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Reed, and later embodied in Rule XV of the House, that members present in the chamber but not voting would be counted in determining the presence of a quorum.[6] The Supreme Court upheld this rule in *United*

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[1] *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 616 (1929).

[2] *In re Loney*, 134 U.S. 372 (1890).

[3] 6 C. Cannon's *Precedents of the House of Representatives* (Washington: 1936), §§ 72–74, 180. *Cf. Newberry* v. *United States*, 256 U.S. 232, 258 (1921).

[4] *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929).

[5] Id., 615. The existence of this power in both houses of Congress does not prevent a State from conducting a recount of ballots cast in such an election any more than it prevents the initial counting by a State. *Roudebush* v. *Hartke*, 405 U.S. 15 (1972).

[6] A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), §§ 2895–2905.

*States* v. *Ballin*,[7] saying that the capacity of the House to transact business is "created by the mere presence of a majority," and that since the Constitution does not prescribe any method for determining the presence of such majority "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact." [8] The rules of the Senate provide for the ascertainment of a quorum only by a roll call,[9] but in a few cases it has held that if a quorum is present, a proposition can be determined by the vote of a lesser number of members.[10]

**Rules of Proceedings**

In the exercise of their constitutional power to determine their rules of proceedings, the Houses of Congress may not "ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House . . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal." [1] Where a rule affects private rights, the construction thereof becomes a judicial question. In *United States* v. *Smith*,[2] the Court held that the Senate's attempt to reconsider its confirmation of a person nominated by the President as Chairman of the Federal Power Commission was not warranted by its rules and did not deprive the appointee of his title to the office. In *Christoffel* v. *United States*,[3] a sharply divided Court upset a conviction for perjury in the district courts of one who had denied under oath before a House committee any affiliation with Communism. The reversal was based on the ground that inasmuch as a quorum of the committee, while present at the outset, was not present at the time of the alleged perjury, testimony before it was not before a "competent tribunal" within the sense of the District

[7] 144 U.S. 1 (1892).

[8] Id., 5–6.

[9] Rule V.

[10] 4 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), §§ 2910–2915; 6 C. Cannon's *Precedents of the House of Representatives* (Washington: 1936), §§ 645, 646.

[1] *United States* v. *Ballin*, 144 U.S. 1, 5 (1892). The Senate is "a continuing body." *McGrain* v. *Daugherty*, 273 U.S. 135, 181–182 (1927). Hence its rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress.

[2] 286 U.S. 6 (1932).

[3] 338 U.S. 84 (1949).

of Columbia Code.[4] Four Justices, speaking by Justice Jackson, dissented, arguing that under the rules and practices of the House, "a quorum once established is presumed to continue unless and until a point of no quorum is raised" and that the Court, was in effect, invalidating this rule, thereby invalidating at the same time the rule of self-limitation observed by courts "where such an issue is tendered." [5]

### Powers of the Houses Over Members

Congress has authority to make it an offense against the United States for a Member, during his continuance in office, to receive compensation for services before a government department in relation to proceedings in which the United States is interested. Such a statute does not interfere with the legitimate authority of the Senate or House over its own Members.[1] In upholding the power of the Senate to investigate charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill, the Supreme Court asserted that "the right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a Member." [2] It cited with apparent approval the action of the Senate in expelling William Blount in 1797 for attempting to seduce an American agent among the Indians from his duty and for negotiating for services in behalf of the British Government among the Indians—conduct which was not a "statutable offense" and which was not committed in his official character, nor during the session of Congress nor at the seat of government.[3]

In *Powell* v. *McCormack*,[4] a suit challenging the *exclusion* of a Member-elect from the House of Representatives, it was argued that inasmuch as the vote to exclude was actually in excess of two-thirds of the Members it should be treated simply as an *expulsion*. The Court rejected the argument, noting that the House precedents were to the effect that it had no power to expel for misconduct occurring prior to the Congress in which the expulsion is proposed, as was the case of Mr. Powell's alleged misconduct, but basing its rejection on its inability to conclude that if the Members of the

[4] Id., 87–90.
[5] Id., 92–95.
[1] *Burton* v. *United States*, 202 U.S. 344 (1906).
[2] *In re Chapman*, 166 U.S. 661 (1897).
[3] Id., 669–670. *See* 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 836.
[4] 395 U.S. 486 (1969).

House had been voting to expel they would still have cast an affirmative vote in excess of two-thirds.[5]

**Duty To Keep a Journal**

The object of the clause requiring the keeping of a Journal is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents." [6] When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was present, though not disclosed by the yeas and nays, is final.[7] But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.[8]

SECTION 6. Clause 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

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[5] Id., 506–512.

[6] 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 840, quoted with approval in *Field* v. *Clark*, 143 U.S. 649, 670 (1892).

[7] *United States* v. *Ballin*, 144 U.S. 1, 4 (1892).

[8] *Field* v. *Clark*, 143 U.S. 649 (1892); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 143 (1911). A parallel rule holds in the case of a duly authenticated official notice to the Secretary of State that a state legislature has ratified a proposed amendment to the Constitution. *Leser* v. *Garnett*, 258 U.S. 130, 137 (1922); *see also Coleman* v. *Miller*, 307 U.S. 433 (1939).

Clause 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

## COMPENSATION, IMMUNITIES AND DISABILITIES OF MEMBERS

### When the Pay Starts

A Member of Congress who receives his certificate of admission, and is seated, allowed to vote, and serve on committees, is *prima facie* entitled to the seat and salary, even though the House subsequently declares his seat vacant. The one who contested the election and was subsequently chosen to fill the vacancy is entitled to salary only from the time the compensation of such "predecessor" has ceased.[1]

### Privilege From Arrest

This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted.[2] It does not apply to service of process in either civil [3] or criminal cases.[4] Nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" is interpreted to withdraw all criminal offenses from the operation of the privilege.[5]

### Privilege of Speech or Debate

***Members.***—This clause represents "the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and through-

[1] *Page* v. *United States*, 127 U.S. 67 (1888).
[2] *Long* v. *Ansell*, 293 U.S. 76 (1934).
[3] Id., 83.
[4] *United States* v. *Cooper*, 4 Dall. (4 U.S.) 341 (C.C. Pa. 1800).
[5] *Williamson* v. *United States*, 207 U.S. 425, 446 (1908).

out United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." [6] So Justice Harlan explained the significance of the speech and debate clause, the ancestry of which traces back to a clause in the English Bill of Rights of 1689 [7] and the history of which traces back almost to the beginning of the development of Parliament as an independent force.[8] "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." [9] "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." [10]

The protection of this clause is not limited to words spoken in debate. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.' " [11] Thus, so long as legislators are "acting in the sphere of legitimate legislative activity," they are "protected not only from the consequence of litigation's results but also from the burden of defending themselves." [12] But the scope of the meaning of "legislative activity" has its limits. "The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." [13] Immunity from civil suit, both in law and

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[6] *United States* v. *Johnson*, 383 U.S. 169, 178 (1966).

[7] "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

[8] *United States* v. *Johnson*, 383 U.S. 169, 177–179, 180–183 (1966); *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969).

[9] *United States* v. *Johnson*, 383 U.S. 169, 178 (1966).

[10] *United States* v. *Brewster*, 408 U.S. 501, 507 (1972). This rationale was approvingly quoted from *Coffin* v. *Coffin*, 4 Mass. 1, 28 (1808), in *Kilbourn* v. *Thompson*, 103 U.S. 168, 203 (1881).

[11] *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969), quoting *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881).

[12] *Tenney* v. *Brandhove*, 341 U.S. 367, 376–377 (1972); *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967); *Powell* v. *McCormack*, 395 U.S. 486, 505 (1969); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503 (1975).

[13] *Gravel* v. *United States*, 408 U.S. 606, 625 (1972). The critical nature of the clause is shown by the holding in *Davis* v. *Passman*, 442 U.S. 228, 235 n. 11 (1979),

equity, and from criminal action based on the performance of legislative duties flows from a determination that a challenged act is within the definition of legislative activity, but the Court in the more recent cases appears to have narrowed the concept somewhat.

In *Kilbourn* v. *Thompson,*[14] Members of the House of Representatives were held immune in a suit for false imprisonment brought about by a vote of the Members on a resolution charging contempt of one of its committees and under which the plaintiff was arrested and detained, even though the Court found that the contempt was wrongly voted. *Kilbourn* was relied on in *Powell* v. *McCormack,*[15] in which the plaintiff was not allowed to maintain an action for declaratory judgment against certain Members of the House of Representatives to challenge his exclusion by a vote of the entire House. Because the power of inquiry is so vital to performance of the legislative function, the Court held that the clause precluded suit against the Chairman and Members of a Senate subcommittee and staff personnel, to enjoin enforcement of a subpoena directed to a third party, a bank, to obtain the financial records of the suing organization. The investigation was a proper exercise of Congress' power of inquiry, the subpoena was a legitimate part of the inquiry, and the clause therefore was an absolute bar to judicial review of the subcommittee's actions prior to the possible institution of contempt actions in the courts.[16] And in *Dombrowski* v. *Eastland,*[17] the Court affirmed the dismissal of an action against the chairman of a Senate committee brought on allegations that he wrongfully conspired with state officials to violate the civil rights of plaintiff.

Through an inquiry into the nature of the "legislative acts" performed by Members and staff, the Court held that the clause did not defeat a suit to enjoin the public dissemination of legisla-

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that when a Member is sued under the Fifth Amendment for employment discrimination on the basis of gender, *only* the clause could shield such an employment decision, and not the separation of powers doctrine or emanations from it. Whether the clause would be a shield the Court had no occasion to decide and the case was settled on remand without a decision being reached.

[14] 103 U.S. 168 (1881). But see *Gravel* v. *United States,* 408 U. S. 606, 618-619 (1972).

[15] 395 U.S. 486 (1969). The Court found sufficient the presence of other defendants to enable it to review Powell's exclusion but reserved the question whether in the absence of someone the clause would still preclude suit. Id., 506 n. 26. See also *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881).

[16] *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975).

[17] 387 U.S. 82 (1967). But see the reinterpretation of this case in *Gravel* v. *United States,* 408 U.S. 606, 619-620 (1972). *And see McSurely* v. *McClellan,* 553 F. 2d 1277 (C.A.D.C. 1976) *(en banc), cert. dismd. as improvidently granted, sub nom. McAdams* v. *McSurely,* 438 U.S. 189 (1978).

tive materials outside the halls of Congress.[18] A committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report which the House of Representatives routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner, and their parents sued various committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was deleted and also seeking damages. The Court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—were protected by the clause. The Superintendent of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and those acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, because it is unnecessary to the performance of official legislative actions. Dissemination of the report within the body was protected, whereas dissemination in normal channels outside it was not.[19]

Bifurcation of the legislative process in this way resulted in holding unprotected the republication by a Member of allegedly defamatory remarks outside the legislative body, here through newsletters and press releases.[20] The clause protects more than speech or debate in either House, the Court affirmed, but in order for the other matters to be covered "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." [21] Press releases and newsletters

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[18] *Doe* v. *McMillan*, 412 U.S. 306 (1973).

[19] Difficulty attends an assessment of the effect of the decision, inasmuch as the Justices in the majority adopted mutually inconsistent stands, id., 325 (concurring opinion), and four Justices dissented. Id., 331, 332, 338. The case leaves unresolved as well the propriety of injunctive relief. Compare id., 330 (Justice Douglas concurring), with id., 343–345 (three dissenters arguing that separation of powers doctrine forbade injunctive relief). Also compare *Davis* v. *Passman*, 442 U.S. 228, 245, 246 n. 24 (1979), with id., 250–251 (Chief Justice Burger dissenting).

[20] *Hutchinson* v. *Proxmire*, 441 U.S. 111 (1979).

[21] Id., 126, quoting *Gravel* v. *United States*, 408 U.S. 606, 625 (1972).

are "[v]aluable and desirable" in "inform[ing] the public and other Members" but neither are essential to the deliberations of the legislative body nor part of the deliberative process.[22]

Parallel developments may be discerned with respect to the application of a general criminal statute to call into question the legislative conduct and motivation of a Member. Thus, in *United States* v. *Johnson*,[23] the Court voided the conviction of a Member for conspiracy to impair lawful governmental functions, in the course of seeking to divert a governmental inquiry into alleged wrongdoing, by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy and extensive evidence concerning it was introduced at a trial. It was this examination into the context of the speech—its authorship, motivation, and content—which the Court found foreclosed by the speech or debate clause.[24]

However, in *United States* v. *Brewster*,[25] while continuing to assert that the clause "must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch," [1] the Court substantially reduced the scope of the coverage of the clause. In upholding the validity of an indictment of a Member which charged that he accepted a bribe to be "influenced in his performance of official acts in respect to his action, vote, and decision" on legislation, the Court drew a distinction between a prosecution that caused an inquiry into legislative acts or the motivation for performance of such acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative

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[22] *Hutchinson* v. *Proxmire*, 443 U.S. 111, 130, 132-133 (1979). The Court distinguished between the more important "informing" function of Congress, i.e., its efforts to inform itself in order to exercise its legislative powers, and the less important "informing" function of acquainting the public about its activities. The latter function the Court did not find an integral part of the legislative process. See also *Doe* v. *McMillan*, 412 U.S. 306, 314-317 (1973). But compare id., 325 (concurring). For consideration of the "informing" function in its different guises in the context of legislative investigations, see *Watkins* v. *United States*, 354 U.S. 178, 200 (1957); *United States* v. *Rumely*, 345 U.S. 41, 43 (1953); *Russell* v. *United States*, 369 U.S. 749, 777-778 (1962) (Justice Douglas dissenting).

[23] 383 U.S. 169 (1966).

[24] Reserved was the question whether a prosecution which entailed inquiry into legislative acts or motivation could be founded upon "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." Id., 185. The question was similarly reserved in *United States* v. *Brewster*, 408 U.S. 501, 529 n. 18 (1972), although Justices Brennan and Douglas would have answered negatively. Id., 529, 540.

[25] 408 U.S. 501 (1972).

[1] Id., 516.

act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson,* for use of a Congressman's influence with the Executive Branch." [2] In other words, it is the fact of having taken a bribe, not the act which the bribe is intended to influence, which is the subject of the prosecution and the speech or debate clause interposes no obstacle to this type of prosecution.[3]

Applying in the criminal context the distinction developed in the civil cases between protected "legislative activity" and unprotected conduct prior to or subsequent to engaging in "legislative activity," the Court in *Gravel* v. *United States* [4] held that a grand jury could validly inquire into the processes by which the Member obtained classified government documents and into the arrangements for subsequent private republication of these documents, since neither action involved protected conduct. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." [5]

***Congressional Employees.***—Until the most recent decision, it was seemingly the basis of the decisions that while Members of Congress may be immune from suit arising out of their legislative activities, legislative employees who participate in the same activities under the direction of the Member or otherwise are responsible for their acts if those acts be wrongful.[6] Thus, in *Kilbourn* v.

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[2] Id., 526.

[3] The holding was reaffirmed in *United States* v. *Helstoski,* 442 U.S. 477 (1979). On the other hand, the Court did hold that the protection of the clause is so fundamental that, assuming a Member may waive it, a waiver could be found only after explicit and unequivocal renunciation, rather than by failure to assert it at any particular point. Similarly, *Helstoski* v. *Meanor,* 442 U.S. 500 (1979), held that since the clause properly applied is intended to protect a Member from even having to defend himself he may appeal immediately from a judicial ruling of nonapplicability rather than wait to appeal after conviction.

[4] 408 U.S. 606 (1972).

[5] Id., 626.

[6] Language in some of the Court's earlier opinions had indicated that the privilege "is less absolute, although applicable," when a legislative aide is sued, without elaboration of what was meant. *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967); *Tenney* v. *Brandhove,* 341 U.S. 367, 378 (1951). In *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963), the Court had imposed substantial obstacles to the possibility of recovery in appropriate situations by holding that a federal cause of action was lacking and remitting litigants to state courts and state law grounds. The case is probably no

*Thompson*,[7] the sergeant at arms of the House was held liable for false imprisonment because he executed the resolution ordering Kilbourn arrested and imprisoned. *Dombrowski* v. *Eastland* [8] held that a subcommittee counsel might be liable in damages for actions as to which the chairman of the committee was immune from suit. And in *Powell* v. *McCormack*,[9] the Court held that the presence of House of Representative employees as defendants in a suit for declaratory judgment gave the federal courts jurisdiction to review the propriety of the plaintiff's exclusion from office by vote of the House. Upon full consideration of the question, however, the Court, in *Gravel* v. *United States*,[10] accepted a series of contentions urged upon it not only by the individual Senator but by the Senate itself appearing by counsel as *amicus:* "that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate clause . . . will inevitably be diminished and frustrated." [11] Therefore, the Court held "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." [12]

The *Gravel* holding, however, does not so much extend congressional immunity to employees as it narrows the actual immunity available to both aides and Members in some important respects. Thus, the Court says, the legislators in *Kilbourn* were immune because adoption of the resolution was clearly a legislative act but the execution of the resolution—the arrest and detention— was not a legislative act immune from liability, so that the House officer was in fact liable as would have been any Member who had executed it.[13] *Dombrowski* was interpreted as having held that no evi-

longer viable, however, after *Bivens* v. *Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971).

[7] 103 U.S. 168 (1881).

[8] 387 U.S. 82 (1967).

[9] 395 U.S. 486 (1969).

[10] 408 U.S. 606 (1972).

[11] Id., 616–617.

[12] Id., 618.

[13] Id., 618–619.

dence implicated the Senator involved, whereas the committee counsel had been accused of "conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize." [14] And *Powell* was interpreted as simply holding that voting to exclude plaintiff, which was all the House defendants had done, was a legislative act immune from Member liability but not from judicial inquiry. "None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. . . . [N]o prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." [15]

**Appointment to Executive Office**

"The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only 'during the time, for which he was elected'; thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination." [1] As might be expected, there is no judicial interpretation of the language of the clause and indeed it has seldom surfaced as an issue.

In 1909, after having increased the salary of the Secretary of State,[2] Congress reduced it to the former figure so that a Member

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[14] Id., 619-620.

[15] Id., 620-621.

[1] 2 J. Story, *Commentaries on the Constitution of the United States* (Boston 1833), § 864.

[2] 34 Stat. 948 (1907). Congress followed this precedent when the President wished to appoint a Senator as Attorney General and the salary had been increased pursuant to a process under which Congress did not need to vote to approve but could vote to disapprove. The salary was temporarily reduced to its previous level. 87 Stat. 697 (1975). See also 89 Stat. 1108 (1975) (reducing the salary of a member of the Federal Maritime Commission in order to qualify a Representative).

of the Senate at the time the increase was voted would be eligible for that office.[3] The clause became a subject of discussion in 1937, when Justice Black was appointed to the Court because Congress had recently increased the amount of pension available to Justices retiring at seventy and Mr. Black's Senate term had still some time to run. The appointment was defended, however, with the argument that inasmuch as Mr. Black was only fifty-one years of age at the time, he would be ineligible for the "increased emolument" for nineteen years and it was not as to him an increased emolument.[4] In 1969, it was briefly questioned whether a Member of the House of Representatives could be appointed Secretary of Defense because, under a salary bill enacted in the previous Congress, the President would propose a salary increase, including that of cabinet officers, early in the new Congress which would take effect if Congress did not disapprove it. The Attorney General ruled that inasmuch as the clause would not apply if the increase were proposed and approved subsequent to the appointment, it similarly would not apply in a situation in which it was uncertain whether the increase would be approved.[5]

**Incompatible Offices**

This second part of the second clause elicited little discussion at the Convention and was universally understood to be a safeguard against executive influence on Members of Congress and the prevention of the corruption of the separation of powers.[1] Congress has at various times confronted the issue in regard to seating or expelling persons who have or obtain office in another branch. Thus, it has determined that visitors to academies, regents, directors, and trustees of public institutions, and members of temporary commissions who receive no compensation as members are not officers within the constitutional inhibition.[2] Government contractors

[3] 35 Stat. 626 (1909).

[4] The matter gave rise to a case, *Ex parte Albert Levitt*, 302 U.S. 633 (1937), in which the Court declined to pass upon the validity of Justice Black's appointment. The Court denied the complainant standing, but strangely it did not advert to the fact that it was being asked to assume original jurisdiction contrary to *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803).

[5] 42 *Op. Atty. Gen.* No. 36 (January 3, 1969).

[1] *The Federalist* No. 76 (Hamilton) (Modern Library ed. 1937), 496; 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 866–869.

[2] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), §§ 493; 6 C. Cannon's *Precedents of the House of Representatives* (Washington: 1936), §§ 63–64.

and federal officers who resign before presenting their credentials may be seated as Members of Congress.[3]

One of the more recurrent problems which Congress has had with this clause is the compatibility of congressional office with service as an officer of some military organization—militia, reserves, and the like.[4] Members have been unseated for accepting appointment to military office during their terms of congressional office [5] but there are apparently no instances in which a Member-elect has been excluded for this reason. Because of the difficulty of successfully claiming standing, the issue has never been a litigatible matter.[6]

SECTION 7. Clause 1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Clause 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be

[3] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), §§ 496–499.

[4] *Cf.* "Right of a Representative in Congress To Hold Commission in National Guard," H. Rept. No. 885, 64th Congress, 1st sess. (1916).

[5] 1 A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), §§ 486–492, 494; 6 C. Cannon's *Precedents of the House of Representatives* (Washington: 1936), §§ 60–62.

[6] An effort to sustain standing was rebuffed in *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Clause 3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitation prescribed in the Case of a Bill.

## THE LEGISLATIVE PROCESS

### Revenue Bills

Only bills to levy taxes in the strict sense of the word are comprehended by the phrase "all bills for raising revenue;" bills for other purposes, which incidentally create revenue, are not included.[1] An act providing a national currency secured by a pledge of bonds of the United States, which, "in the furtherance of that object, and also to meet the expenses attending the execution of the act," imposed a tax on the circulating notes of national banks was held not to be a revenue measure which must originate in the House of Representatives.[2] Neither was a bill which provided that the District of Columbia should raise by taxation and pay to designated railroad companies a specified sum for the elimination of grade crossings and the construction of a railway station.[3] The substitution of a corporation tax for an inheritance tax,[4] and the addi-

[1] 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 880.

[2] *Twin City National Bank* v. *Nebeker*, 167 U.S. 196 (1897).

[3] *Millard* v. *Roberts*, 202 U.S. 429 (1906).

[4] *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 143 (1911).

tion of a section imposing an excise tax upon the use of foreign-built pleasure yachts,[5] have been held to be within the Senate's constitutional power to propose amendments.

### Approval by the President

The President is not restricted to signing a bill on a day when Congress is in session.[6] He may sign within ten days (Sundays excepted) after the bill is presented to him, even if that period extends beyond the date of the final adjournment of Congress.[7] His duty in case of approval of a measure is merely to sign it. He need not write on the bill the word "approved" nor the date. If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer.[8] A bill becomes a law on the date of its approval by the President.[9] When no time is fixed by the act it is effective from the date of its approval,[10] which usually is taken to be the first moment of the day, fractions of a day being disregarded.[11]

### The Veto Power

The veto provisions, the Supreme Court has told us, serve two functions. On the one hand, they ensure that "the President shall have suitable opportunity to consider the bills presented to him. . . . It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become law if the adjournment of the Congress prevents their return." [12] At the same time, the sections ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." [13] The Court asserted that "[w]e should not adopt a construction which would frustrate either of these purposes." [14]

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[5] *Rainey* v. *United States*, 232 U.S. 310 (1914).

[6] *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 453 (1899).

[7] *Edwards* v. *United States*, 286 U.S. 482 (1932). On one occasion in 1936, delay in presentation of a bill enabled the President to sign it 23 days after the adjournment of Congress. Schmeckebier, "Approval of Bills After Adjournment of Congress," 33 Am. Pol. Sci. Rev. 52-53 (1939).

[8] *Gardner* v. *Collector*, 6 Wall. (73 U.S.) 499 (1868).

[9] Id., 504. *See also Burgess* v. *Salmon*, 97 U.S. 381, 383 (1878).

[10] *Matthews* v. *Zane*, 7 Wheat. (20 U.S.) 164, 211 (1822).

[11] *Lapeyre* v. *United States*, 17 Wall. (84 U.S.) 191, 198 (1873).

[12] *Wright* v. *United States*, 302 U. S. 583, 596 (1938).

[13] Ibid.

[14] Ibid.

That the interpretation of the provisions has not been entirely consistent is evident from a review of the only two Supreme Court decisions interpreting them. In *The Pocket Veto Case,*[15] the Court held that the return of a bill to the Senate, where it originated, had been prevented when the Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President. The word "adjournment" was seen to have been used in the Constitution not in the sense of final adjournments but to any occasion on which a House of Congress is not in session. "We think that under the constitutional provision the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed." [16] Because neither House was in session to receive the bill, the President was prevented from returning it. It had been argued to the Court that the return may be validly accomplished to a proper agent of the house of origin for consideration when that body convenes. After first noting that Congress had never authorized an agent to receive bills during adjournment, the Court opined that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate." [17]

However, in *Wright* v. *United States,*[18] the Court held that the President's return of a bill on the tenth day after presentment, during a three-day adjournment by the originating House only, to the Secretary of the Senate was an effective return. In the first place, the Court thought, the pocket veto clause referred only to an adjournment of "the Congress", and here only the Senate, the originating body, had adjourned. The President can return the bill to the originating House if that body be in an intrasession adjournment, because there is no "practical difficulty" in effectuating the return. "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive the bill." [19] Such a procedure complied with the constitutional provisions. "The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return." [20] The concerns activating

[15] 279 U.S. 655 (1929).
[16] Id., 680.
[17] Id., 684.
[18] 302 U.S. 583 (1938).
[19] Id., 589–590.
[20] Id., 589.

the Court in *The Pocket Veto Case* were not present. There was no indefinite period in which a bill was in a state of suspended animation with public uncertainty over the outcome. "When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over." [21]

The tension between the two cases, even though at a certain level of generality they are consistent because of factual differences, has existed without the Supreme Court yet having occasion to review the issue again. But in *Kennedy* v. *Sampson*,[22] an appellate court held that a return is not prevented by an intrasession adjournment of any length by one or both Houses of Congress, so long as the originating House arranged for receipt of veto messages. The court stressed that the absence of the evils deemed to bottom the Court's premises in *The Pocket Veto Case*—long delay and public uncertainty—made possible the result.

The two-thirds vote of each House required to pass a bill over a veto means two-thirds of a quorum.[23] After a bill becomes law, of course, the President has no authority to repeal it. Asserting this truism, the Court in *The Confiscation Cases* [24] held that the immunity proclamation issued by the President in 1868 did not require reversal of a decree condemning property seized under the Confiscation Act of 1862.[25]

### Presentation of Resolutions

The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would

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[21] Id., 595.

[22] 511 F. 2d 430 (C.A.D.C. 1974). The Administration declined to appeal the case to the Supreme Court. The adjournment here was for five days. Subsequently, the President attempted to pocket veto two other bills, one during a 32 day recess and one during the period which Congress had adjourned *sine die* from the first to the second session of the 93d Congress. After renewed litigation, the Administration entered its consent to a judgment that both bills had become law, *Kennedy* v. *Jones*, Civil Action No. 74-194 (D.C.D.C., decree entered April 13, 1976), and it was announced that President Ford "will use the return veto rather than the pocket veto during intra-session and intersession recesses and adjournments of the Congress", provided that the House to which the bill must be returned has authorized an officer to receive vetoes during the period it is not in session.

[23] *Missouri Pacific Ry. Co.* v. *Kansas*, 248 U.S. 276 (1919).

[24] 20 Wall. (87 U.S.) 92 (1874).

[25] 12 Stat. 589 (1862).

have been bogged down hopelessly, not to mention the creation of other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, no resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action (e.g., the concurrent resolutions by which during the fight over Reconstruction the Southern States were excluded from representation in the House and Senate, the Joint Committee on Reconstruction containing members from both Houses was created, etc.), or to directing the expenditure of money appropriated to the use of the two Houses.[1] Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course.[2]

Within recent years, the concurrent resolution (as well as the simple resolution) has been put to a new use—serving as the instrument to terminate powers delegated to the Chief Executive or to disapprove particular exercises of power by him or his agents. The "legislative veto" or "congressional veto" was first developed in context of the delegation to the Executive of power to reorganize governmental agencies,[3] and was really furthered by the necessities of providing for national security and foreign affairs immediately prior to and during World War II.[4]

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[1] S. Rept. No. 1335, 54th Congress, 2d Sess.; 4 A. Hinds' *Precedents of the House of Representatives* (Washington: 1970), § 3483.

[2] *Hollingsworth* v. *Virginia*, 3 Dall. (3 U.S.) 378 (1798).

[3] Act of June 30, 1932, § 407, 47 Stat. 414.

[4] See, e.g., Lend Lease Act of March 11, 1941, 55 Stat. 31; First War Powers Act of December 18, 1941, 55 Stat. 838; Emergency Price Control Act of January 30, 1942, 56 Stat. 23; Stabilization Act of October 2, 1942, 56 Stat. 765; War Labor Disputes Act of June 25, 1943, 57 Stat. 163, all providing that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.

The proliferation of "congressional veto" provisions in legislation in recent years has raised a series of interrelated constitutional questions.[5] Congress, which until recently had applied the veto provisions to some action taken by the President or another executive officer—such as a reorganization of an agency, the lowering or raising of tariff rates, the disposal of federal property—has now begun expanding the device to give itself a negative over regulations issued by executive branch agencies,[6] and proposals have been made to give Congress a negative over all regulations issued by executive branch independent agencies.[7] Constitutional opponents of the congressional veto argue that the device violates the presentation clause inasmuch as the congressional vote of disapproval is not submitted to the President for his action and that the device violates the separation of powers generally because it allows Congress to intrude upon the administration of the laws it enacts, contrary to the constitutional scheme whereby the President is authorized to perform this function. Proponents counter that the legislation containing the congressional veto is presented to the Presi-

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[5] From 1932 to the present, by one count, nearly 300 separate provisions giving Congress power to halt or overturn executive action had been passed in nearly 200 acts; substantially more than half of these had been enacted since 1970. A partial listing is included in *The Constitution, Jefferson's Manual and Rules of the House of Representatives*, H. Doc. No. 96-398, 96th Congress, 2d Sess. (1981), 731-922. The types of provisions vary widely. They may require congressional approval before an executive action takes effect but more commonly they provide for a negative upon executive action. See, e.g., the Congressional Budget and Impoundment Control Act of 1974, 88 Stat. 333, §§ 1012, 1013, 1017, 31 U.S.C. §§ 1402, 1403, 1407, which includes both forms. Congressional action may be by concurrent resolution of both Houses, Trade Act of 1974, 88 Stat. 1980, 19 U.S.C. §§ 2112, 2253, 2412, 2432, 2437, by resolution of only one House, Federal Pay Comparability Act of 1970, 84 Stat. 1943, 5 U.S.C. § 5305(C)(2), or even by a committee of one House, P. L. 93-380, 88 Stat. 545 (1974), 20 U.S.C. § 1853 (special education projects).

[6] E.g., Housing and Community Development Amendments of 1978, 92 Stat. 2103, § 324, 42 U.S.C. § 3535(o)(1) (all future rules and regulations of the Department of Housing and Urban Development); Federal Election Campaign Act Amendments of 1974, § 315, 86 Stat. 16, as amended and redesignated Federal Election Campaign Act Amendments of 1976, §§ 105, 110(b), 90 Stat. 475, 2 U.S.C. § 438(c); Federal Trade Commission Improvements Act of 1980, P.L. 96-252, 94 Stat. 374, 393, § 21, 15 U.S.C. § 57a-1 (any final rule of FTC subject to disapproval by concurrent resolution); Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 (1974) § 104(b), 44 U.S.C. § 2107 note; Pension Reform Act, 88 Stat. 829 (1974), § 3632(d), 29 U.S.C. § 1232(d).

[7] A bill providing for this failed to receive the two-thirds vote required to pass under suspension of the rules by only three votes in the 94th Congress. H.R. 12048, 94th Congress, 2d sess. See H. Rept. No. 94-1014, 94th Congress, 2d sess. (1976) and 122 Cong. Rec. 31615-641, 31668. Considered extensively in the 95th and 96th Congresses, similar bills have not yet been adopted. See *Regulatory Reform and Congressional Review of Agency Rules*, Hearings before the Subcommittee on Rules of the House of the House Rules Committee, 96th Congress, 1st sess. (1979); *Regulatory Reform Legislation*, Hearings before the Senate Committee on Governmental Affairs, 96th Congress, 1st sess. (1979).

dent and that his approval of it or its enactment over his veto satisfies the presentation argument; further, it is urged that Congress may utilize the device as to legislative authority that it has delegated to the President and as to which it retains supervisory authority. The questions have not been judicially resolved [8] and remain the object of executive-congressional controversy.

SECTION 8. Clause 1. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

## POWER TO TAX AND SPEND

### Kinds of Taxes Permitted

By the terms of the Constitution, the power of Congress to levy taxes is subject to but one exception and two qualifications. Articles exported from any State may not be taxed at all. Direct taxes must be levied by the rule of apportionment and indirect taxes by the rule of uniformity. The Court has emphasized the sweeping character of this power by saying from time to time that it "reaches every subject," [1] that it is "exhaustive" [2] or that it "em-

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[8] The Supreme Court has declined to consider the question on several occasions. Its decision on other points made reaching the veto question unnecessary in *Buckley* v. *Valeo*, 424 U.S. 1, 140 n. 176 (1976), although Justice White argued for the constitutionality of the device. Id., 257, 282–286 (concurring in part and dissenting in part). The summary affirmance of *Pressler* v. *Simon*, 428 F. Supp. 302 (D.C.D.C. 1976), *aff'd* 434 U.S. 1028 (1978), upholding the Federal Pay Comparability Act including a veto, was on the merits but as noted in Justice Rehnquist's concurrence could have been based on a conclusion that plaintiffs lacked standing. See also *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977), *cert. den.* 434 U.S. 1009 (1978) (lower court, 4-to-3, sustained Federal Salary Act congressional veto provision); *Clark* v. *Valeo*, 559 F. 2d 642 (C.A.D.C.) *(en banc), aff'd.*, 431 U.S. 950 (1977) (question not ripe because veto not used); *McCorkle* v. *United States*, 559 F. 2d 1258 (C.A. 4 1977), *cert. den.* 434 U.S. 1011 (1978) (veto question not decided because not severable from entire statute, so that ruling could not help plaintiffs).

Nevertheless, recent cases invalidating the device practically ensure Supreme Court consideration on the merits and eventual resolution. See *Chadha* v. *INS*, 634 F. 2d 408 (C.A. 9, 1980) (one-house veto disapproving suspension of order of deportation); *Consumer Energy Council* v. *FERC*, 673 F. 2d 425 (C.A.D.C. 1982) (one-house veto of regulatory agency rules), *Consumers Union* v. *FTC*, 691 F. 2d 575 (C.A.D.C. 1982) (en banc) (two-house veto of regulatory agency rules).

[1] *License Tax Cases*, 5 Wall. (72 U.S.) 462, 471 (1867).

[2] *Brushaber* v. *Union Pacific R. Co.*, 240 U.S. 1 (1916).

braces every conceivable power of taxation." [3] Despite these generalizations, the power has been at times substantially curtailed by judicial decision with respect to the subject matter of taxation, the manner in which taxes are imposed, and the objects for which they may be levied.

***Decline of the Forbidden Subject Matter Test.***—In recent years the Supreme Court has restored to Congress the power to tax most of the subject matter which had previously been withdrawn from its reach by judicial decision. The holding of *Evans* v. *Gore* [4] and *Miles* v. *Graham* [5] that the inclusion of the salaries received by federal judges in measuring the liability for a nondiscriminatory income tax violated the constitutional mandate that the compensation of such judges should not be diminished during their continuance in office was repudiated in *O'Malley* v. *Woodrough.*[6] The specific ruling of *Collector* v. *Day* [7] that the salary of a state officer is immune to federal income taxation also has been overruled.[8] But the principle underlying that decision—that Congress may not lay a tax which would impair the sovereignty of the States—is still recognized as retaining some vitality.

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[3] Id., 12.

[4] 253 U.S. 245 (1920).

[5] 268 U.S. 501 (1925).

[6] 307 U.S. 277 (1939).

[7] 11 Wall. (78 U.S.) 113 (1871).

[8] *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939). *Collector* v. *Day* was decided in 1871 while the country was still in the throes of Reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in *Helvering* v. *Gerhardt*, 304 U.S. 405, 414 n. 4 (1938), the Court had not determined how far the Civil War Amendments had broadened the federal power at the expense of the States, but the fact that the taxing power had recently been used with destructive effect upon notes issued by the state banks, *Veazie Bank* v. *Fenno*, 8 Wall. (75 U.S.) 533 (1869), suggested the possibility of similar attacks upon the existence of the States themselves. Two years later, the Court took the logical step of holding that the federal income tax could not be imposed on income received by a municipal corporation from its investments. *United States* v. *Railroad Company*, 17 Wall. (84 U.S.) 322 (1873). A far-reaching extension of private immunity was granted in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), where interest received by a private investor on state or municipal bonds was held to be exempt from federal taxation. As the apprehension of this era subsided, the doctrine of these cases was pushed into the background. It never received the same wide application as did *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819), in curbing the power of the States to tax operations or instrumentalities of the Federal Government. Only once since the turn of the century has the national taxing power been further narrowed in the name of dual federalism. In 1931 the Court held that a federal excise tax was inapplicable to the manufacture and sale to a municipal corporation of equipment for its police force. *Indian Motorcycle* v. *United States*, 283 U.S. 570 (1931). Justice Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today. Cf. *Massachusetts* v. *United States*, 435 U.S. 444 (1978).

***Federal Taxation of State Interests.***—In 1903 a succession tax upon a bequest to a municipality for public purposes was upheld on the ground that the tax was payable out of the estate before distribution to the legatee. Looking to form and not to substance, in disregard of the mandate of *Brown* v. *Maryland*,[9] a closely divided Court declined to "regard it as a tax upon the municipality, though it might operate incidentally to reduce the bequest by the amount of the tax." [10] When South Carolina embarked upon the business of dispensing alcoholic beverages, its agents were held to be subject to the national internal revenue tax, the ground of the holding being that in 1787 such a business was not regarded as one of the ordinary functions of government.[11]

Another decision marking a clear departure from the logic of *Collector* v. *Day* was *Flint* v. *Stone Tracy Co.*,[12] where the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income. The argument that the tax imposed an unconstitutional burden on the exercise by a State of its reserved power to create corporate franchises was rejected, partly in consideration of the principle of national supremacy, and partly on the ground that the corporate franchises were private property. This case also qualified *Pollock* v. *Farmers' Loan & Trust Company* to the extent of allowing interest on state bonds to be included in measuring the tax on the corporation.

Subsequent cases have sustained an estate tax on the net estate of a decedent, including state bonds,[13] excise taxes on the transportation of merchandise in performance of a contract to sell and deliver it to a county,[14] on the importation of scientific apparatus by a state university,[15] on admissions to athletic contests sponsored by a state institution, the net proceeds of which were used to further its educational program,[16] and on admissions to recreational facilities operated on a nonprofit basis by a municipal corporation.[17] Income derived by independent engineering contrac-

[9] 12 Wheat. (25 U.S.) 419, 444 (1827).

[10] *Snyder* v. *Bettman*, 190 U.S. 249, 254 (1903).

[11] *South Carolina* v. *United States*, 199 U.S. 437 (1905). *See also Ohio* v. *Helvering*, 292 U.S. 360 (1934).

[12] 220 U.S. 107 (1911).

[13] *Greiner* v. *Lewellyn*, 258 U.S. 384 (1922).

[14] *Wheeler Lumber Co.* v. *United States*, 281 U.S. 572 (1930).

[15] *Board of Trustees* v. *United States*, 289 U.S. 48 (1933).

[16] *Allen* v. *Regents*, 304 U.S. 439 (1938).

[17] *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411 (1949).

tors from the performance of state functions,[18] the compensation of trustees appointed to manage a street railway taken over and operated by a State,[19] profits derived from the sale of state bonds,[20] or from oil produced by lessees of state lands,[21] have all been held to be subject to federal taxation despite a possible economic burden on the State.

***Scope of State Immunity From Federal Taxation.***—Although there have been sharp differences of opinion among members of the Supreme Court in recent cases dealing with the tax immunity of state functions and instrumentalities, it has been stated that "all agree that not all of the former immunity is gone." [22] Twice, the Court has made an effort to express its new point of view in a statement of general principles by which the right to such immunity shall be determined. However, the failure to muster a majority in concurrence with any single opinion in the more recent of these cases leaves the question very much in doubt. In *Helvering* v. *Gerhardt,*[23] where, without overruling *Collector* v. *Day,* it narrowed the immunity of salaries of state officers and federal income taxation, the Court announced ". . . two guiding principles of limitation for holding the tax immunity of State instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the State or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of State governments even though the tax be collected from the State treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the State only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the State is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the State government; even though the function be thought important enough to demand immunity from a tax upon the State itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons." [24]

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[18] *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514 (1926).

[19] *Helvering* v. *Powers,* 293 U.S. 214 (1934).

[20] *Willcuts* v. *Bunn,* 282 U.S. 216 (1931).

[21] *Helvering* v. *Producers Corp.,* 303 U.S. 376 (1938), overruling *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393 (1932).

[22] *New York* v. *United States,* 326 U.S. 572, 584 (1946) (concurring opinion of Justice Rutledge).

[23] 304 U.S. 405 (1938).

[24] Id., 419–420.

The second attempt to formulate a general doctrine was made in *New York* v. *United States*,[25] where, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court reconsidered the right of Congress to tax business enterprises carried on by the States. Justice Frankfurter, speaking for himself and Justice Rutledge, made the question of discrimination *vel non* against state activities the test of the validity of such a tax. They found "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." [1] In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier case to the effect that ". . . the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." [2] Justices Douglas and Black dissented in an opinion written by the former on the ground that the decision disregarded the Tenth Amendment, placed "the sovereign States on the same plane as private citizens," and made them "pay the Federal Government for the privilege of exercising powers of sovereignty guaranteed them by the Constitution." [3] In the most recent case dealing with state immunity the Court sustained the tax on the second ground mentioned in *Helvering* v. *Gerhardt*—that the burden of the tax was borne by private persons—and did not consider whether the function was one which the Federal Government might have taxed if the municipality had borne the burden of the exaction.[4]

***Uniformity Requirement.***—Whether a tax is to be apportioned among the States according to the census taken pursuant to Article I, § 2, or imposed uniformly throughout the United States depends upon its classification as direct or indirect.[5] The rule of uniformity

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[25] 326 U.S. 572 (1946).

[1] Id., 584.

[2] Id., 589–590.

[3] Id., 596. The decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), logically should have an impact in this area, but what it is is yet speculative.

[4] *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411 (1949). *Cf. Massachusetts* v. *United States*, 435 U.S. 444 (1978).

[5] *See also* Article I, § 9, clause 4.

for indirect taxes is easy to obey. It exacts only that the subject matter of a levy be taxed at the same rate wherever found in the United States; or, as it is sometimes phrased, the uniformity required is "geographical," not "intrinsic." [6] The clause accordingly places no obstacle in the way of legislative classification for the purpose of taxation, nor in the way of what is called progressive taxation.[7] A taxing statute does not fail of the prescribed uniformity because its operation and incidence may be affected by differences in state laws.[8] A federal estate tax law which permitted deduction for a like tax paid to a State was not rendered invalid by the fact that one State levied no such tax.[9] The term "United States" in this clause refers only to the States of the Union, the District of Columbia, and incorporated territories. Congress is not bound by the rule of uniformity in framing tax measures for unincorporated territories.[10] Indeed, in *Binns* v. *United States*,[11] the Court sustained license taxes imposed by Congress but applicable only in Alaska, where the proceeds, although paid into the general fund of the Treasury, did not in fact equal the total cost of maintaining the territorial government.

## PURPOSES OF TAXATION

### Regulation by Taxation

The discretion of Congress in selecting the objectives of taxation has also been held at times to be subject to limitations implied from the nature of the Federal System. Apart from matters which Congress is authorized to regulate, the national taxing power, it has been said, "reaches only existing subjects." [1] Congress may tax any activity actually carried on, such as the business of accepting wagers,[2] regardless of whether it is permitted or prohib-

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[6] *LaBelle Iron Works* v. *United States*, 256 U.S. 377 (1921); *Brushaber* v. *Union Pacific R. Co.*, 240 U.S. 1 (1916); *Head Money Cases*, 112 U.S. 580 (1884).

[7] *Knowlton* v. *Moore*, 178 U.S. 41 (1900).

[8] *Fernandez* v. *Wiener*, 326 U.S. 340 (1945); *Riggs* v. *Del Drago*, 317 U.S. 95 (1942); *Phillips* v. *Commissioner*, 283 U.S. 589 (1931); *Poe* v. *Seaborn*, 282 U.S. 101, 117 (1930).

[9] *Florida* v. *Mellon*, 273 U.S. 12 (1927).

[10] *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

[11] 194 U.S. 486 (1904). The Court recognized that Alaska was an incorporated territory but took the position that the situation in substance was the same as if the taxes had been directly imposed by a territorial legislature for the support of the local government.

[1] *License Tax Cases*, 5 Wall. (72 U.S.) 462, 471 (1867).

[2] *United States* v. *Kahriger*, 345 U.S. 22 (1953). Dissenting, Justice Frankfurter maintained that this was not a bona fide tax, but was essentially an effort to check, if not stamp out, professional gambling, an activity left to the responsibility of the States. Justices Jackson and Douglas noted partial agreement with this conclusion. *See also Lewis* v. *United States*, 348 U.S. 419 (1955).

ited by the laws of the United States [3] or by those of a State.[4] But so-called federal "licenses," so far as they relate to trade within state limits, merely express, "the purpose of the government not to interfere . . . with the trade nominally licensed, if the required taxes are paid." Whether the "licensed" trade shall be permitted at all is a question for decision by the State.[5] This, nevertheless, does not signify that Congress may not often regulate to some extent a business within a State in order to tax it more effectively. Under the necessary and proper clause, Congress may do this very thing. Not only has the Court sustained regulations concerning the packaging of taxed articles such as tobacco [6] and oleomargarine,[7] ostensibly designed to prevent fraud in the collection of the tax, it has also upheld measures taxing drugs [8] and firearms [9] which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way. These regulations were sustained as conducive to the efficient collection of the tax though they clearly transcended in some respects this ground of justification.[10]

**Extermination by Taxation**

A problem of a different order is presented where the tax itself has the effect of suppressing an activity or where it is coupled with regulations which clearly have no possible relation to the collection of the tax. Where a tax is imposed unconditionally, so that no other purpose appears on the face of the statute, the Court has refused to inquire into the motives of the lawmakers and has sustained the tax despite its prohibitive proportions.[1] In the language of a recent opinion: "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle ap-

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[3] *United States* v. *Yuginovich*, 256 U.S. 450 (1921).
[4] *United States* v. *Constantine*, 296 U.S. 287, 293 (1935).
[5] *License Tax Cases*, 5 Wall. (72 U.S.) 462, 471 (1867).
[6] *Felsenheld* v. *United States*, 186 U.S. 126 (1902).
[7] *In re Kollock*, 165 U.S. 526 (1897).
[8] *United States* v. *Doremus*, 249 U.S. 86 (1919). *Cf. Nigro* v. *United States*, 276 U.S. 332 (1928).
[9] *Sonzinsky* v. *United States*, 300 U.S. 506 (1937).
[10] Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled *Kahriger, Lewis, Doremus, Sonzinsky*, and similar cases on the ground that the statutory scheme compelled self-incrimination through registration. *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968) ; *Haynes* v. *United States*, 390 U.S. 85 (1968) ; *Leary* v. *United States*, 395 U.S. 6 (1969).
[1] *McCray* v. *United States*, 195 U.S. 27 (1904).

plies even though the revenue obtained is obviously negligible . . . or the revenue purpose of the tax may be secondary, . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate. As was pointed out in *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 47 (1934): 'From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishments.' " [2]

But where the tax is conditional, and may be avoided by compliance with regulations set out in the statute, the validity of the measure is determined by the power of Congress to regulate the subject matter. If the regulations are within the competence of Congress, apart from its power to tax, the exaction is sustained as an appropriate sanction for making them effective; [3] otherwise it is invalid.[4] During the Prohibition Era, Congress levied a heavy tax upon liquor dealers who operated in violation of state law. In *United States* v. *Constantine* [5] the Court held that this tax was unenforceable after the repeal of the Eighteenth Amendment, since the National Government had no power to impose an additional penalty for infractions of state law.

**Promotion of Business: Protective Tariff**

The earliest examples of taxes levied with a view to promoting desired economic objectives in addition to raising revenue were, of course, import duties. The second statute adopted by the first Congress was a tariff act which recited that "it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandise imported." [6] After being debated for nearly a century and a half, the constitutionality of protective tariffs was finally settled by the unanimous decision of the Supreme Court in *J. W. Hampton & Co.* v. *United States*,[7] where Chief Justice Taft wrote: "The second objection to

[2] *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950). *See also Sonzinsky* v. *United States*, 300 U.S. 506, 513–514 (1937).

[3] *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 383 (1940). *See also Head Money Cases*, 112 U.S. 580, 596 (1884).

[4] *Child Labor Tax Case (Bailey* v. *Drexel Furniture Co.)*, 259 U.S. 20 (1922); *Hill* v. *Wallace*, 259 U.S. 44 (1922); *Helwig* v. *United States*, 188 U.S. 605 (1903).

[5] 296 U.S. 287 (1935).

[6] 1 Stat. 24 (1789).

[7] 276 U.S. 394 (1928).

§ 315 is that the declared plan of Congress, either expressly or by clear implication, formulates its rule to guide the President and his advisory Tariff Commission as one directed to a tariff system of protection that will avoid damaging competition to the country's industries by the importation of goods from other countries at too low a rate to equalize foreign and domestic competition in the markets of the United States. It is contended that the only power of Congress in the levying of customs duties is to create revenue, and that it is unconstitutional to frame the customs duties with any other view than that of revenue raising."

The Chief Justice then observed that the first Congress in 1789 had enacted a protective tariff. "In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. . . . The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history. . . . Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subject of taxes cannot invalidate Congressional action." [8]

## SPENDING FOR THE GENERAL WELFARE

### Scope of the Power

The grant of power to "provide . . . for the general welfare" raises a two-fold question: How may Congress provide for "the general welfare" and what is "the general welfare" which it is authorized to promote? The first half of this question was answered by Thomas Jefferson in his opinion on the Bank as follows: "[T]he laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They [Congress] are not to lay taxes *ad libitum for any purpose they please;* but only *to pay the debts or provide for the welfare of the Union.* In like manner, they are not *to do anything they please* to provide for the general welfare, but only to *lay taxes* for that purpose." [1] The clause, in short

[8] Id., 411–412.

[1] 3 *Writings of Thomas Jefferson* (Library Edition, 1904) 147–149.

is not an independent grant of power, but a qualification of the taxing power. Although a broader view has been occasionally asserted,[2] Congress has not acted upon it and the Court has had no occasion to adjudicate the point.

With respect to the meaning of "the general welfare" the pages of *The Federalist* itself disclose a sharp divergence of views between its two principal authors. Hamilton adopted the literal, broad meaning of the clause; [3] Madison contended that the powers of taxation and appropriation of the proposed government should be regarded as merely instrumental to its remaining powers, in other words, as little more than a power of self-support.[4] From an early date Congress has acted upon the interpretation espoused by Hamilton. Appropriations for subsidies [5] and for an ever increasing variety of "internal improvements" [6] constructed by the Federal Government, had their beginnings in the administrations of Washington and Jefferson.[7] Since 1914, federal grants-in-aid—sums of money apportioned among the States for particular uses, often conditioned upon the duplication of the sums by the recipient State, and upon observance of stipulated restrictions as to its use—have become commonplace.

The scope of the national spending power was brought before the Supreme Court at least five times prior to 1936, but the Court disposed of four of the suits without construing the "general welfare" clause. In the *Pacific Railway Cases (California* v. *Pacific Railroad Co.)* [8] and *Smith* v. *Kansas City Title Co.*,[9] it affirmed the power of Congress to construct internal improvements, and to charter and purchase the capital stock of federal land banks, by reference to the powers of the National Government over commerce, and post roads and fiscal operations, and to its war powers. Deci-

[2] *See* W. Crosskey, *Politics and the Constitution in the History of The United States* (Chicago: 1953).

[3] *The Federalist* Nos. 30 and 34. (Modern Library ed. 1937).

[4] Id., No. 41.

[5] 1 Stat. 229 (1792).

[6] 2 Stat. 357 (1806).

[7] In an advisory opinion which it rendered for President Monroe at his request on the power of Congress to appropriate funds for public improvements, the Court answered that such appropriations might be properly made under the war and postal powers. *See* Albertsworth, "Advisory Functions in the Supreme Court," 23 Geo. L. J. 643, 644–647 (1935). Monroe himself ultimately adopted the broadest view of the spending power, from which, however, he carefully excluded any element of regulatory or police power. *See* his "Views of the President of the United States on the Subject of Internal Improvements," of May 4, 1822, 2 *Messages and Papers of the Presidents* (Richardson ed. 1906), 713–752.

[8] 127 U.S. 1 (1888).

[9] 255 U.S. 180 (1921).

sions on the merits were withheld in two other cases—*Massachusetts* v. *Mellon* and *Frothingham* v. *Mellon* [10]—on the ground that neither a State nor an individual citizen is entitled to a remedy in the courts against an alleged unconstitutional appropriation of national funds. In *United States* v. *Gettysburg Electric Ry.*,[11] however, the Court had invoked "the great power of taxation to be exercised for the common defence and general welfare" [12] to sustain the right of the Federal Government to acquire land within a State for use as a national park.

Finally, in *United States* v. *Butler*,[13] the Court gave its unqualified endorsement to Hamilton's views on the taxing power. Wrote Justice Roberts for the Court: "Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the numerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court had noticed the question, but has never found it necessary to decide which is the true construction. Justice Story, in his *Commentaries*, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of

[10] 262 U.S. 447 (1923). *See also Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938). These cases were limited by *Flast* v. *Cohen*, 392 U.S. 83 (1968).

[11] 160 U.S. 668 (1896).

[12] Id., 681.

[13] 297 U.S. 1 (1936). *See also Cleveland* v. *United States*, 323 U.S. 329 (1945).

public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." [14]

***Social Security Act Cases.***—Although holding that the spending power is not limited by the specific grants of power contained in Article I, § 8, the Court found, nevertheless, that it was qualified by the Tenth Amendment, and on this ground ruled in the *Butler* case that Congress could not use moneys raised by taxation to "purchase compliance" with regulations "of matters of State concern with respect to which Congress has no authority to interfere." [15] Within little more than a year this decision was reduced to narrow proportions by *Steward Machine Co.* v. *Davis,*[16] which sustained the tax imposed on employers to provide unemployment benefits, and the credit allowed for similar taxes paid to a State. To the argument that the tax and credit in combination were "weapons of coercion, destroying or impairing the autonomy of the States," the Court replied that relief of unemployment was a legitimate object of federal expenditure under the "general welfare" clause, that the Social Security Act represented a legitimate attempt to solve the problem by the cooperation of State and Federal Governments, that the credit allowed for state taxes bore a reasonable relation "to the fiscal need subserved by the tax in its normal operation," [17] since state unemployment compensation payments would relieve the burden for direct relief borne by the national treasury. The Court reserved judgment as to the validity of a tax "if it is laid upon the condition that a State may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power." [18]

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[14] 297 U.S., 65, 66. The power of the National Government to promote agriculture through disbursement of funds in the acquisition of property and construction of irrigation and reclamation projects is clearly deducible from the general welfare clause. So settled is the issue that recent attacks on federal grants-in-aid omit any challenge on the broad level and rely on specific prohibitions, i.e., the religion clauses of the First Amendment. *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Tilton* v. *Richardson,* 403 U.S. 672 (1971).

[15] Justice Stone, speaking for himself and two other Justices, dissented on the ground that Congress was entitled when spending the national revenues for the "general welfare" to see to it that the country got its money's worth thereof, and that the condemned provisions were "necessary and proper" to that end. *United States* v. *Butler,* 297 U.S. 1, 84–86 (1936).

[16] 301 U.S. 548 (1937).

[17] Id., 591.

[18] Id., 590. *See also Buckley* v. *Valeo,* 424 U.S. 1, 90–92 (1976); *Fullilove* v. *Klutznick,* 448 U.S. 448, 473–475 (1980); *Pennhurst State School & Hospital* v. *Halderman,* 451 U.S. 1 (1981).

***Earmarked Funds.***—The appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other constitutional provision is violated. Thus a processing tax on coconut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury.[19] In *Helvering* v. *Davis,*[20] the excise tax on employers, the proceeds of which were not earmarked in any way, although intended to provide funds for payments to retired workers, was upheld under the "general welfare" clause, the Tenth Amendment being found to be inapplicable.

***Conditional Grants-in-Aid.***—In the *Steward Machine Company* case, it was a taxpayer who complained of the invasion of the state sovereignty and the Court put great emphasis on the fact that the State was a willing partner in the plan of cooperation embodied in the Social Security Act.[21] A decade later the right of Congress to impose conditions upon grants-in-aid over the objection of a State was squarely presented in *Oklahoma* v. *Civil Service Commission.*[22] The State objected to the enforcement of a provision of the Hatch Act, whereby its right to receive federal highway funds would be diminished in consequence of its failure to remove from office a member of the State Highway Commission found to have taken an active part in party politics while in office. Although it found that the State had asserted a legal right which entitled it to an adjudication of its objection, the Court denied the relief sought on the ground that "[w]hile the United States is not concerned with, and has no power to regulate local political activities as such of State officials, it does have power to fix the terms upon which its money allotments to State shall be disbursed. . . . The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the State, it has never been thought that such effect made the federal act invalid." [23]

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[19] *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308 (1937).

[20] 301 U.S. 619 (1937).

[21] 301 U.S. 548, 589, 590 (1937).

[22] 330 U.S. 127 (1947).

[23] Id., 143. *National League of Cities* v. *Usery,* 426 U.S. 833, 852 n. 17 (1976), reserved the question whether its commerce clause ruling might be extended to spending power exercises which affect integral operations of the States. The Court has adopted a rule of construction requiring Congress to speak unambiguously when imposing conditions on States receiving federal money. *Pennhurst State School & Hospital* v. *Halderman.* 451 U.S. 1, 17 (1981).

***Debts of the United States.***—The power to pay the debts of the United States is broad enough to include claims of citizens arising on obligations of right and justice.[1] The Court sustained an act of Congress which set apart for the use of the Philippine Islands, the revenue from a processing tax on coconut oil of Philippine production, as being in pursuance of a moral obligation to protect and promote the welfare of the people of the Islands.[2] Curiously enough, this power was first invoked to assist the United States to collect a debt due to it. In *United States* v. *Fisher* [3] the Supreme Court sustained a statute which gave the Federal Government priority in the distribution of the estates of its insolvent debtors. The debtor in that case was the endorser of a foreign bill of exchange which apparently had been purchased by the United States. Invoking the "necessary and proper" clause, Chief Justice Marshall deduced the power to collect a debt from the power to pay its obligations by the following reasoning: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." [4]

Clause 2. *The Congress shall have Power* * * * To borrow Money on the credit of the United States.

### BORROWING POWER

The original draft of the Constitution reported to the convention by its Committee of Detail empowered Congress "To borrow money and emit bills on the credit of the United States." [5] When this section was reached in the debates, Gouverneur Morris moved to strike out the clause "and emit bills on the credit of the United States." Madison suggested that it might be sufficient "to prohibit the making them a tender." After a spirited exchange of views on the subject of paper money, the convention voted, nine States to two, to delete the words "and emit bills." [6] Nevertheless, in 1870,

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[1] *United States* v. *Realty Company*, 163 U.S. 427 (1896); *Pope* v. *United States*, 323 U.S. 1, 9 (1944).

[2] *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308 (1937).

[3] 2 Cr. (6 U.S.) 358 (1805).

[4] Id., 396.

[5] 2 M. Farrand, *Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 144, 308–309.

[6] Id., 310.

the Court relied in part upon this clause in holding that Congress had authority to issue treasury notes and to make them legal tender in satisfaction of antecedent debts.[7]

When it borrows money "on the credit of the United States," Congress creates a binding obligation to pay the debt as stipulated and cannot thereafter vary the terms of its agreement. A law purporting to abrogate a clause in government bonds calling for payment in gold coin was held to contravene this clause, although the creditor was denied a remedy in the absence of a showing of actual damage.[8]

Clause 3. *The Congress shall have Power* * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

## POWER TO REGULATE COMMERCE

### Purposes Served by the Grant

This clause serves a two-fold purpose: it is the direct source of the most important powers which the Federal Government exercises in peacetime, and, except for the due process and equal protection clauses of the Fourteenth Amendment, it is the most important limitation imposed by the Constitution on the exercise of state power. The latter, restrictive operation of the clause was long the more important one from the point of view of the constitutional lawyer. Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from state legislation.[1] The result was that, generally, the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in that of its operation as a source of national power. The consequence of this historical progression was that the word "commerce" came to dominate the clause while the word "regulate" remained in the background. The so-called "constitutional revolution" of the 1930's, however, brought the latter word to its present prominence.

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[7] *Knox* v. *Lee (Legal Tender Cases)*, 12 Wall. (79 U.S.) 457 (1871), overruling *Hepburn* v. *Griswold*, 8 Wall. (75 U.S.) 603 (1870).

[8] *Perry* v. *United States*, 294 U.S. 330, 351 (1935). *See also Lynch* v. *United States*, 292 U.S. 571 (1934).

[1] E. Prentice & J. Egan, *The Commerce Clause of the Federal Constitution* (Chicago: 1898), 14.

**Definition of Terms**

*Commerce.*—The etymology of the word "commerce" [2] carries the primary meaning of traffic, of transporting goods across state lines for sale. This possibly narrow constitutional conception was rejected by Chief Justice Marshall in *Gibbons* v. *Ogden,*[3] which remains one of the seminal cases dealing with the Constitution. The case arose because of a monopoly granted by the New York legislature on the operation of steam-propelled vessels on its waters, a monopoly challenged by Gibbons who transported passengers from New Jersey to New York pursuant to privileges granted by an act of Congress.[4] The New York monopoly was not in conflict with the congressional regulation of commerce, argued the monopolists, because the vessels carried only passengers between the two States and were thus not engaged in traffic, in "commerce" in the constitutional sense.

"The subject to be regulated is commerce," the Chief Justice wrote. "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse." [5] The term, therefore, included navigation—a conclusion which Marshall also supported by appeal to general understanding, to the prohibition in Article I, § 9, against any preference being given "by any regulation of commerce or revenue, to the ports of one State over those of another," and to the admitted and demonstrated power of Congress to impose embargoes.[6]

Marshall qualified the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.[7] But, today, "commerce" in the constitutional sense, and hence "interstate commerce", covers every species of movement of persons and things, whether for profit or not, across state lines,[8] every

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[2] That is, "cum merce (with merchandise)."

[3] 9 Wheat. (22 U.S.) 1 (1824).

[4] Act of February 18, 1793, 1 Stat. 305, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

[5] *Gibbons* v. *Ogden,* 9 Wheat. (22 U.S.) 1, 189 (1824).

[6] Id., 190–194.

[7] Id., 193.

[8] As we will see, however, the crossing of state lines gives way in many later formulations, or, rather, is supplemented with, a requirement of effect on interstate commerce which may result from a wholly intrastate transaction.

species of communication, every species of transmission of intelligence, whether for commercial purposes or otherwise,[9] every species of commercial negotiation which will involve sooner or later an act of transportation of persons or things, or the flow of services or power, across state lines.[10]

There was a long period in the Court's history when a majority of the Justices, seeking to curb the regulatory powers of the Federal Government by various means, held that certain things were not encompassed by the commerce clause because they were either not interstate commerce or bore no sufficient nexus to interstate commerce. Thus, at one time, the Court held that mining or manufacturing, even when the product would move in interstate commerce, was not reachable under the commerce clause; [11] it held insurance transactions carried on across state lines not commerce,[12] and that exhibitions of baseball between professional teams which travel from State to State were not in commerce,[13] and that similarly the commerce clause was not applicable to the making of contracts for the insertion of advertisements in periodicals in another State [14] or

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[9] E.g., *United States* v. *Simpson*, 252 U.S. 465 (1920); *Caminetti* v. *United States*, 242 U.S. 470 (1917).

[10] "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 549-550 (1944).

[11] *Kidd* v. *Pearson*, 128 U.S. 1 (1888); *Oliver Iron Co.* v *Lord*, 262 U.S. 172 (1923); *United States* v. *E. C. Knight Co.*, 156 U.S. 1 (1895); and *see Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).

[12] *Paul* v. *Virginia*, 8 Wall. (75 U.S.) 168 (1869); and see the cases to this effect cited in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 543-545, 567-568, 578 (1944).

[13] *Federal Baseball League* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). When called on to reconsider its decision, the Court declined, noting that Congress had not seen fit to bring the business under the antitrust laws by legislation having prospective effect and that the business had developed under the understanding that it was not subject to these laws, a reversal of which would have retroactive effect. *Toolson* v. *New York Yankees*, 346 U.S. 356 (1953). In *Flood* v. *Kuhn*, 407 U.S. 258 (1972), the Court recognized these decisions as aberrations but thought the doctrine entitled to the benefits of *stare decisis* inasmuch as Congress was free to change it at any time. The same considerations not being present, the Court has held that businesses, conducted on a multistate basis but built around local exhibitions, are in commerce and subject to, *inter alia*, the antitrust laws, in the instance of professional football, *Radovich* v. *National Football League*, 352 U.S. 445 (1957), professional boxing, *United States* v. *International Boxing Club*, 348 U.S. 236 (1955), and legitimate theatrical productions. *United States* v. *Shubert*, 348 U.S. 222 (1955).

[14] *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U.S. 436 (1920).

to the making of contracts for personal services to be rendered in another State.[15] Later decisions either have overturned or have undermined all of these holdings. The gathering of news by a press association and its transmission to client newspapers is interstate commerce.[16] The activities of a Group Health Association which serves only its own members are "trade" and capable of becoming interstate commerce;[17] the business of insurance when transacted between an insurer and an insured in different States is interstate commerce.[18] But most important of all there was the development of, or more accurately the return to,[19] the rationales by which manufacturing,[20] mining,[21] business transactions,[22] and the like, which are antecedent to or subsequent to a move across state lines, are conceived to be part of an integrated commercial whole and therefore subject to the reach of the commerce power.

*National League of Cities* v. *Usery*[23] may portend a modest resurrection of judicial limitations upon congressional exercise of the commerce power with its holding that the power does not extend to the regulation of traditional governmental activities of state governments. But despite the broad phrasing of the opinion, its accommodation of cases in which Congress has been permitted to regulate and Justice Blackmun's limited concurrence suggest that the potential of the case may be quite restrained.

***Among the Several States.***—Continuing in *Gibbons* v. *Ogden*, Chief Justice Marshall observed that the phrase "among the several States" was "not one which would probably have been selected to indicate the completely interior traffic of a state . . . ." It must

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[15] *Williams* v. *Fears*, 179 U.S. 270 (1900). See also *Diamond Glue Co.* v. *United States Glue Co.*, 187 U.S. 611 (1903); *Browning* v. *City of Waycross*, 233 U.S. 16 (1914); *General Railway Signal Co.* v. *Virginia*, 246 U.S. 500 (1918). But see *York Manufacturing Co.* v. *Colley*, 247 U.S. 21 (1918).

[16] *Associated Press* v. *United States*, 326 U.S. 1 (1945).

[17] *American Medical Association* v. *United States*, 317 U.S. 519 (1943). *Cf. United States* v. *Oregon Medical Society*, 343 U.S. 326 (1952).

[18] *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944).

[19] "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 194 (1824). *And see* id., 195–196.

[20] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[21] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). And see *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264, 275–283 (1981). See also *Mulford* v. *Smith*, 307 U.S. 38 (1939) (agricultural production).

[22] *Swift & Co.* v. *United States*, 196 U.S. 375 (1905); *Stafford* v. *Wallace*, 258 U.S. 495 (1922); *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1 (1923).

[23] 426 U. S. 833 (1976). For the Court's refusal to expand on *League of Cities*, see *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264, 283–293 (1981); *United Trans. Union* v. *Long Island Rail Road Co.*, 455 U. S. 678 (1982); *FERC* v. *Mississippi*, 456 U.S. 742 (1982)

therefore have been selected to demark "the exclusively internal commerce of a state." While, of course, the phrase "may very properly be restricted to that commerce which concerns more states than one", it is obvious that "[c]ommerce among the states, cannot stop at the exterior boundary line of each state, but may be introduced into the interior." The Chief Justice then succinctly stated the rule which, though restricted in some periods, continues to govern the interpretation of the clause. "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." [24]

Recognition of an "exclusively internal" commerce of a State—or "intrastate commerce" in today's terms—was at times regarded as setting out an area of state concern which Congress was precluded from reaching.[25] While these cases seemingly visualized Congress' power arising only when there was an actual crossing of state boundaries, this view ignored the Marshall's equation of "intrastate commerce" which "affect[s] other states" or "with which it is necessary to interfere" in order to effectuate congressional power with those actions which are "purely" interstate. This equation came back into its own, both with the Court's stress on the "current of commerce" bringing each element in the current within Congress' regulatory power,[1] with the emphasis on the interrelationships of industrial production to interstate commerce [2] but especially with the emphasis that even minor transactions have an effect on interstate commerce [3] and that the cumulative

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[24] 9 Wheat. (22 U.S.) 1, 194, 195 (1824).

[25] *New York* v. *Miln*, 11 Pet. (36 U.S.) 102 (1837); *License Cases*, 5 How. (46 U.S.) 504 (1847); *Passenger Cases*, 7 How. (48 U.S.) 282 (1849); *Patterson* v. *Kentucky*, 97 U.S. 501 (1879); *Trade-Mark Cases*, 100 U.S. 82 (1879); *Kidd* v. *Pearson*, 128 U.S. 1 (1888); *Illinois Central Railroad* v. *McKendree*, 203 U.S. 514 (1906); *Keller* v. *United States*, 213 U.S. 138 (1909); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918); *Oliver Iron Co.* v. *Lord*, 262 U.S. 172 (1923).

[1] *Swift & Co.* v. *United States*, 196 U.S. 375 (1905); *Stafford* v. *Wallace*, 258 U.S. 495 (1922); *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1 (1923).

[2] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[3] *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939); *Kirschbaum* v. *Walling*, 316 U.S. 517 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *NLRB* v. *Reliance Fuel Oil Co.*, 371 U.S. 224 (1963). *See also Houston & Texas Railway* v. *United States*, 234 U.S. 342 (1914); *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563 (1922); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *United States* v. *Ohio*, 385 U.S. 9 (1966); *McLain* v. *Real Estate Bd.*, 444 U.S. 232, 241–243 (1980); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976); *McElroy* v. *United States*, 455 U.S. 642 (1982).

effect of many minor transactions with no separate effect on interstate commerce, when they are viewed as a class, may be sufficient to merit congressional regulation.[4] "Commerce among the states must, of necessity, be commerce with[in] the states. . . . The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states." [5]

***Regulate.***—"We are now arrived at the inquiry—" continued the Chief Justice, "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." [6]

Of course, the power to regulate commerce is the power to prescribe conditions and rules for the carrying-on of commercial transactions, the keeping-free of channels of commerce, the regulating of prices and terms of sale. Even if the clause granted only this power, the scope would be wide, but it extends to include many more purposes than these. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police

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[4] *United States* v. *Darby*, 312 U.S. 100 (1941); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *Perez* v. *United States*, 402 U.S. 146 (1971).

[5] *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 196 (1824). Commerce "among the several States" does not comprise commerce of the District of Columbia nor of the territories of the United States. Congress' power over their commerce is an incident of its general power over them. *Stoutenburgh* v. *Hennick*, 129 U.S. 141 (1889); *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427 (1932); *In re Bryant*, 4 Fed. Cas. 514 (No. 2067) (D. Oreg. 1865). Transportation between two points in the same State, when a part of the route is a loop outside the State, is interstate commerce. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U.S. 617 (1903); *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17 (1920). But such a deviation cannot be solely for the purpose of evading a tax or regulation in order to be exempt from the State's reach. *Greyhound Lines* v. *Mealey*, 334 U.S. 653, 660 (1948); *Eichholz* v. *Public Service Comm.*, 306 U.S. 268, 274 (1939). Red cap services performed at a transfer point within the State of departure but in conjunction with an interstate trip are reachable. *New York, N.H. & N.R. Co.* v. *Nothnagle*, 346 U.S. 128 (1953).

[6] Id., 196–197.

power, for the benefit of the public, within the field of interstate commerce." [7] Thus, in upholding a federal statute prohibiting the shipment in interstate commerce of goods made with child labor, not because the goods were intrinsically harmful but in order to extirpate child labor, the Court said: "It is no objection to the assertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." [8]

The power has been exercised to enforce majority conceptions of morality,[9] to ban racial discrimination in public accommodations,[10] and to protect the public against evils both natural and manmade.[11] The power to regulate interstate commerce is, therefore, rightly regarded as the most potent grant of authority in § 8.

***Necessary and Proper Clause.***—All grants of power to Congress in § 8, as elsewhere, must be read in conjunction with the final clause, cl. 18, of § 8, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." [12] It will be recalled that Chief Justice Marshall alluded to the power thus enhanced by this clause when he said that the regulatory power did not extend "to those internal concerns [of a state] . . . with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." [13] There are numerous cases permitting Congress to reach "purely" intrastate activities on the theory, combined with the previously mentioned emphasis on the cumulative effect of minor transactions, that it is necessary to regulate them in order that the regulation of interstate activities might be fully effectuated.[14]

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[7] *Brooks* v. *United States*, 267 U.S. 432, 436–437 (1925).

[8] *United States* v. *Darby*, 312 U.S. 100, 114 (1941).

[9] E.g., *Caminetti* v. *United States*, 242 U.S. 470 (1917) (transportation of female across state line for noncommercial sexual purposes); *Cleveland* v. *United States*, 329 U.S. 14 (1946) (transportation of plural wives across state lines by Mormons); *United States* v. *Simpson*, 252 U.S. 465 (1920) (transportation of five quarts of whiskey across state line for personal consumption).

[10] *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Daniel* v. *Paul*, 395 U.S. 298 (1969).

[11] E.g., *Reid* v. *Colorado*, 187 U.S. 137 (1902) (transportation of diseased livestock across state line); *Perez* v. *United States*, 402 U.S. 146 (1971) (prohibition of all loansharking).

[12] *Infra*, pp. 370–375.

[13] *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 195 (1824).

[14] E.g., *Houston & Texas Ry.* v. *United States*, 234 U.S. 342 (1914) (necessary for ICC to regulate rates of an intrastate train in order to effectuate its rate setting for a competing interstate train); *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563 (1922) (same); *Southern Railway Co.* v. *United States*, 222 U.S. 20 (1911) (upholding requirement of same safety equipment on intrastate as interstate

*Illegal Commerce.*—That Congress' protective power over interstate commerce reaches all kinds of obstructions and impediments was made clear in *United States* v. *Ferger.*[15] The defendants had been indicted for issuing a false bill of lading to cover a fictitious shipment in interstate commerce. Before the Court they argued that inasmuch as there could be no commerce in a fraudulent bill of lading, Congress had no power to exercise criminal jurisdiction over them. Said Chief Justice White: "But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce . . . and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves." [16] Much of Congress' criminal legislation is based simply on the crossing of a state line as creating federal jurisdiction.[17]

**Interstate Versus Foreign Commerce**

There are certain dicta which urge or suggest that Congress' power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the Nation's unlimited power over foreign relations, the former was conferred upon the National Government primarily in order to protect freedom of commerce from state interference. The four dissenting Justices in the *Lottery Case* endorsed this view in the following words: "The power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu,* for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign

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trains). *See also Wickard* v. *Filburn,* 317 U.S. 111 (1942); *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110 (1942).

[15] 250 U.S. 199 (1919).

[16] Id., 203.

[17] E.g., *Hoke* v. *United States,* 227 U.S. 308 (1913) (transportation of women for purposes of prostitution); *Gooch* v. *United States,* 297 U.S. 124 (1936) (kidnapping); *Brooks* v. *United States,* 267 U.S. 432 (1925) (stolen autos). *Cf. Rewis* v. *United States,* 401 U.S. 808 (1971); *McElroy* v. *United States,* 455 U.S. 642 (1982).

nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case would not be necessary or proper in the other."[18]

And twelve years later Chief Justice White, speaking for the Court, expressed the same view, as follows: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand." [19]

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it." [20] And nearly fifty years later Justice Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." [21] Today it is firmly established doctrine that the power to regulate commerce, whether with foreign nations or among the several States, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only the specific limitations imposed upon Congress' powers, as by the due process clause of the Fifth Amendment, are not transgressed.[22]

### Instruments of Commerce

The applicability of Congress' power to the agents and instruments of commerce is implied in Marshall's opinion in *Gibbons* v. *Ogden*,[1] where the waters of the State of New York in their quality

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[18] *Lottery Case (Champion* v. *Ames)*, 188 U.S. 321, 373–374 (1903).

[19] *Brolan* v. *United States*, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in *Japan Line* v. *County of Los Angeles*, 441 U.S. 434, 448–451 (1979). In context, the distinction seems unexceptionable, but the language extends beyond context.

[20] *License Cases*, 5 How. (46 U.S.) 504, 578 (1847).

[21] *Pittsburgh & Southern Coal Co.* v. *Bates*, 156 U.S. 577, 587 (1895).

[22] *United States* v. *Carolene Products Co.*, 304 U.S. 144, 147–148 (1938).

[1] 9 Wheat. (22 U.S.) 1, 217, 221 (1824).

as highways of interstate and foreign transportation were held to be governed by the overriding power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the "principle" by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Waite in the case of the *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*,[2] a case closely paralleling *Gibbons* v. *Ogden* in other respects also. "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation." [3]

The Radio Act of 1927 [4] whereby "all forms of interstate and foreign radio transmissions within the United States, its Territories and possessions" were brought under national control, affords another illustration. Because of the doctrine thus stated, the measure met no serious constitutional challenge either on the floors of Congress or in the Courts.[5]

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[2] 96 U.S. 1 (1878). *See also Western Union Telegraph Co.* v. *Texas*, 105 U.S. 460 (1882).

[3] Id., 9. "Commerce embraces appliances necessarily employed in carrying on transportation by land and water." *Railroad Company* v. *Fuller*, 17 Wall. (84 U.S.) 560, 568 (1873).

[4] Act of March 28, 1927, 45 Stat. 373, superseded by the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 et seq.

[5] "No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communication." Chief Justice Hughes speaking for the Court in *Federal Radio Comm.* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). See also *Fisher's Blend Station* v. *Tax Comm.*, 297 U. S. 650, 654-655 (1936).

**Congressional Regulation of Waterways**

***Navigation.***—In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*,[1] the Court granted an injunction requiring that a bridge, erected over the Ohio River under a charter from the State of Virginia, either be altered so as to admit of free navigation of the river or else be entirely abated. The decision was justified on the basis both of the commerce clause and of a compact between Virginia and Kentucky, whereby both these States had agreed to keep the Ohio River "free and common to the citizens of the United States." The injunction was promptly rendered inoperative by an act of Congress declaring the bridge to be "a lawful structure" and requiring all vessels navigating the Ohio to be so regulated as not to interfere with it.[2] This act the Court sustained as within Congress' power under the commerce clause, saying: "So far . . . as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, [it] is not so in the contemplation of law. . . . [Congress] having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and federal, which, if not sufficient, certainly none can be found in our system of government." [3] In short, it is Congress and not the Court which is authorized by the Constitution to regulate commerce.[4]

The law and doctrine of the earlier cases with respect to the fostering and protection of navigation are well summed up in a frequently cited passage from the Court's opinion in *Gilman* v. *Philadelphia*.[5] "Commerce includes navigation. The power to regulate

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[1] 13 How. (54 U.S.) 518 (1852).

[2] 10 Stat 112, § 6 (1852).

[3] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. (59 U.S.) 421, 430 (1856). "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject." *Transportation Co.* v. *Parkersburg*, 107 U.S. 691, 701 (1883). *See also Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946); *Robertson* v. *California*, 328 U.S. 440 (1946).

[4] *But see In re Debs*, 158 U.S. 564 (1895), in which the Court held that in the absence of legislative authorization the Executive had power to seek and federal courts to grant injunctive relief to remove obstructions to interstate commerce and the free flow of the mail.

[5] 3 Wall. (70 U.S.) 713 (1866).

commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes. Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." [6]

Thus, Congress was within its powers in vesting the Secretary of War with power to determine whether a structure of any nature in or over a navigable stream is an obstruction to navigation and to order its abatement if he so finds.[7] Nor is the United States required to compensate the owners of such structures for their loss, since they were always subject to the servitude represented by Congress' powers over commerce, and the same is true of the property of riparian owners which is damaged.[8] And while it was formerly

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[6] Id., 724-725.

[7] *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907). *See also Monongahela Bridge* v. *United States*, 216 U.S. 177 (1910); *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929). The United States, may seek injunctive or declaratory relief requiring the removal of obstructions to commerce by those negligently responsible for them or it may itself remove the obstructions and proceed against the responsible party for costs. *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967). Congress' power in this area is newly demonstrated by legislation aimed at pollution and environmental degradation. *Cf.*, Fish and Wildlife Coordination Act, 72 Stat. 563 (1958), 16 U.S.C. § 661 *et seq.;* National Environmental Policy Act, 83 Stat. 852 (1969), 42 U.S.C. § 4321 *et seq.* The policy thus enunciated has been implemented in refusing licenses for operations on or projects on navigable waters on ecological grounds although navigation was not impaired. *Cf. Zabel* v. *Tabb*, 430 F. 2d 199 (C.A. 5, 1970), *cert. den.*, 401 U.S. 910 (1971). In confirming the title of the States to certain waters under the Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. § 1301 et seq., Congress was careful to retain authority over the waters for purposes of commerce, navigation, and the like. *United States* v. *Rands*, 389 U.S. 121, 127 (1967).

[8] *Gibson* v. *United States*, 166 U.S. 269 (1897). *See also Bridge Co.* v. *United States*, 105 U.S. 470 (1882); *United States* v *Rio Grande Irrigation Co.*, 174 U.S. 690 (1899); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *Seattle* v. *Oregon & W.R.R.*, 255 U.S. 56, 63 (1921); *Economy Light Co.* v. *United States*, 256 U.S. 113 (1921); *United States* v. *River Rouge Co.*, 269 U.S. 411, 419 (1926); *Ford & Son* v. *Little Falls Co.*, 280 U.S. 369 (1930); *United States* v. *Commodore Park*, 324 U.S. 386 (1945); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956); *United States* v. *Rands*, 389 U.S. 121 (1967).

held that lands adjoining nonnavigable streams were not subject to the above mentioned servitude,[9] this rule has been impaired by recent decisions;[10] and at any rate it would not apply as to a stream which had been rendered navigable by improvements.[11]

In exercising its power to foster and protect navigation Congress legislates primarily on things external to the act of navigation. But that act itself and the instruments by which it is accomplished are also subject to Congress' power if and when they enter into or form a part of "commerce among the several States." When does this happen? Words quoted above from the Court's opinion in the *Gilman* case answered this question to some extent; but the decisive answer to it was returned five years later in the case of *The Daniel Ball.*[12] Here the question at issue was whether an act of Congress, passed in 1838 and amended in 1852, which required that steam vessels engaged in transporting passengers or merchandise upon the "bays, lakes, rivers, or other navigable waters of the United States," applied to the case of a vessel which navigated only the waters of the Grand River, a stream which lies entirely in the State of Michigan. The Court ruled: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; . . . . So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."[13]

Counsel had suggested that if the vessel was in commerce because it was part of a stream of commerce then all transportation within a State was commerce. Turning to this point, the Court added: "We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over inter-

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[9] *United States* v. *Cress*, 243 U.S. 316 (1917).

[10] *United States* v. *Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 597 (1941); *United States* v. *Willow River Co.*, 324 U.S. 499 (1945).

[11] *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690 (1899).

[12] 10 Wall. (77 U.S.) 557 (1871).

[13] Id., 565.

state commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when the agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter." [14] In short, it was admitted, inferentially, that the principle of the decision would apply to land transportation, but the actual demonstration of the fact still awaited some years.[15]

***Hydroelectric Power; Flood Control.***—As a consequence, in part, of its power to forbid or remove obstructions to navigation in the navigable waters of the United States, Congress has acquired the right to develop hydroelectric power and the ancillary right to sell it to all takers. By a long-standing doctrine of constitutional law, the States possess dominion over the beds of all navigable streams within their borders,[16] but because of the servitude which

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[14] Id., 566. "The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway." Justice Brewer for the Court in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 342 (1893).

[15] Congress had the right to confer upon the Interstate Commerce Commission the power to regulate interstate ferry rates, *N.Y. Central R.R.* v. *Hudson County*, 227 U.S. 248 (1913), and to authorize the Commission to govern the towing of vessels between points in the same State but partly through waters of an adjoining State. *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634 (1944). Congress' power over navigation extends to persons furnishing wharfage, dock, warehouse, and other terminal facilities to a common carrier by water. Hence an order of the United States Maritime Commission banning certain allegedly "unreasonable practices" by terminals in the Port of San Francisco, and prescribing schedules of maximum free time periods and of minimum charges was constitutional. *California* v. *United States*, 320 U.S. 577 (1944). The same power also comprises regulation of the registry enrollment, license, and nationality of ships and vessels, the method of recording bills of sale and mortgages thereon, the rights and duties of seamen, the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime. *See The Lottawanna*, 21 Wall. (88 U.S.) 558, 577 (1875); *Providence & N.Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 589 (1883); *The Hamilton*, 207 U.S. 398 (1907); *O'Donnell* v. *Great Lakes Co.*, 318 U.S. 36 (1943).

[16] *Pollard* v. *Hagan*, 3 How. (44 U.S.) 212 (1845); *Shively* v. *Bowlby*, 152 U.S. 1 (1894).

Congress' power to regulate commerce imposes upon such streams, the States, without the assent of Congress, practically are unable to utilize their prerogative for power development purposes. Sensing no doubt that controlling power to this end must be attributed to some government in the United States and that "in such matters there can be no divided empire," [17] the Court held in *United States* v. *Chandler-Dunbar Co.*,[18] that in constructing works for the improvement of the navigability of a stream, Congress was entitled, as part of a general plan, to authorize the lease or sale of such excess water power as might result from the conservation of the flow of the stream. "If the primary purpose is legitimate," it said, "we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments." [19]

Since the *Chandler-Dunbar* case the Court has come, in effect, to hold that it will sustain any act of Congress which purports to be for the improvement of navigation whatever other purposes it may also embody, nor does the stream involved have to be one which is "navigable in its natural state." Such, at least, seems to be the sum of its holdings in *Arizona* v. *California*,[20] and *United States* v. *Appalachian Power Co.*[21] In the former, the Court, speaking through Justice Brandeis, said that it was not free to inquire into the motives "which induced members of Congress to enact the Boulder Canyon Project Act," adding: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation . . . the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. . . . And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of congressional power." [22]

And in the *Appalachian Power Case*, the Court, abandoning previous holdings which had laid down the doctrine that to be subject to Congress' power to regulate commerce a stream must be

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[17] *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58, 80 (1898).

[18] 229 U.S. 53 (1913).

[19] Id., 73, citing *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U.S. 254 (1891).

[20] 283 U.S. 423 (1931).

[21] 311 U.S. 377 (1940).

[22] 283 U.S., 455–456. *See also United States* v. *Twin City Power Co.*, 350 U.S. 222, 224 (1956).

"navigable in fact," said: "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken," provided there must be a "balance between cost and need at a time when the improvement would be useful. . . . Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. . . . Nor is it necessary for navigability that the use should be continuous. . . . Even absence of use over long periods of years, because of changed conditions, . . . does not affect the navigability of rivers in the constitutional sense." [23]

Furthermore, the Court defined the purposes for which Congress may regulate navigation in the broadest terms. "It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . That authority is as broad as the needs of commerce. . . . Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." [24] These views the Court has since reiterated.[25] Nor is it by virtue of Congress' power over navigation alone that the National Government may develop water power. Its war powers and powers of expenditure in furtherance of the common defense and the general welfare supplement its powers over commerce in this respect.[26]

### Congressional Regulation of Land Transportation

***Federal Stimulation of Land Transportation.***—The settlement of the interior of the country led Congress to seek to facilitate access by first encouraging the construction of highways. In successive acts, it authorized construction of the Cumberland and the National Road from the Potomac across the Alleghenies to the Ohio, reserving certain public lands and revenues from land sales for construction of public roads to new States granted statehood.[1] Acquisition and settlement of California stimulated interest in railway lines to the west, but it was not until the Civil War that Congress voted aid in the construction of a line from the Missouri

[23] 311 U.S., 407, 409-410.
[24] Id., 426.
[25] *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 523-533 *passim* (1941).
[26] *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936).
[1] *Cf. Indiana* v. *United States*, 148 U.S. 148 (1893).

River to the Pacific; four years later, it chartered the Union Pacific Company.[2]

The litigation growing out of these and subsequent activities settled several propositions. First, Congress may provide highways and railways for interstate transportation; [3] second, it may charter private corporations for that purpose; third, it may vest such corporations with the power of eminent domain in the States; and fourth, it may exempt their franchises from state taxation.[4]

***Federal Regulation of Land Transportation.***—Congressional regulation of railroads may be said to have begun in 1866. By the Garfield Act, Congress authorized all railroad companies operating by steam to interconnect with each other "so as to form continuous lines for the transportation of passengers, freight, troops, governmental supplies, and mails, to their destination." [5] An act of the same year provided federal chartering and protection from conflicting state regulations to companies formed to construct and operate telegraph lines.[6] Another act regulated the transportation by railroad of livestock so as to preserve the health and safety of the animals.[7]

Congress' entry into the rate regulation field was preceded by state attempts to curb the abuses of the rail lines in the Middle West, which culminated in the "Granger Movement." Because the businesses were locally owned, the Court at first upheld state laws as not constituting a burden on interstate commerce; [8] but after the various business panics of the 1870's and 1880's drove numerous small companies into bankruptcy and led to consolidation, there emerged great interstate systems. Thus in 1886, the Court held that a State may not set charges for carriage even within its own boundaries of goods brought from without the State or destined to points outside it; that power was exclusively with Congress.[9]

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[2] 12 Stat. 489 (1862); 13 Stat. 356 (1864); 14 Stat. 79 (1866).

[3] The result then as well as now might have followed from Congress' power of spending, independently of the commerce clause, as well as from its war and postal powers, which were also invoked by the Court in this connection.

[4] *Thomson* v. *Union Pacific Railroad,* 9 Wall. (76 U.S.) 579 (1870); *California* v. *Pacific Railroad Co. (Pacific Ry. Cases),* 127 U.S. 1 (1888); *Cherokee Nation* v. *Southern Kansas Railway Co.,* 135 U.S. 641 (1890); *Luxton* v. *North River Bridge Co.,* 153 U.S. 525 (1894).

[5] 14 Stat. 66 (1866).

[6] 14 Stat. 221 (1866).

[7] 17 Stat. 353 (1873).

[8] *Munn* v. *Illinois,* 94 U.S. 113 (1877); *Chicago B. & Q. R. Co.* v. *Illinois,* 94 U.S. 155 (1877); *Peik* v. *Chicago & Nw. Ry. Co.,* 94 U.S. 164 (1877); *Pickard* v. *Pullman Southern Car Co.,* 117 U.S. 34 (1886).

[9] *Wabash, St. L. & P. Ry. Co.* v. *Illinois,* 118 U.S. 557 (1886). A variety of state regulations have been struck down on the burdening-of-commerce rationale. E.g.,

In the following year, Congress passed the original Interstate Commerce Act.[10] A Commission was authorized to pass upon the "reasonableness" of all rates by railroads for the transportation of goods or persons in interstate commerce and to order the discontinuance of all charges found to be "unreasonable." The Commission's basic authority was upheld in *ICC* v. *Brimson*,[11] in which the Court upheld the validity of the Act as a means "necessary and proper" for the enforcement of the regulatory commerce power and in which it also sustained the Commission's power to go to court to secure compliance with its orders. Later decisions circumscribed somewhat the ICC's power.[12]

Expansion of the Commission's authority came in the Hepburn Act of 1906[13] and the Mann-Elkins Act of 1910.[14] By the former, the Commission was explicitly empowered, after a full hearing on a complaint, "to determine and prescribe just and reasonable" maximum rates; by the latter, it was authorized to set rates on its own initiative and empowered to suspend any increase in rates by a carrier until it reviewed the change. At the same time, the Commission's jurisdiction was extended to telegraphs, telephones, and cables.[15] By the Motor Carrier Act of 1935,[16] the ICC was authorized to regulate the transportation of persons and property by motor vehicle common carriers.

The powers of the Commission today are largely defined by the Transportation Acts of 1920[17] and 1940.[18] The jurisdiction of the

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*Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (train length); *Napier* v. *Atlantic Coast Line R.*, 272 U.S. 605 (1926) (locomotive accessories); *Pennsylvania R.* v. *Public Service Comm.*, 250 U.S. 566 (1919). But the Court has largely exempted regulations with a safety purpose, even a questionable one. *Brotherhood of Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U.S. 129 (1968).

[10] 24 Stat. 379 (1887).

[11] 154 U.S. 447 (1894).

[12] *ICC* v. *Alabama Midland Ry.*, 168 U.S. 144 (1897); *Cincinnati, N.O. & Texas Pacific Ry.* v. *ICC*, 162 U.S. 184 (1896).

[13] 34 Stat. 584 (1906).

[14] 36 Stat. 539 (1910).

[15] These regulatory powers are now vested, of course, in the Federal Communications Commission.

[16] 49 Stat. 543 (1935).

[17] 41 Stat. 474 (1920).

[18] 54 Stat. 898 (1940), U.S.C. § 1 *et seq.* The two acts were "intended . . . to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers." *United States* v. *Pennsylvania Railroad Co.*, 323 U.S. 612, 618-619 (1945). The ICC's powers include authority to determine the reasonableness of a joint through international rate covering transportation in the United States and abroad and to order the domestic carriers to pay reparations in the amount by which the rate is unreasonable. *Canada Packers* v. *Atchison, T. & S. F. Ry. Co.*, 385 U.S. 182 (1966), and cases cited.

Commission covers not only the characteristics of the rail, motor, and water carriers in commerce among the States but also the issuance of securities by them and all consolidations of existing companies or lines.[19] Further, the Commission was charged with regulating so as to foster and promote the meeting of the transportation needs of the country. Thus, from a regulatory exercise originally begun as a method of restraint there has emerged a policy of encouraging a consistent national transportation policy.[20]

***Federal Regulation of Intrastate Rates (The Shreveport Doctrine).***—Although its statutory jurisdiction did not apply to intrastate rate systems, the Commission early asserted the right to pass on rates which, though in effect on intrastate lines, gave these lines competitive advantages over interstate lines the rates of which the Commission had set. This power the Supreme Court upheld in a case involving a line operating wholly intrastate in Texas but which paralleled within Texas an interstate line operating between Louisiana and Texas; the Texas rate body had fixed the rates of the intrastate line substantially lower than the rate fixed by the ICC on the interstate line. "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the States and not the Nation, would be supreme in the national field." [21]

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[19] Disputes between the ICC and other Government agencies over mergers have occupied a good deal of the Court's time. *Cf. United States* v. *ICC*, 396 U.S. 491 (1970). *See also County of Marin* v. *United States*, 356 U.S. 412 (1958); *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944); *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968).

[20] Among the various provisions of the Interstate Commerce Act which have been upheld are: a section penalizing shippers for obtaining transportation at less than published rates, *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); a section construed as prohibiting the hauling of commodities in which the carrier had at the time of haul a proprietary interest, *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909); a section abrogating life passes, *Louisville & Nashville R. Co.* v. *Mottley*, 219 U.S. 467 (1911); a section authorizing the ICC to regulate the entire bookkeeping system of interstate carriers, including intrastate accounts, *ICC* v. *Goodrich Transit Co.*, 224 U.S. 194 (1912); a clause affecting the charging of rates different for long and short hauls, *Intermountain Rate Cases*, 234 U.S. 476 (1914).

[21] *Houston & Texas Railway* v. *United States*, 234 U.S. 342, 351-352 (1914). *See also, American Express Co.* v. *Caldwell*, 244 U.S. 617 (1917); *Pacific Tel. & Tel. Co.* v. *Tax Comm.*, 297 U.S. 403 (1936); *Weiss* v. *United States*, 308 U.S. 321 (1939); *Bethlehem Steel Co.* v. *State Board*, 330 U.S. 767 (1947); *United States* v. *Walsh*, 331 U.S. 432 (1947).

The same holding was applied in a subsequent case in which the Court upheld the Commission's action in annulling intrastate passenger rates which it found to be unduly low in comparison with the rates which the Commission had established for interstate travel, thus tending to thwart, in deference to a local interest, the general purpose of the act to maintain an efficient transportation service for the benefit of the country at large.[22]

***Federal Protection of Labor in Interstate Rail Transportation.***— Federal entry into the field of protective labor legislation and the protection of organization efforts of workers began in connection with the railroads. The Safety Appliance Act of 1893,[23] applying only to cars and locomotives engaged in moving interstate traffic, was amended in 1903 so as to embrace much of the intrastate rail systems on which there was any connection with interstate commerce.[24] The Court sustained this extension in language much like that it would use in the *Shreveport* case three years later.[25] These laws were followed by the Hours of Service Act of 1907,[1] which prescribed maximum hours of employment for rail workers in interstate or foreign commerce. The Court sustained the regulation as a reasonable means of protecting workers and the public from the hazards which could develop from long, tiring hours of labor.[2]

Most far-reaching of these regulatory measures were the Federal Employers Liability Acts of 1906 [3] and 1908.[4] These laws were intended to modify the common-law rules with regard to the liability of employers for injuries suffered by their employees in the course of their employment and under which employers were generally not liable. Rejecting the argument that regulation of such relationships between employers and employees was a reserved state power, the Court adopted the argument of the United States that Congress was empowered to do anything which it might deem appropriate to save interstate commerce from interruption or burden-

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[22] *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563 (1922). *Cf. Colorado* v. *United States*, 271 U.S. 153 (1926), upholding an ICC order directing abandonment of an intrastate branch of an interstate railroad. *But see North Carolina* v. *United States*, 325 U.S. 507 (1945), setting aside an ICC disallowance of intrastate rates set by a state commission as unsupported by the evidence and findings.

[23] 27 Stat. 531, 45 U.S.C. §§ 1–7.

[24] 32 Stat. 943, 45 U.S.C. §§ 8–10.

[25] *Southern Railway Co.* v. *United States*, 222 U.S. 20 (1911). *See also Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916); *United States* v. *California*, 297 U.S. 175 (1936); *United States* v. *Seaboard Air Line R.*, 361 U.S. 78 (1959).

[1] 34 Stat. 1415, 45 U.S.C. §§ 61–64.

[2] *Baltimore & Ohio Railroad* v. *ICC*, 221 U.S. 612 (1911).

[3] 34 Stat. 232, held unconstitutional in part in the *Employers' Liability Cases*, 207 U.S. 463 (1908).

[4] 35 Stat. 65, 45 U.S.C. §§ 51–60.

ing and that inasmuch as the labor of employees was necessary for the function of commerce Congress could certainly act to ameliorate conditions which made labor less efficient, less economical, and less reliable. Assurance of compensation for injuries growing out of negligence in the course of employment was such a permissible regulation.[5]

Legislation and litigation dealing with the organizational rights of rail employees are dealt with elsewhere.[6]

***Regulation of Other Agents of Carriage and Communications.***— In 1914, the Court affirmed the power of Congress to regulate the transportation of oil and gas in pipe lines from one State to another and held that this power applied to the transportation even though the oil or gas was the property of the lines.[7] Subsequently, the Court struck down state regulation of rates of electric current generated within that State and sold to a distributor in another State as a burden on interstate commerce.[8] Proceeding on the assumption that the ruling meant the Federal Government had the power, Congress in the Federal Power Act of 1935 conferred on the Federal Power Commission authority to regulate the wholesale distribution of electricity in interstate commerce[9] and three years later vested the FPC with like authority over natural gas moving in interstate commerce.[10] Thereafter, the Court sustained the power of the Commission to set the prices at which gas originating in one State and transported into another should be sold to distributors wholesale in the latter State.[11] "The sale of natural gas originating in the State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress . . . . The authority of Congress to regulate the prices of commodities in interstate commerce is at

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[5] *The Second Employers Liability Cases*, 223 U.S. 1 (1912). For a longer period, a Court majority reviewed a surprising large number of FELA cases, almost uniformly expanding the scope of recovery under the statute. *Cf. Rogers* v. *Missouri Pacific R.*, 352 U.S. 500 (1957). This practice was criticized both within and without the Court, *cf. Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Hart, "Foreword: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 96–98 (1959), and has been discontinued.

[6] *Infra, pp.* 183–184, 185.

[7] *The Pipe Line Cases*, 234 U.S. 548 (1914). *See also State Comm.* v. *Wichita Gas Co.*, 290 U.S. 561 (1934); *Eureka Pipe Line Co.* v. *Hallanan*, 257 U.S. 265 (1921); *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277 (1921); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Missouri ex rel. Barrett* v. *Kansas Gas Co.*, 265 U.S. 298 (1924).

[8] *Public Utilities Comm.* v. *Attleboro Co.*, 273 U.S. 83 (1927). *See also Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932); *Pennsylvania Power Co.* v. *FPC*, 343 U.S. 414 (1952).

[9] 49 Stat. 863, 16 U.S.C. §§ 791a–825u.

[10] 52 Stat. 821, 15 U.S.C. §§ 717–717w.

[11] *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).

least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce." [12]

Other acts regulating commerce and communication which originated in this period have evoked no basic constitutional challenge. These include the Federal Communications Act of 1934, providing for the regulation of interstate and foreign communication by wire and radio,[13] and the Civil Aeronautics Act of 1938, providing for the regulation of all phases of airborne commerce, foreign and interstate.[14]

**Congressional Regulation of Commerce as Traffic**

***The Sherman Act: Sugar Trust Case.***—Congress' chief effort to regulate commerce in the primary sense of "traffic" is embodied in the Sherman Antitrust Act of 1890, the opening section of which declares "every contract, combination in the form of trust or otherwise," or "conspiracy in restraint of trade and commerce among the several States, or with foreign nations" to be "illegal," while the second section makes it a misdemeanor for anybody to "monopolize or attempt to monopolize any part of such commerce." [1] The act was passed to curb the growing tendency to form industrial combinations and the first case to reach the Court under it was the famous *Sugar Trust Case, United States* v. *E. C. Knight Co.*[2] Here the Government asked for the cancellation of certain agreements, whereby the American Sugar Refining Company, had "acquired," it was conceded, "nearly complete control of the manufacture of refined sugar in the United States."

The question of the validity of the Act was not expressly discussed by the Court, but was subordinated to that of its proper construction. The Court, in pursuance of doctrines of constitutional

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[12] Id., 582. Sales to distributors by a wholesaler of natural gas which is delivered to it from out-of-state sources are subject to FPC jurisdiction. *Colorado-Wyoming Co.* v. *FPC*, 324 U.S. 626 (1945). *See also Illinois Gas Co.* v. *Public Service Co.*, 314 U.S. 498 (1942); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950). In *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), the Court ruled that an independent company engaged in one State in production, gathering, and processing of natural gas which it thereafter sells in the same State to pipelines which transport and sell the gas in other States is subject to FPC jurisdiction. *See also California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

[13] 48 Stat. 1064, 47 U.S.C. § 151 *et seq. Cf. United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), on the regulation of community antenna television systems (CATV).

[14] 52 Stat. 973, as amended, 72 Stat. 731 (1958), 49 U.S.C. App. §§ 1151 *et seq.*, 1301 *et seq.*

[1] 26 Stat. 209 (1890); 15 U.S.C. §§ 1–7.

[2] 156 U.S. 1 (1895).

law which were then dominant with it, turned the Act from its intended purpose and destroyed its effectiveness for several years, as that of the Interstate Commerce Act was being contemporaneously impaired. The following passage early in Chief Justice Fuller's opinion for the Court, sets forth the conception of the federal system that controlled the decision: "It is vital that the independence of the commercial power and of the police power, and the delimination between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality." [3]

In short, what was needed, the Court felt, was a hard and fast line between the two spheres of power, and in a series of propositions it endeavored to lay down such a line: (1) production is always local, and under the exclusive domain of the States; (2) commerce among the States does not begin until goods "commence their final movement from their State of origin to that of their destination"; (3) the sale of a product is merely an incident of its production and, while capable of "bringing the operation of commerce into play," affects it only incidentally; (4) such restraint as would reach commerce, as above defined, in consequence of combinations to control production "in all its forms," would be "indirect, however inevitable and whatever its extent," and as such beyond the purview of the Act.[4] Applying the above reasoning to the case before it, the Court proceeded: "The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function.

"Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopo-

[3] Id., 13.
[4] Id., 13-16.

lize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." [5]

***Sherman Act Revived.***—Four years later came the case of *Addyston Pipe and Steel Co.* v. *United States,*[6] in which the Antitrust Act was successfully applied as against an industrial combination for the first time. The agreements in the case, the parties to which were manufacturing concerns, effected a division of territory among them, and so involved, it was held, a "direct" restraint on the distribution and hence of the transportation of the products of the contracting firms. The holding, however, did not question the doctrine of the earlier case, which in fact continued substantially undisturbed until 1905, when *Swift and Co.* v. *United States,*[7] was decided.

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[5] Id., 17. The doctrine of the case boiled down to the proposition that commerce was transportation only, a doctrine which Justice Harlan undertook to refute in his notable dissenting opinion. "Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations" Id., 22. "Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. *McCulloch* v. *Maryland,* 4 Wheat. 316, 405," Id., 33.

[6] 175 U.S. 211 (1899).

[7] 196 U.S. 375 (1905). The Sherman Act was applied to break up combinations of interstate carriers in *United States* v. *Trans-Missouri Freight Assn.,* 166 U.S. 290 (1897); *United States* v. *Joint-Traffic Association,* 171 U.S. 505 (1898); and *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904).

Alluding in his opinion for the Court in *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U.S. 219 (1948), to the *Sugar Trust* case, Justice Rutledge said: "Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving 'primarily' only 'production' or 'manufacturing,' although the vast part of the sugar produced was sold and shipped interstate, and this was the main end of the enterprise. The interstate distributing phase, however, was regarded as being only 'incidentally,' 'indirectly,' or 'remotely' involved; and to be 'incidental,' 'indirect,' or 'remote' was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. *See Wickard* v. *Filburn,* 317 U.S. at 119 *et seq.* (1942).

***The "Current of Commerce" Concept: The Swift Case.***—Defendants in *Swift* were some thirty firms engaged in Chicago and other cities in the business of buying livestock in their stockyards, in converting it at their packing houses into fresh meat, and in the sale and shipment of such fresh meat to purchasers in other States. The charge against them was that they had entered into a combination to refrain from bidding against each other in the local markets, to fix the prices at which they would sell, to restrict shipments of meat, and to do other forbidden acts. The case was appealed to the Supreme Court on defendants' contention that certain of the acts complained of were not acts of interstate commerce and so did not fall within a valid reading of the Sherman Act. The Court, however, sustained the Government on the ground that the "scheme as a whole" came within the act, and that the local activities alleged were simply part and parcel of this general scheme.[8]

Referring to the purchase of livestock at the stockyards, the Court, speaking by Justice Holmes, said: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."[9] Likewise the sales alleged of fresh meat at the slaughtering places fell within the general design. Even if they imported a technical passing of title at the slaughtering places, they also imported that the sales were to persons in other States, and that shipments to such States were part of the transaction.[10] Thus, sales of the type which in the *Sugar Trust case* were thrust to one side as immaterial from the point of view of the law, because they enabled the manufacturer "to fulfill its function," were here treated as merged in an interstate commerce stream.

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"The *Knight* decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal." Id., 229–239.

[8] *Swift and Co.* v. *United States*, 196 U.S. 375, 396 (1905).

[9] Id., 398–399.

[10] Id., 399–401.

Thus, the concept of commerce as *trade*, that is, as *traffic*, again entered the constitutional law picture, with the result that conditions which directly affected interstate trade could not be dismissed on the ground that they affected interstate commerce, in the sense of interstate *transportation*, only "indirectly." Lastly, the Court added these significant words: "But we do not mean to imply that the rule which marks the point at which State taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States." [11] That is to say, the line that confines state power from one side does not always confine national power from the other. Even though the line accurately divides the subject matter of the complementary spheres, national power is always entitled to take on the additional extension that is requisite to guarantee its effective exercise and is furthermore supreme.

***The Danbury Hatters Case.***—In this respect, the *Swift* case only states what the *Shreveport* case was later to declare more explicitly, and the same may be said of an ensuing series of cases in which combinations of employees engaged in such intrastate activities as manufacturing, mining, building, construction, and the distribution of poultry were subjected to the penalties of the Sherman Act because of the effect or intended effect of their activities on interstate commerce.[12]

***Stockyards and Grain Futures Acts.***—In 1921 Congress passed the Packers and Stockyards Act [13] whereby the business of commission men and livestock dealers in the chief stockyards of the country was brought under national supervision, and in the year following it passed the Grain Futures Act [14] whereby exchanges dealing in grain futures were subjected to control. The decisions of the Court sustaining these measures both built directly upon the *Swift* case.

In *Stafford* v. *Wallace*,[15] which involved the former act, Chief Justice Taft, speaking for the Court, said: "The object to be secured

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[11] Id., 400.

[12] *Loewe* v. *Lawlor (The Danbury Hatters Case)*, 208 U.S. 274 (1908); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921); *Coronado Co.* v. *United Mine Workers*, 268 U.S. 295 (1925); *United States* v. *Bruins*, 272 U.S. 549 (1926); *Bedford Co.* v. *Stone Cutters Assn.*, 274 U.S. 37 (1927); *Local 167* v. *United States*, 291 U.S. 293 (1934); *Allen Bradley Co.* v. *Union*, 325 U.S. 797 (1945); *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186 (1954); *United States* v. *Green*, 350 U.S. 415 (1956); *Callanan* v. *United States*, 364 U.S. 587 (1961).

[13] 42 Stat. 159, 7 U.S.C. §§ 171–183, 191–195, 201–203.

[14] 42 Stat. 998 (1922), 7 U.S.C. §§ 1–9, 10a–17.

[15] 258 U.S. 495 (1922).

by the act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market." [16] The stockyards, therefore, were "not a place of rest or final destination." They were "but a throat through which the current flows," and the sales there were not merely local transactions. "They do not stop the flow;—but, on the contrary" are "indispensable to its continuity." [17]

In *Chicago Board of Trade* v. *Olsen,*[18] involving the Grain Futures Act, the same course of reasoning was repeated. Speaking of the *Swift* case, Chief Justice Taft remarked: "That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of a great interstate movement, which taken alone are intrastate, to characterize the movement as such." [19]

Of special significance, however, is the part of the opinion which was devoted to showing the relation between future sales and cash sales, and hence the effect of the former upon the interstate grain trade. The test, said the Chief Justice, was furnished by the question of price. "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." [20] Thus a practice which demonstrably affects prices would also affect interstate trade "directly," and so, even though local in itself, would fall within the regulatory power of Congress. In the following passage, indeed, Chief Justice Taft whittled down, in both cases, the "direct-indirect" formula to the vanishing point: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger to meet it. This court will certainly not substi-

[16] Id., 514.

[17] Id., 515–516. *See also Lemke* v. *Farmers' Grain Co.*, 258 U.S. 50 (1922); *Minnesota* v. *Blasius*, 290 U.S. 1 (1933).

[18] 262 U.S. 1 (1923).

[19] Id., 35.

[20] Id., 40.

tute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent." [21]

It was in reliance on the doctrine of these cases that Congress first set to work to combat the Depression in 1933 and the years immediately following. But in fact, much of its legislation at this time marked a wide advance upon the measures just passed in review. They did not stop with regulating traffic among the States and the instrumentalities thereof; they also essayed to govern production and industrial relations in the field of production. Confronted with this expansive exercise of Congress' power, the Court again deemed itself called upon to define a limit to the commerce power that would save to the States their historical sphere, and especially their customary monopoly of legislative power in relation to industry and labor management.

***Securities and Exchange Commission.***—Not all antidepression legislation, however, was of this new approach. The Securities Exchange Act of 1934 [22] and the Public Utility Company Act ("Wheeler-Rayburn Act") of 1935 [23] were not. The former created the Securities and Exchange Commission, and authorized it to lay down regulations designed to keep dealing in securities honest and aboveboard and closed the channels of interstate commerce and the mails to dealers refusing to register under the act. The latter required the companies which are governed by it to register with the Securities and Exchange Commission and to inform it concerning their business, organization and financial structure, all on pain of being prohibited use of the facilities of interstate commerce and the mails; while by § 11, the so-called "death sentence" clause, the same act closed after a certain date the channels of interstate communication to certain types of public utility companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. All these provisions have been sustained,[24] *Gibbons* v. *Ogden*, furnishing the Court its principle reliance.

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[21] Id., 37, quoting *Stafford* v. *Wallace*, 258 U.S. 495, 521 (1922).

[22] 48 Stat. 881, 15 U.S.C. § 77b *et seq.*

[23] 49 Stat. 803, 15 U.S.C. §§ 79–79z–6.

[24] *Electric Bond Co.* v. *SEC*, 303 U.S. 419 (1938); *North American Co.* v. *SEC*, 327 U.S. 686 (1946); *American Power Co.*, v. *SEC*, 329 U.S. 90 (1946).

### Congressional Regulation of Production and Industrial Relations: Antidepression Legislation

In the words of Chief Justice Hughes, spoken in a case which was decided a few days after President Franklin D. Roosevelt's first inauguration the problem which confronted the new Administration was clearly set forth. "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." [1]

***National Industrial Recovery Act.***—The initial effort of Congress to deal with this situation was embodied in the National Industrial Recovery Act of June 16, 1933.[2] The opening section of the Act asserted the existence of "a national emergency productive of widespread unemployment and disorganization of industry which" burdened "interstate and foreign commerce," affected "the public welfare," and undermined "the standards of living of the American people." To affect the removal of these conditions the President was authorized, upon the application of industrial or trade groups, to approve "codes of fair competition," or to prescribe the same in cases where such applications were not duly forthcoming. Among other things such codes, of which eventually more than 700 were promulgated, were required to lay down rules of fair dealing with customers and to furnish labor certain guarantees respecting hours, wages and collective bargaining. For the time being business and industry were to be cartelized on a national scale.

In the case of *A.L.A. Schechter Poultry Corp.* v. *United States,*[3] one of these codes, the Live Poultry Code, was pronounced unconstitutional. Although it was conceded that practically all poultry handled by the Schechters came from outside the State, and hence via interstate commerce, the Court held, nevertheless, that once the chickens came to rest in the Schechter's wholesale market, interstate commerce in them ceased. The act, however, also purported to govern business activities which "affected" interstate commerce. This, Chief Justice Hughes held, must be taken to mean "directly" affect such commerce: "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, . . . there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized govern-

[1] *Appalachian Coals* v. *United States,* 288 U.S. 344, 372 (1933).
[2] 48 Stat. 195.
[3] 295 U.S. 495 (1935).

ment." [4] In short, the case was governed by the ideology of the *Sugar Trust* case, which was not mentioned in the Court's opinion.[5]

***Agricultural Adjustment Act.***—Congress' second attempt to combat the Depression comprised the Agricultural Adjustment Act of 1933.[6] As is pointed out elsewhere, the measure was set aside as an attempt to regulate production, a subject which was held to be "prohibited" to the United States by the Tenth Amendment.[7]

***Bituminous Coal Conservation Act.***—The third measure to be disallowed was the Guffey-Snyder Bituminous Coal Conservation Act of 1935.[8] The statute created machinery for the regulation of the price of soft coal, both that sold in interstate commerce and that sold "locally," and other machinery for the regulation of hours of labor and wages in the mines. The clauses of the act dealing with these two different matters were declared by the act itself to be separable so that the invalidity of the one set would not affect the validity of the other, but this strategy was ineffectual. A majority of the Court, speaking by Justice Sutherland, held that the act constituted one connected scheme of regulation which, inasmuch as it invaded the reserved powers of the States over conditions of employment in productive industry, was violative of the Constitution.[9] Justice Sutherland's opinion set out from Chief Justice Hughes' assertion in the *Schechter* case of the "fundamental" character of the distinction between "direct" and "indirect" effects, that is to say,

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[4] Id., 548. *See also* id., 546.

[5] In *United States* v. *Sullivan*, 332 U.S. 689 (1948), the Court interpreted the Federal Food, Drug, and Cosmetics Act of 1938 as applying to the sale by a retailer of drugs purchased from his wholesaler within the State nine months after their interstate shipment had been completed. The Court, speaking by Justice Black, cited *United States* v. *Walsh*, 331 U.S. 432 (1947); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States* v. *Darby*, 312 U.S. 100 (1941). The last three of these cases are discussed below. *Infra*, *pp.* 187–190, Justice Frankfurter dissented on the basis of *FTC* v. *Bunte Bros.*, 312 U.S. 349 (1941). It is apparent that the *Schechter* case has been thoroughly repudiated so far as the distinction "direct" and "indirect" effects is concerned. *Cf. Perez* v. *United States*, 402 U.S. 146 (1971). *See also McDermott* v. *Wisconsin*, 228 U.S. 115 (1913), which preceded the *Schechter* decision by more than two decades.

The N.I.R.A., however, was found to have several other constitutional infirmities besides its disregard, as illustrated by the Live Poultry Code, of the "fundamental" distinction between "direct" and "indirect" effects, namely, the delegation of uncanalized legislative power, the absence of any administrative procedural safeguards, the absence of judicial review, and the dominant role played by private groups in the general scheme of regulation. These objections are dealt with elsewhere in this volume. *Supra*, *pp.* 75–76.

[6] 48 Stat. 31 (1933), 7 U.S.C. §§ 601–604, 607–608, 608a–612, 613–619, 620, 623–624.

[7] *United States* v. *Butler*, 297 U.S. 1, 63–64, 68 (1936).

[8] 49 Stat. 991.

[9] *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).

from the doctrine of the *Sugar Trust* case. It then proceeded: "Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character." [10]

***Railroad Retirement Act.***—Still pursuing the idea of protecting commerce and the labor engaged in it concurrently, Congress, by the Railroad Retirement Act of June 27, 1934,[11] ordered the compulsory retirement of superannuated employees of interstate carriers, and provided that they be paid pensions out of a fund comprising compulsory contributions from the carriers and their present and future employees. In *Railroad Retirement Board* v. *Alton R. Co.*,[12] however, a closely divided Court held this legislation to be in excess of Congress' power to regulate commerce and contrary to the due process clause of the Fifth Amendment. Said Justice Roberts for the majority: "We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation." [13]

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[10] Id., 308–309.
[11] 48 Stat. 1283.
[12] 295 U.S. 330 (1935).
[13] Id., 374.

Chief Justice Hughes, speaking for the dissenters, contended, on the contrary, that "the morale of the employees [had] an important bearing upon the efficiency of the transportation service." He added: "The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable." [14] Under subsequent legislation, an excise is levied on interstate carriers and their employees, while by separate but parallel legislation a fund is created in the Treasury out of which pensions are paid along the lines of the original plan. The constitutionality of this scheme appears to be taken for granted in *Railroad Retirement Board* v. *Duquesne Warehouse Co.*[15]

***National Labor Relations Act.***—The case in which the Court reduced the distinction between "direct" and "indirect" effects to the vanishing point and thereby placed Congress in the position to regulate productive industry and labor relations in these industries was *NLRB* v. *Jones & Laughlin Steel Corp.*[16] Here the statute involved was the National Labor Relations Act of 1935,[17] which declared the right of workers to organize, forbade unlawful employer interference with this right, established procedures by which workers could choose exclusive bargaining representatives with which

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[14] Id., 379, 384.

[15] 326 U.S. 446 (1946). Indeed, in a case decided in June, 1948, Justice Rutledge, speaking for a majority of the Court, listed the *Alton* case as one "foredoomed to reversal," though the formal reversal has never taken place. *See Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 230 (1948). Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976).

[16] 301 U.S. 1 (1937). A major political event had intervened between this decision and those described in the preceding pages. President Roosevelt, angered at the Court's invalidation of much of his depression program, proposed a "reorganization" of the Court by which he would have been enabled to name one new Justice for each Justice on the Court who was more than 70 years old, in the name of "judicial efficiency". The plan was defeated in the Senate, in part perhaps because in such cases as *Jones & Laughlin* a Court majority began to demonstrate sufficient "judicial efficiency." *See* Leuchtenberg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," 1966 Sup. Ct. Rev. 347 (P. Kurland ed.); Mason, "Harlan Fiske Stone and FDR's Court Plan," 61 Yale L. J. 791 (1952); 2 M. Pusey, *Charles Evans Hughes* (Cambridge: 1951), 759–765.

[17] 49 Stat. 449, as amended, 29 U.S.C. § 151 *et seq.*

employers were required to bargain, and created a board to oversee all these processes.[18]

The Court, speaking through Chief Justice Hughes, upheld the Act and found the corporation to be subject to the Act. "The close and intimate effect," he said, "which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local." Nor will it do to say that such effect is "indirect." Considering defendant's "far-flung activities," the effect of strife between it and its employees ". . . would be immediate and [it] might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience." [19]

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[18] The NLRA was enacted not only against the backdrop of depression, although obviously it went far beyond being a mere antidepression measure, but Congress could as well look to its experience in railway labor legislation. In 1898, Congress passed the Erdman Act, 30 Stat. 424, which attempted to influence the unionization of railroad workers and facilitate negotiations with employers through mediation. The statute fell largely into disuse because the railroads refused to mediate. Additionally, in *Adair* v. *United States,* 208 U.S. 161 (1908), the Court struck down a section of the law outlawing "yellow-dog contracts," by which employers exacted promises of workers to quit or not to join unions as a condition of employment. The Court held the section not to be a regulation of commerce, there being no connection between an employee's membership in a union and the carrying on of interstate commerce. *Cf. Coppage* v. *Kansas,* 236 U.S. 1 (1915).

The Court did uphold in *Wilson* v. *New,* 243 U.S. 332 (1917), a congressional settlement of a threatened rail strike through the enactment of an eight-hour day and a time-and-a-half for overtime for all interstate railway employees. The national emergency confronting the Nation was cited by the Court but with the implication that the power existed in more normal times, suggesting that Congress' powers were not as limited as some judicial decisions had indicated.

Congress' enactment of the Railway Labor Act in 1926, 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.,* was sustained by a Court decision admitting the connection between interstate commerce and union membership as a substantial one. *Texas & N.L.R. Co.* v. *Brotherhood of Railway Clerks,* 281 U.S. 548 (1930). A subsequent decision sustained the application of the Act to "back shop" employees of an interstate carrier who engaged in making heavy repairs on locomotives and cars withdrawn from service for long periods, the Court finding that the activities of these employees were related to interstate commerce. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937).

[19] *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 38, 41–42 (1937).

While the Act was thus held to be within the constitutional powers of Congress in relation to a productive concern because the interruption of its business by strike "might be catastrophic," the decision was forthwith held to apply also to two minor concerns,[20] and in a later case the Court stated specifically that the smallness of the volume of commerce affected in any particular case is not a material consideration.[21] More recently the act was declared to be applicable to a local retail auto dealer on the ground that he was an integral part of the manufacturer's national distribution system,[22] to a labor dispute arising during alteration of a county courthouse because one-half of the cost—$225,000—was attributable to materials shipped from out-of-State,[23] and to a dispute involving a retail distributor of fuel oil, all of whose sales were local, but who obtained the oil from a wholesaler who imported it from another State.[24]

Indeed, "[t]his Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." [25] Thus the board has formulated jurisdictional standards which assume the requisite effect on interstate commerce from a prescribed dollar volume of business and these standards have been implicitly approved by the Court.[1]

***Fair Labor Standards Act.***—In 1938, Congress enacted the Fair Labor Standards Act. The measure prohibited not only the shipment in interstate commerce of goods manufactured by employees whose wages are less than the prescribed maximum but also the employment of workmen in the production of goods for such commerce at other than the prescribed wages and hours. Interstate commerce was defined by the act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

It was further provided that "for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [that is, for interstate commerce] if such employee was em-

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[20] *NLRB* v. *Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937).

[21] *NLRB* v. *Fainblatt*, 306 U.S. 601, 606 (1939).

[22] *Howell Chevrolet Co.* v. *NLRB*, 346 U.S. 482 (1953).

[23] *Journeymen Plumbers' Union* v. *County of Door*, 359 U.S. 354 (1959).

[24] *NLRB* v. *Reliance Fuel Oil Co.*, 371 U.S. 224 (1963).

[25] Id., 226. *See also Guss* v. *Utah Labor Board*, 353 U.S. 1, 3 (1957); *NLRB* v. *Fainblatt*, 306 U.S. 601, 607 (1939).

[1] *NLRB* v. *Reliance Fuel Oil Co.*, 371 U.S. 224, 225 n. 2 (1963); *Liner* v. *Jafco*, 375 U.S. 301, 303 n. 2 (1964).

ployed . . . in any process or occupation directly essential to the production thereof in any State." [2] Sustaining an indictment under the act, a unanimous Court, speaking through Chief Justice Stone, said: "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows." [3] In support of the decision the Court invoked Chief Justice Marshall's reading of the necessary and proper clause in *McCulloch* v. *Maryland* and his reading of the commerce clause in *Gibbons* v. *Ogden.*[4] Objections purporting to be based on the Tenth Amendment were met from the same point of view: "Our conclusion is unaffected by the Tenth Amendment which provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new National Government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers." [5]

Subsequent decisions of the Court took a very broad view of which employees should be covered by the Act [6] and in 1949 Con-

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[2] 52 Stat. 1060, as amended, 63 Stat. 910 (1949). The 1949 amendment substituted the phrase "in any process or occupation directly essential to the production thereof in any State" for the original phrase "in any process or occupation necessary to the production thereof in any State." In *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 317 (1960), the Court noted that the change "manifests the view of Congress that on occasion courts . . . had found activities to be covered, which . . . [Congress now] deemed too remote from commerce or too incidental to it." The 1961 amendments to the Act, 75 Stat. 65, departed from previous practices of extending coverage to employees individually connected to interstate commerce to cover all employees of any "enterprise" engaged in commerce or production of commerce; thus, there was an expansion of employees covered but not, of course, of employers, 29 U.S.C. § 201 *et seq.* *See* 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a).

[3] *United States* v. *Darby*, 312 U.S. 100, 115 (1941).

[4] Id., 113, 114, 118.

[5] Id., 123–124.

[6] E.g., *Kirschbaum* v. *Walling*, 316 U.S. 517 (1942) (operating and maintenance employees of building, part of which was rented to business producing goods for interstate commerce); *Walton* v. *Southern Package Corp.*, 320 U.S. 540 (1944) (night watchman in a plant the substantial portion of the production of which was shipped in interstate commerce); *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944) (employees on stand-by auxiliary fire-fighting service of an employer engaged in interstate com-

gress to some degree narrowed the permissible range of coverage and disapproved some of the Court's decisions.[7] But in 1961,[8] with extensions in 1966,[9] Congress itself expanded by several million persons the coverage of the Act, introducing the "enterprise" concept by which all employees in a business which produced anything in commerce or affected commerce were brought within the protection of the minimum wage-maximum hours standards.[10] The "enterprise concept" was sustained by the Court in *Maryland* v. *Wirtz.*[11] Justice Harlan for a unanimous Court on this issue found the extension entirely proper on the basis of two theories: one, a business' competitive position in commerce is determined in part by all its significant labor costs, and not just those costs attributable to its employees engaged in production in interstate commerce, and, two, labor peace and thus smooth functioning of interstate commerce was facilitated by the termination of substandard labor conditions affecting all employees and not just those actually engaged in interstate commerce.[12]

***Agricultural Marketing Agreement Act.***—Meanwhile Congress had returned to the task of bolstering agriculture by passing the Agricultural Marketing Agreement Act of June 3, 1937,[13] authorizing the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs "in the current of interstate or foreign commerce or . . . directly burdens. obstructs or affects interstate or foreign commerce in such commodity or product thereof." In *United States* v. *Wrightwood Dairy Co.,*[14] the Court sustained an order of the Secre-

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merce); *Borden Co.* v. *Borella,* 325 U.S. 679 (1945) (maintenance employees in building housing company's central offices where management was located though the production of interstate commerce was elsewhere); *Martino* v. *Michigan Window Cleaning Co.,* 327 U.S. 173 (1946) (employees of a window-cleaning company the principal business of which was performed on windows of industrial plants producing goods for interstate commerce); *Mitchell* v. *Lublin, McGaughy & Associates,* 358 U.S. 207 (1959) (nonprofessional employees of architectural firm working on plans for construction of air bases, bus terminals, and radio facilities).

[7] *Cf. Mitchell* v. *H. B. Zachry Co.,* 362 U.S. 310, 316–318 (1960).

[8] 75 Stat. 65.

[9] 80 Stat. 830.

[10] 29 U.S.C. §§ 203(r), 203(s).

[11] 392 U.S. 183 (1968).

[12] Another aspect of this case was overruled in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

[13] 50 Stat. 246, 7 U.S.C. § 601 *et seq.*

[14] 315 U.S. 110 (1942). The Court had previously upheld other legislation which regulated agricultural production through limitations on sales in or affecting interstate commerce. *Currin* v. *Wallace,* 306 U.S. 1 (1939); *Mulford* v. *Smith,* 307 U.S. 38 (1939).

tary of Agriculture fixing the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground of its applying to milk produced and sold intrastate. Sustaining the order the Court said: "Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." [15]

In *Wickard* v. *Filburn* [16] a still deeper penetration by Congress into the field of production was sustained. As amended by the act of 1941, the Agricultural Adjustment Act of 1938,[17] regulated production even when not intended for commerce but wholly for consumption on the producer's farm. Sustaining this extension of the act, the Court pointed out that the effect of the statute was to support the market. "It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Homegrown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm grown, if wholly outside the

[15] Id., 118–119.
[16] 317 U.S. 111 (1942).
[17] 52 Stat. 31, 7 U.S.C. §§ 612c, 1281–1282 *et seq.*

scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." [18] And it elsewhere stated: "Questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce. . . . The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible." [19]

### Acts of Congress Prohibiting Commerce

***Foreign Commerce: Jefferson's Embargo.***—"Jefferson's Embargo" of 1807–1808, which cut all trade with Europe, was attacked on the ground that the power to regulate commerce was the power to preserve it, not the power to destroy it. This argument was rejected by Judge Davis of the United States District Court for Massachusetts in the following words: "A national sovereignty is created [by the Constitution]. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualification and restrictions, expressed in the Constitution. Commerce is one of those objects. The care, protection, management and control, of this great national concern, is, in my opinion, vested by the Constitution, in the Congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the President and Senate. . . .

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[18] 317 U.S., 128–129.

[19] Id., 120–124. In *United States* v. *Rock Royal Co-operative*, 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, regulating the price of milk in certain instances. Said Justice Reed for the majority of the Court: "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond State lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within State lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the State of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales." Id., 568–569.

Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the National Government, to whom the subject appears to be committed? . . . The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has contended, that they are not the proper objects of national regulation; and several acts of Congress have been made respecting them. . . . [Furthermore] if it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range.

"Congress has power to declare war. It, of course, has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion. . . . Under the Confederation, . . . we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power. . . . Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures—but this has never been claimed or pretended, since the adoption of the Federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, 'to regulate commerce.' Hence I infer, that the power, reserved to the States by the articles of Confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where." [1]

***Foreign Commerce: Protective Tariffs.***—Tariff laws have customarily contained prohibitory provisions, and such provisions have been sustained by the Court under Congress' revenue powers and under its power to regulate foreign commerce. Speaking for the Court in *Board of Trustees* v. *United States*,[2] in 1933, Chief Jus-

[1] *United States* v. *The William*, 28 Fed. Cas. 614, 620–623 (No. 16,700) (D. Mass. 1808). *See also Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 191 (1824); *United States* v. *Marigold*, 9 How. (50 U.S.) 560 (1850).

[2] 289 U.S. 48 (1933).

tice Hughes said: "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. . . . It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. . . . It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, cl. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons* v. *Ogden,* 9 Wheat. 1, 202. 'Under the power to regulate foreign commerce Congress imposes duties on importations, give drawbacks, pass embargo and nonintercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves* v. *Slaughter,* 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 *Story on the Constitution,* § 1088." [3]

***Foreign Commerce: Banned Articles.***—The forerunners of more recent acts excluding objectionable commodities from interstate commerce are the laws forbidding the importation of like commodities from abroad. This power Congress has exercised since 1842. In that year it forbade the importation of obscene literature or pictures from abroad.[4] Six years later it passed an act "to prevent the importation of spurious and adulterated drugs" and to provide a system of inspection to make the prohibition effective.[5] Such legislation guarding against the importation of noxiously adulterated foods, drugs, or liquor has been on the statute books ever since. In 1887 the importation by Chinese nationals of smoking opium was prohibited,[6] and subsequent statutes passed in 1909 and 1914 made it unlawful for anyone to import it.[7] In 1897 Congress forbade the importation of any tea "inferior in purity, quality, and fitness for consumption" as compared with a legal standard.[8] The Act was sustained in 1904, in the leading case of *Buttfield* v. *Stranahan.*[9] In *"The Abby Dodge"* an act excluding sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or

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[3] Id., 57, 58.
[4] 5 Stat. 566, § 28.
[5] 9 Stat. 237 (1848).
[6] 24 Stat. 409.
[7] 35 Stat. 614; 38 Stat. 275.
[8] 29 Stat. 605.
[9] 192 U.S. 470 (1904).

Straits of Florida was sustained but construed as not applying to sponges taken from the territorial water of a State.[10]

In *Weber* v. *Freed,*[11] an act prohibiting the importation and interstate transportation of prize-fight films or of pictorial representation of prize fights was upheld. Chief Justice White grounded his opinion for a unanimous Court on the complete and total control over foreign commerce possessed by Congress, in contrast implicitly to the lesser power over interstate commerce.[12] And in *Brolan* v. *United States,*[13] the Court rejected as wholly inappropriate citation of cases dealing with interstate commerce on the question of Congress' power to prohibit foreign commerce. It has been earlier noted, however, that the purported distinction is one which the Court both previously to and subsequent to these opinions has rejected.[14]

***Interstate Commerce: Power to Prohibit Questioned.***—The question whether Congress' power to regulate commerce "among the several States" embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution's interpretation, a debate the final resolution of which in favor of congressional power is an event of first importance for the future of American federalism. The issue was as early as 1841 brought forward by Henry Clay, in an argument before the Court in which he raised the specter of an act of Congress forbidding the interstate slave trade.[15] The debate was concluded ninety-nine years later by the decision in *United States* v. *Darby,*[16] in which the Fair Labor Standards Act was sustained.[17]

***Interstate Commerce: National Prohibitions and State Police Power.***—The earliest such acts were in the nature of quarantine regulations and usually dealt solely with interstate transportation.

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[10] 223 U.S. 166 (1912); *cf. United States* v. *California,* 332 U.S. 19 (1947).

[11] 239 U.S. 325 (1915).

[12] Id., 329.

[13] 236 U.S. 216 (1915).

[14] *Supra, pp.* 160–161.

[15] *Groves* v. *Slaughter,* 15 Pet. (40 U.S.) 449, 488–489 (1841).

[16] 312 U.S. 100 (1941).

[17] The judicial history of the argument may be examined in the majority and dissenting opinions in *Hammer* v. *Dagenhart,* 247 U.S. 251 (1918), a five-to-four decision, in which the majority held Congress not to be empowered to ban from the channels of interstate commerce goods made with child labor, since Congress' power was to prescribe the rule by which commerce was to be carried on and not to prohibit it, except with regard to those things the character of which—diseased cattle, lottery tickets—was inherently evil. With the majority opinion, compare Justice Stone's unanimous opinion in *United States* v. *Darby,* 312 U.S. 100, 112–124 (1941), overruling *Hammer* v. *Dagenhart. See also* Corwin, "The Power of Congress to Prohibit Commerce," 3 *Selected Essays on Constitutional Law* (Chicago: 1938), 103.

In 1884 the exportation or shipment in interstate commerce of livestock having any infectious disease was forbidden.[18] In 1903 power was conferred upon the Secretary of Agriculture to establish regulations to prevent the spread of such diseases through foreign or interstate commerce.[19] In 1905 the same official was authorized to lay an absolute embargo or quarantine upon all shipments of cattle from one State to another when the public necessity might demand it.[20] A statute passed in 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.[21] In 1912 a similar exclusion of diseased nursery stock was decreed,[22] while by the same act and again by an act of 1917,[23] the Secretary of Agriculture was invested with powers of quarantine on interstate commerce for the protection of plant life from disease similar to those above described for the prevention of the spread of animal disease. While the Supreme Court originally held federal quarantine regulations of this sort to be constitutionally inapplicable to intrastate shipments of livestock, on the ground that federal authority extends only to foreign and interstate commerce,[24] this view has today been abandoned.

***The Lottery Case.***—The first case to come before the Court in which the issues discussed above were canvassed at all thoroughly was *Champion* v. *Ames,*[25] involving the act of 1895 "for the suppression of lotteries." [1] An earlier act excluding lottery tickets from the mails had been upheld in the case of *In re Rapier,*[2] on the proposition that Congress clearly had the power to see that the very facilities furnished by it were not put to bad use. But in the case of commerce, the facilities are not ordinarily furnished by the National Government and the right to engage in foreign and interestate commerce comes from the Constitution itself or is anterior to it.

How difficult the Court found the question produced by the act of 1895, forbidding any person to bring within the United States or

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[18] 25 Stat. 31.
[19] 32 Stat. 791.
[20] 33 Stat. 1264.
[21] 33 Stat. 1269.
[22] 37 Stat. 315.
[23] 39 Stat. 1165.
[24] *Illinois Central Railroad* v. *McKendree,* 203 U.S. 514 (1906). *See also United States* v. *DeWitt,* 9 Wall. (76 U.S.) 41 (1970).
[25] *Lottery Case (Champion* v. *Ames),* 188 U.S. 321 (1903).
[1] 28 Stat. 963.
[2] 143 U.S. 110 (1892).

to cause to be "carried from one State to another" any lottery ticket, or an equivalent thereof, "for the purpose of disposing of the same," was shown by the fact that the case was argued three times before the Court and the fact that the Court's decision finally sustaining the act was a five-to-four decision. The opinion of the Court, on the other hand, prepared by Justice Harlan, marked an almost unqualified triumph at the time for the view that Congress' power to regulate commerce among the States included the power to prohibit it, especially to supplement and support state legislation enacted under the police power. Early in the opinion, extensive quotation is made from Chief Justice Marshall's opinion in *Gibbons* v. *Ogden*,[3] with special stress upon the definition there given of the phrase "to regulate." Justice Johnson's assertion on the same occasion is also given: "The power of a sovereign State over commerce, . . . amounts to nothing more than a power to limit and restrain it at pleasure." Further along is quoted with evident approval Justice Bradley's statement in *Brown* v. *Houston*,[4] that "[t]he power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

Following the wake of the *Lottery Case*, Congress has repeatedly brought its prohibitory powers over interstate commerce and communications to the support of certain local policies of the States in the exercise of their reserved powers, thereby aiding them in the repression of a variety of acts and deeds objectionable to public morality. The conception of the Federal System on which the Court based its validation of this legislation was stated by it in 1913 in sustaining the Mann "White Slave" Act in the following words: "Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material, and moral." [5] At the same time, the Court made it plain that in prohibiting commerce among the States, Congress was equally free to support state legislative policy or to devise a policy of its own. "Congress," it said, "may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the States may induce legislation without reference to the par-

[3] 9 Wheat. (22 U.S.) 1, 227 (1824).
[4] 114 U.S. 622, 630 (1885).
[5] *Hoke* v. *United States*, 227 U.S. 308, 322 (1913).

ticular policy or law of any given State. Acting within the authority conferred by the Constitution it is for Congress to determine what legislation will attain its purpose. The control of Congress over interstate commerce is not to be limited by State laws." [6]

In *Brooks* v. *United States,*[7] the Court sustained the National Motor Vehicle Theft Act [8] as a measure protective of owners of automobiles; that is, of interests in "the State of origin." The statute was designed to repress automobile motor thefts, notwithstanding that such thefts antedate the interstate transportation of the article stolen. Speaking for the Court, Chief Justice Taft, at the outset, stated the general proposition that "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin." Noting "the radical change in transportation" brought about by the automobile, and the rise of "[e]laborately organized conspiracies for the theft of automobiles . . . and their sale or other disposition" in another jurisdiction from the owner's, the Court concluded that such activity "is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by anyone with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." The fact that stolen vehicles were "harmless" and did not spread harm to persons in other States on this occasion was not deemed to present any obstacle to the exercise of the regulatory power of Congress.[9]

***The Darby Case.***—In sustaining the Fair Labor Standards Act [10] in 1941 [11] the Court expressly overruled *Hammer* v. *Dagenhart.*[12] "The distinction on which the [latter case] . . . was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of

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[6] *United States* v. *Hill,* 248 U.S. 420, 425 (1919).

[7] 267 U.S. 432 (1925).

[8] 41 Stat. 324 (1919), 18 U.S.C., §§ 2311-2313.

[9] 267 U.S., 436-439. *See also Kentucky Whip & Collar Co.* v. *I.C.R. Co.,* 299 U.S. 334 (1937).

[10] 29 U.S.C. §§ 201-219.

[11] *United States* v. *Darby,* 312 U.S. 100 (1941).

[12] 247 U.S. 251 (1918). That case voided the prohibition from interstate commerce of goods made by child labor on the ground that Congress was seeking to regulate production, not commerce, another use of the *Sugar Trust Case.*

the prohibition or its effect to control in some measure the use or production within the States of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . The conclusion is inescapable that *Hammer* v. *Dagenhart,* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, was a precedent, as it then had has long since been exhausted. It should be and now is overruled." [13]

**The Commerce Clause as a Source of National Police Power**

The Court has several times expressly noted that Congress' exercise of power under the commerce clause is akin to the police power exercised by the States.[1] It should follow, therefore, that Congress may achieve results unrelated to purely commercial aspects of commerce and this result in fact has often been accomplished.

***Civil Rights.***—It had been generally established some time ago that Congress had power under the commerce clause to prohibit racial discrimination in the use of the channels of commerce.[2] The power under the clause to forbid discrimination within the States was firmly and unanimously sustained by the Court when Congress in 1964 enacted a comprehensive measure outlawing discrimination because of race or color in access to public accommodations with a requisite connection to interstate commerce.[3] Hotels and motels were declared covered, that is, declared to "affect commerce," if they provided lodging to transient guests; restaurants, cafeterias, and the like, were covered only if they served or offered to serve interstate travelers or if a substantial portion of the food which they served had moved in commerce.[4] The Court sustained the Act as applied to a downtown Atlanta motel which did serve interstate travelers,[5] to an out-of-the-way restaurant in Birmingham which catered to a local clientele but which had spent 46 percent of its previous year's out-go on meat from a local supplier who had procured it from out-of-state,[6] and to a rurally-located amusement

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[13] Id., 116–117.

[1] *E.g., Brooks* v. *United States,* 267 U.S. 432, 436–437 (1925); *United States* v. *Darby,* 312 U.S. 100, 114 (1941). *See* Cushman, "The National Police Power Under the Commerce Clause," 3 *Selected Essays on Constitutional Law* (Chicago: 1938), 62.

[2] *Boynton* v. *Virginia,* 364 U.S. 454 (1960); *Henderson* v. *United States,* 339 U.S. 816 (1950); *Mitchell* v. *United States,* 313 U.S. 80 (1941); *Morgan* v. *Virginia,* 328 U.S. 373 (1946).

[3] Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. § 2000a *et seq.*

[4] 42 U.S.C. § 2000a (b).

[5] *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964).

[6] *Katzenbach* v. *McClung,* 379 U.S. 294 (1964).

area which operated a snack bar and other facilities, which advertised in a manner likely to attract an interstate clientele, and which served food a substantial portion of which came from outside the State.[7]

Writing for the Court in *Heart of Atlanta Motel* and *McClung*, Justice Clark denied that Congress was disabled from regulating the operations of motels or restaurants because those operations may be, or may appear to be, "local" in character. "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." [8]

But, it was objected, Congress is regulating on the basis of moral judgments and not to facilitate commercial intercourse. "That Congress [may legislate] . . . against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." [9] The evidence did, in fact, noted the Justice, support Congress' conclusion that racial discrimination impeded interstate travel by more than 20 million black citizens, which was an impairment Congress could legislate to remove. [10]

The commerce clause basis for civil rights legislation in respect to private discrimination was important because of the understanding that Congress' power to act under the Fourteenth and Fifteenth Amendments was limited to official discrimination.[11] The Court's recent determination that Congress is not in fact so limited in its power reduces greatly the importance of the commerce clause in this area.[12]

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[7] *Daniel* v. *Paul*, 395 U.S. 298 (1969).

[8] *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 301–304 (1964).

[9] *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 257 (1964).

[10] Id., 252–253; *Katzenbach* v. *McClung*, 379 U.S. 294, 299–301 (1964).

[11] *Civil Rights Cases*, 109 U.S. 3 (1883); *United States* v. *Reese*, 92 U.S. 214 (1876); *Collins* v. *Hardyman*, 341 U.S. 651 (1951).

[12] The "open housing" provision of the 1968 Civil Rights Act, Title VIII, 82 Stat. 73, 81, 42 U.S.C. § 3601, was based on the commerce clause, but in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that antidiscrimination-in-housing leg-

*Criminal Law.*—Federal criminal jurisdiction based on the commerce power, and frequently combined with the postal power, has historically been an auxiliary criminal jurisdiction. That is, Congress has made federal crimes of acts which constitutes state crimes on the basis of some contact, however tangential, with a matter subject to congressional regulation even though the federal interest in the acts may be minimal.[13] Examples of this type of federal criminal statute abound, including the Mann Act designed to outlaw interstate white slavery,[14] the Dyer Act punishing interstate transportation of stolen automobiles,[15] and the Lindbergh Law punishing interstate transportation of kidnapped persons.[16] But just as in other areas Congress has passed beyond a proscription of the use of interstate facilities in the commission of a crime, it has in the criminal law area expanded the scope of its jurisdiction. Typical of this kind of expansion is a statute which makes it a federal offense to "in any way or degree obstruct . . . delay . . . or affect . . . commerce . . . by robbery or extortion . . . ." [17] With the expansion of the scope of the reach of "commerce" the statute potentially could reach crimes involving practically all business concerns, although it appears to be used principally against organized crime.

To date, the most far-reaching measure to be sustained by the Court has been the "loan-sharking" prohibition of the Consumer Credit Protection Act.[18] The title affirmatively finds that extortionate credit transactions affect interstate commerce because loan sharks are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Upholding the statute, the Court found that though individual loan-sharking activities may be intrastate in nature, still it is within Congress' power to determine that it was within a class the activities of which did affect interstate commerce, thus affording Congress power to regulate the entire class.[19] The "class of activities" test,

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islation could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that although § 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of § 5. *United States* v. *Guest*, 383 U.S. 745, 761, 774 (1966) (concurring opinions); *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

[13] E.g., *Barrett* v. *United States*, 423 U.S. 212 (1976); *Scarborough* v. *United States*, 431 U.S. 563 (1977); *Lewis* v. *United States*, 445 U.S. 55 (1980); *McElroy* v. *United States*, 455 U. S. 642 (1982).

[14] 18 U.S.C. § 2421.

[15] 18 U.S.C. § 2312.

[16] 18 U.S.C. § 1201.

[17] 18 U.S.C. § 1951. And *see*, 18 U.S.C. § 1952.

[18] Title II, 82 Stat. 159 (1968), 18 U.S.C. § 891 *et seq.*

[19] *Perez* v. *United States*, 402 U.S. 146 (1971).

which has a substantial recent history in the Court's decisions,[20] obviously affords Congress a great area of discretion in which to act.

## THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

### Doctrinal Background

The grant of power to Congress over commerce, unlike that of power to levy customs duties, the power to raise armies, and some others, is unaccompanied by correlative restrictions on state power. This circumstance does not, however, of itself signify that the States were expected to participate in the power thus granted Congress, subject only to the operation of the supremacy clause. As Hamilton pointed out in *The Federalist,*[1] while some of the powers which are vested in the National Government admit of their "concurrent" exercise by the States, others are of their very nature "exclusive," and hence render the notion of a like power in the States "contradictory and repugnant." As an example of the latter kind of power Hamilton mentioned the power of Congress to pass a uniform naturalization law. Was the same principle expected to apply to the power over foreign and interstate commerce?

Unquestionably one of the great advantages anticipated from the grant to Congress of power over commerce was that state interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would be thereby brought to an end. As Webster stated in his argument for appellant in *Gibbons* v. *Ogden:* "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law." In other words, the constitutional grant was itself a regulation of commerce in the interest of uniformity. Justice Johnson's testimony in his concurring opinion in the same case is to like effect: "There was not a State in the Union, in which there did not, at that time, exist a variety of commercial regulations; . . . By common consent, those laws dropped lifeless from their statute books, for want of sustaining power that had been relinquished to Congress." [2] Madison's asser-

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[20] *United States* v. *Darby,* 312 U.S. 100 (1941); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110 (1942); *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Maryland* v. *Wirtz,* 392 U.S. 183 (1968).

[1] *The Federalist* No. 32. (Modern Library ed. 1937).

[2] 9 Wheat. (22 U.S.) 1, 11, 226 (1824).

tion, late in life, that power had been granted Congress over interstate commerce mainly as "a negative and preventive provision against injustice among the States," [3] carries a like implication.

That, however, the commerce clause, unimplemented by congressional legislation, took from the States any and all power over foreign and interstate commerce was by no means universally conceded, and Ogden's attorneys directly challenged the idea. Moreover, as was pointed out on both sides in *Gibbons* v. *Ogden,* legislation by Congress regulative of any particular phase of commerce raises the question whether the States were entitled to fill the remaining gaps, if not by virtue of a "concurrent" power over interstate and foreign commerce, then by virtue of "that immense mass of legislation" as Marshall termed it, "which embraces everything within the territory of a State, not surrendered to the general government," [4]—in a word, the "police power."

The commerce clause does not, therefore, without more ado, settle the question of what power is left to the States to adopt legislation regulating foreign or interstate commerce in greater or lesser measure. To be sure, in cases of flat conflict between an act or acts of Congress regulative of such commerce and a state legislative act or acts, from whatever state power ensuing, the act of Congress is today recognized, and was recognized by Marshall, as enjoying an unquestionable supremacy.[5] But suppose, *first,* that Congress has passed no act, or *second,* that its legislation does not clearly cover the ground traversed by previously enacted state legislation—what rules then apply? Since *Gibbons* v. *Ogden* both of these situations have confronted the Court, especially as regards interstate commerce, hundreds of times, and in meeting them the Court has, first and last, coined or given currency to numerous formulas, some of which still guide, even when they do not govern, its judgment.

The earliest, and most successful, attempt to set forth a principle capable of guiding the Court in adjusting the powers of the States to unexercised power of Congress under the commerce

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[3] 4 *Letters and Other Writings of James Madison* (Philadelphia: 1865), 14-15.

[4] 9 Wheat. (22 U.S.) 1, 203.

[5] Id., 210-211. *But compare Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963), *with Pike* v. *Bruce Church Inc.,* 397 U.S. 137 (1970). In the former, the Court upheld a state statute, which provided a higher standard for determining the maturity of avocados than the federal law, as being within the state police power to prevent deception of consumers as to quality of fresh foods, whereas in the latter case, a state statute designed to prohibit deceptive packaging of state grown fruits and vegetables and which did not contradict or conflict with any federal statute in the same area was struck down as imposing an undue burden on interstate commerce.

clause was that which was made by Daniel Webster in his argument in *Gibbons* v. *Ogden,* in the following words: "He contended . . . that the people intended, in establishing the Constitution, to transfer from the several States to a general government, those high and important powers over commerce, which, in their exercise, were to maintain a uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several States, respectively, but the commerce of the United States. Henceforth, the commerce of the States was to be a unit; and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform." At the same time Webster conceded "that the words used in the Constitution, 'to regulate commerce,' are so very general and extensive, that they might be construed to cover a vast field of legislation, part of which has always been occupied by State laws; and therefore, the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires." [6]

Webster also dealt with the problem which arises when Congress has exercised its power. The results of its act, he contended, must be treated as a unit, so that when Congress had left subject matter within its jurisdiction unregulated, it must be deemed to have done so of design, and its omissions, or silences, accordingly be left undisturbed by state action. Although Marshall, because he thought the New York act creating the Livingston-Fulton monopoly to be in direct conflict with the Enrolling and Licensing Act of 1793, was not compelled to pass on either of Webster's theories, he indicated his sympathy with them.[7]

**Cooley v. Port Wardens**

Aside from Marshall's opinion in 1827 in *Brown* v. *Maryland,*[1] in which the famous "original package" formula made its debut, the most important utterance of the Court touching interpretation of the commerce clause as a restriction on state legislative power is that for which *Cooley* v. *Board of Wardens of Port of Philadelphia* [2]

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[6] 9 Wheat. (22 U.S.) 1, 13–14, 16.

[7] Id., 17–18, 209.

[1] 12 Wheat. (25 U.S.) 419 (1827).

[2] 12 How. (53 U.S.) 299 (1851).

is usually cited. The question at issue was the validity of a Pennsylvania pilotage act so far as it applied to vessels engaged in foreign commerce and the coastwise trade. The Court, speaking through Justice Curtis, sustained the act on the basis of a distinction between those subjects of commerce which "imperatively demand a single uniform rule" operating throughout the country and those which "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former the Court held Congress' power to be "exclusive"—as to the latter it held that the States enjoyed a power of "concurrent legislation."

While this formula obviously stems directly from Webster's argument in *Gibbons* v. *Ogden,* it covers considerably less ground. Citation, nevertheless, of the *Cooley* case throughout the next half century eliminated the difference and brought the Curtis dictum abreast of Webster's earlier argument. The doctrine consequently came to be established, *first,* that Congress' power over interstate commerce is "exclusive" as to those phases of it which require "uniform regulation", *second,* that outside this field, as plotted by the Court, the States enjoyed a "concurrent" power of regulation, subject to Congress' overriding power.[3]

**Judicial Formulas**

But meantime other formulas had emerged from the course of litigation, several of which are brought together into something like a doctrinal system, in Justice Hughes' comprehensive opinion for the Court in the *Minnesota Rate Cases,*[1] decided in 1913. "Direct" regulation of foreign or interstate commerce by a State is here held to be out of the question. At the same time, the States have their police and taxing powers and may use them as their own views of sound public policy may dictate even though interstate commerce may be "incidentally" or "indirectly" regulated, it being understood that such "incidental" or "indirect" effects are always subject to congressional disallowance. "Our system of government," Justice Hughes reflected, "is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency." [2]

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[3] Congressional regulation of commerce, however, does not have to be uniform. The uniformity rule is a test of the invalidity of state legislation affecting commerce, not the validity of congressional legislation regulating commerce.

[1] *Simpson* v. *Shepard,* 230 U.S. 352 (1913).

[2] Id., 400–402. As will be evident, the modern Court follows a balancing standard, rather than a "direct"-"indirect" dichotomy, using the standards first gathered in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 143 (1970).

In more concrete terms, the varied formulas which characterize this branch of our constitutional law have been devised by the Court from time to time in an endeavor to effect "a practical adjustment" between two great interests, the maintenance of freedom of commerce except so far as Congress may choose to restrain it, and the maintenance in the States of efficient local governments. Thus, while formulas may serve to steady and guide its judgment, the Court's real function in this area of judicial review is essentially that of an arbitral or quasi-legislative body. So much so is this the case that in 1940 three Justices joined in an opinion in which they urged that the business of drawing the line between the immunity of interstate commerce and the taxing power of the States "should be left to the legislatures of the States and the Congress," with the final remedy in the hands of the latter.[3]

## STATE TAXING POWER AND COMMERCE

### Brown v. Maryland: The Original Package Doctrine

The leading case under this heading is *Brown* v. *Maryland*,[1] the issue in which was the validity of a Maryland statute requiring "all importers of foreign articles or commodities," preparatory to selling the same, to take out a license. Holding this act to be void under both Art. I, § 10, and the commerce clause, the Court, speaking through Chief Justice Marshall, advanced the following propositions: (1) that "commerce is intercourse; one of its most ordinary ingredients is traffic"; (2) that the right to import includes the right to sell; (3) that a tax on the sale of an article is a tax on the article itself—a conception of the incidence of taxation which has at times had important repercussions in other fields of constitutional law; (4) that the taxing power of the State does not extend in any form to imports from abroad so long as they remain "the property of the importer, in his warehouse, in the original form or package" in which they were imported—the famous "original package doctrine"; (5) that once, however, the importer parts with his importations "or otherwise mixes them with the general property of the State by breaking up his packages," the law may treat them as part and parcel of such property; (6) that even while in the original package imports are subject to the incidental operation of police measures adopted by the State in good faith for the protec-

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[3] *McCarroll* v. *Dixie Lines*, 309 U.S. 176, 188–189 (1940). For a recent opinion stressing the Court's hesitancy to impose uniformity on state taxation, as well as other regulations, of interstate commerce and its recognition of Congress' greater expertise to legislate, see *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 280 (1978).

[1] 12 Wheat. (25 U.S.) 419 (1827).

tion of the public against apparent dangers. Lastly, in determining whether a state law amounts to a regulation of commerce the Court would, Marshall announced, be guided by "substance" and not by "form"—a proposition which has many times opened the way to extensive inquiries by the Court into the actualities both of commercial practice and of state administration.

The decision in *Brown* v. *Maryland*, but more especially the "original package doctrine" there laid down, has been sometimes criticized as going too far. It would have been sufficient, the critics contend, for the Court to have held the Maryland act void because of its obviously discriminatory character, and they urge that original packages receiving the protection of the State ought to be subject to nondiscriminatory taxation by it. The criticism was partially anticipated by Marshall himself in the apprehensions which he voiced that any concession to "the great importing States" might be turned by them against the rest of the country. Indeed, he was uncertain whether the original package doctrine would prove sufficient for its purposes and accordingly offered it not as a rule "universal in its application," but rather as a stop-gap principle. History has proved, however, that in this he builded better than he knew. For in the field of foreign commerce, the original package doctrine, until recently, has never been qualified, and it has scarcely been added to; and so confined, it has never been surpassed by any later piece of judicial legislation, whether in point of durability or in that of definiteness and easy comprehensibility.[2]

### State Taxation of the Subject Matter of Interstate Commerce

***General Considerations.***—The task of drawing the line between state power and the commercial interest has proved a comparatively simple one in the field of foreign commerce, the two things being in great part territorially distinct. With "commerce among the States" it is very different. This is conducted in the interior of the country, by persons and corporations that are ordinarily engaged also in local business; its usual incidents are acts which, if unconnected with commerce among the States, would fall within the State's powers of police and taxation, while the things it deals in

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[2] Compare, for example, *May* v. *New Orleans*, 178 U.S. 496 (1900), and the more recent case of *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945). In the latter case the benefits of the original package doctrine were extended to imports from the Philippine Islands, title to which did not vest in the importer until their arrival in the United States. "Whatever may be the significance of retaining in the 'original package' goods that have been imported for sale, goods that may have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package' if, . . . they have been put to the use for which they were imported." *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534, 548 (1959).

and the instruments by which it is carried on comprise the most ordinary subject matter of state power. In this field, the Court consequently has been unable to rely upon sweeping solutions. To the contrary, its judgments have often been fluctuating and tentative, even contradictory, and this is particularly the case with respect to the infringement of the state taxing power on interstate commerce. In the words of Justice Frankfurter: "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a Federal Government like ours, where the same transaction has aspects that may concern the interest and involve the authority of both the central government and the constituent States. The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." [1]

***State Freight Tax Case.***—The great leading case dealing with the relation of the State's taxing power to interstate commerce is that of the *State Freight Tax*.[2] The question before the Court was the validity of a Pennsylvania statute which required every company transporting freight within the State, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. Overturning the act, the Court held: "(1) The transportation of freight, or of the subjects of commerce, is a constituent part of commerce itself; (2) a tax upon freight, transported from State to State, is a regulation of commerce among the States; (3) whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature National, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress; (4) transportation of passengers or merchandise through a State, or from one State to another, is of this nature; (5) hence a statute of a State imposing a tax upon freight, taken up within the State and carried out of it, or taken up without the State and brought within it, is repugnant to that provision of the Constitution of the United States, which ordains that 'Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes.' " [3]

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[1] *Freeman* v. *Hewit*, 329 U.S. 249, 251-252 (1946).

[2] *Reading Railroad* v. *Pennsylvania*, 15 Wall. (82 U.S.) 232 (1873).

[3] Headnotes. The reader must bear in mind, as will become evident, that the Court has now abandoned the restriction on taxation directly of interstate com-

***Goods in Transit.***—States, therefore, might not tax property in transit in interstate commerce. A nondiscriminatory tax, however, was permitted if the goods had not yet started in interstate commerce, or had completed the interstate transit even though still in the original package, unless they are foreign imports in the original package. State might also impose a nondiscriminatory tax when there was a break in an interstate transit and the goods had not been restored to the current of interstate commerce. Two questions arose, *first,* when do goods originating in a State pass from under its power to tax, and, *second,* when do goods arriving from another State lose their immunity?

The leading case dealing with the first of these questions is *Coe* v. *Errol,*[4] in which the matter at issue was the right of the town of Errol, New Hampshire, to tax certain logs on their way to points in Maine, while they lay in the river before the town or along its shore awaiting the spring freshets and consequent rise of the river. As to the logs in the river, which had come from Maine on their way to Lewiston in the same State, but had been detained at Errol by low water, the Supreme Court of New Hampshire itself ruled that the local tax did not apply, the logs being still in transit. As to the logs which had been cut in New Hampshire and lay on the shore or in tributaries of the river, both courts were again in agreement that they were still subject to local taxation, notwithstanding the intention of their owners to send them out of the State. Said Justice Bradley: "[G]oods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." [5]

***Mining and Manufacturing.***—Under the above rule, obviously, production was not interstate commerce even though the thing produced is intended for the interstate market. Thus a Pennsylvania *ad valorem* tax on anthracite coal when prepared and ready for shipment was held not to be an interference with interstate commerce although applied to coal destined for a market in other States,[6] and in *Oliver Iron Co.* v. *Lord,*[7] an occupation tax on the

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merce in favor of a balancing test, premised on the thought that interstate commerce must pay its own way. E.g., *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959); *Complete Auto Transit* v. *Brady,* 430 U.S. 274 (1977); *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609 (1981).

[4] 116 U.S. 517 (1886).

[5] Id., 527.

[6] *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245 (1922).

[7] 262 U.S. 172 (1923).

mining of iron ore was upheld, although substantially all of the ore was immediately and continuously loaded on cars and shipped into other States. Said the Court: "Mining is not interstate commerce, but . . . subject to local regulation and taxation. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce." [8] Likewise an annual privilege tax on the business of producing natural gas in the State, computed on the value of the gas produced "as shown by the gross proceeds derived from the sale thereof by the producer," was held constitutional even though most of the gas passed into interstate commerce in continuous movement from the wells.[9] And in *Utah Power & Light Co.* v. *Pfost* [10] the generation of electricity in a State was held to be distinguishable from its transmission over wires to consumers in another State and hence taxable by the former State. Likewise, a state statute imposing a privilege tax on the production of mechanical power for sale or use did not contravene the interstate commerce clause although applied to an engine operating a compressor to increase the pressure of natural gas and thereby permitting it to be transported to purchasers in other States.[11]

A tax at so much per pound on shrimp taken within the three-mile belt of the coast of the taxing State was sustained, inasmuch as the taxable event, the taking of the shrimp, occurred before they could be said to have entered the interstate commerce stream.[12] So also, an Alaskan occupational tax collected from freezer ships which transport their catch to Washington for canning and levied at the rate of four per cent of the value of the salmon taken in Alaskan waters by such ships or purchased by them from Alaskan fishermen was upheld, in the absence of conflicting federal legislation, as a valid tax. Although no tax was levied on the salmon caught and frozen in Alaskan waters and destined for Alaskan canneries, the latter, which were the only true competitors of the freezer ships, were taxed at the rate of six per cent and, accordingly, the tax on the freezer ships was deemed not to be discriminatory.[13]

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[8] Id., 178. *See also Diamond Match Co.* v. *Ontonagon,* 188 U.S. 82 (1903).

[9] *Hope Gas Co.* v. *Hall,* 274 U.S. 284 (1927). *See also American Mfg. Co.* v. *St. Louis,* 250 U.S. 459 (1919), in which there was imposed a license tax on manufacture of goods computed upon the amount of sales of the goods.

[10] 286 U.S. 165 (1932).

[11] *Coverdale* v. *Pipe Line Co.,* 303 U.S. 604 (1938).

[12] *Toomer* v. *Witsell,* 334 U.S. 385 (1948).

[13] *Alaska* v. *Arctic Maid,* 366 U.S. 199 (1961).

***Production for an Established Market.***—But while the production of goods intended for the interstate market is taxable by the State where it takes place, their purchase for an established market in another State is interstate commerce and as such is neither regulatable nor taxable by the State of origin, provided at any rate their trans-shipment is not unduly delayed.[14] Thus, oil gathered into the pipe lines of a distributing company and intended for the most part for customers outside the State is in interstate commerce from the moment it leaves the wells,[15] and a like result has been reached as to natural gas.[16] "The typical and actual course of events," said the Court, "marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account." [17]

***Stoppage in Transit.***—It also follows logically from *Coe* v. *Errol*,[18] and the cases deriving from it, that a State may impose a nondiscriminatory tax when there is a break in interstate transit and the goods have not been restored to the current of interstate commerce. The effect of an interruption upon the continuity of an interstate movement depends upon its causes and purposes. If the delay is due to the necessities of the journey, as in the *Coe* case, where the logs were detained for a time within the State by low water, they are deemed "in the course of commercial transportation, and . . . clearly under the protection of the Constitution." [19] Intention thus often enters into the determination of the question whether goods from another State have come to rest sufficiently to subject them to the local taxing power. In a typical case the Court held that oil shipped from Pennsylvania and held in tanks in Memphis, Tennessee, for separation, distribution and reshipment, was subject to the taxing power of the latter State.[20] The delay in transportation resulting from these proceedings on the part of the owners, the Court pointed out, was clearly designed for their own profit and convenience and was not a necessary incident to the method of transportation adopted, as had been the delay of the logs

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[14] *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282 (1921). Followed in *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50 (1922); *Flanagan* v. *Federal Coal Co.*, 267 U.S. 222 (1925).

[15] *Eureka Pipe Line Co.* v. *Hallanan*, 258 U.S. 265 (1921).

[16] *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277 (1921).

[17] *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277, 281 (1921). *See also State Tax Comm.* v. *Interstate Natural Gas Co.*, 284 U.S. 41 (1931) holding invalid a state privilege tax imposed on a foreign corporation selling to distributors in the State natural gas piped in from another State, whose only activity was the use of a thermometer and meter and reduction of pressure to permit vendee to draw off the gas.

[18] 116 U.S. 517 (1886).

[19] Id., 525.

[20] *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908).

coming from Maine in *Coe* v. *Errol.* This distinction is fundamental.[21]

Applying this rule in more recent cases, the Court has upheld state taxation on the use and storage of gasoline brought into the State by a railroad company and unloaded and stored there, to be used for its interstate trains,[22] on gasoline imported and stored by an airplane company and withdrawn to fill airplanes that use it in their interstate travel,[23] on supplies brought into the State by an interstate railroad company to be used in replacements, repairs and extensions, and installed immediately upon arrival in the taxing State,[24] and on equipment brought into the State by a telephone and telegraph company for operation, maintenance, and repair of its interstate system.[25] In all these cases the Court applied the principle that "use and storage" are subject to local taxation when "there is an interval after the articles have reached the end of their interstate movement and before their consumption in interstate operation has begun." [1] On the other hand, in the absence of such an "interval," the Court declared invalid state gasoline taxes imposed per gallon of gasoline imported by interstate carriers as fuel for use in such vehicles and used within the State as well as in their interstate travel.[2]

***Rejection of Original Package Doctrine in Interstate Commerce.***—The question also arises when goods entering a State from another State become part of the mass of property of the former and hence taxable by it? In *Brown* v. *Maryland,*[3] Chief Justice

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[21] *American Steel & Wire Co.* v. *Speed,* 192 U.S. 500 (1904); *Bacon* v. *Illinois,* 227 U.S. 504 (1913); *Susquehanna Coal Co.* v. *South Amboy,* 228 U.S. 665 (1913); *Minnesota* v. *Blasius,* 290 U.S. 1 (1933); *Independent Warehouses* v. *Scheele,* 331 U.S. 70 (1947).

[22] *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249 (1933).

[23] *Edelman* v. *Boeing Air Transport,* 289 U.S. 249 (1933). The Court also upheld a tax on the sale of gasoline for use by an air transport line in conducting interstate transportation across the State in *Eastern Air Transport* v. *Tax Comm.,* 285 U.S. 147 (1932).

[24] *Southern Pac. Co.* v. *Gallagher,* 306 U.S. 167 (1939).

[25] *Pacific Tel. Co.* v. *Gallagher,* 306 U.S. 182 (1939).

[1] *Southern Pac. Co.* v. *Gallagher,* 306 U.S. 167 (1939), as formulated in the headnotes. *See also Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86 (1934).

[2] *Bingaman v. Golden Eagle Lines,* 297 U.S. 626 (1936); *McCarroll* v. *Dixie Lines,* 309 U.S. 176 (1940). In *Helson* v. *Kentucky,* 279 U.S. 245 (1929), the Court held that gasoline purchased in Illinois and used in an Illinois-Kentucky ferry could not be taxed by Kentucky, being, as it were, a part of the ferry, an instrument of commerce between the two States. *See also Kelley* v. *Rhoads,* 188 U.S. 1 (1903); *Champlain Co.* v. *Brattleboro,* 260 U.S. 366 (1922); *Hughes Bros. Co.* v. *Minnesota,* 272 U.S. 469 (1926); *Carson Petroleum Co.* v. *Vial,* 279 U.S. 95 (1929).

[3] 12 Wheat. (25 U.S.) 419 (1827).

Marshall, had remarked at the close of his opinion, "We suppose the principles laid down in this case, apply equally to importations from a sister State." [4] Forty-two years later, in *Woodruff* v. *Parham*,[5] an effort was made to induce the Court, in reliance on this dictum, to apply the original package doctrine against a Mobile, Alabama, tax on sales at auction, so far as it reached "imports" from sister States. The Court refused the invitation, *first*, on the ground that Marshall's statement was *obiter*, the point not having been involved in *Brown* v. *Maryland*, *second*, because usage contemporary with the Constitution and of the Constitution itself confined the term "imports" as employed in Article I, § 10 to imports from abroad, *third*, because the tax in question was nondiscriminatory. At the same time, nevertheless, reference was made to the power of Congress to interpose at any time in exercise of its power over commerce, "in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another." [6] The same result was reached a few years later in *Brown* v. *Houston*,[7] where it was held that coal transported down the Mississippi from Pennsylvania had been validly subjected by Louisiana to a general *ad valorem* property tax, having "come to its place of rest, for final disposal or use," and hence become "a part of the general mass of property in the State." [8] Again, however, a caveat was entered in behalf of the power of Congress to impose a different rule affording "a temporary exemption" of property transported from one State to another from taxation by the latter.[9]

***Inspection Charges.***—*Woodruff* v. *Parham* and *Brown* v. *Houston* are still good law for the most part.[10] Nevertheless, there is one respect in which imports from sister States are treated as "imports" in the sense of the Constitution and that is in being exempt from "unreasonable" inspection charges.[11] It is true, also, that in a series of cases involving sales of oil about 1920 the Court appeared to be contemplating reviving the original package doctrine,[12] but

[4] Id., 449.

[5] 8 Wall. (75 U.S.) 123 (1869).

[6] Id., 140.

[7] 114 U.S. 622 (1885). *See also Pittsburgh & Southern Coal Co.* v. *Bates*, 156 U.S. 577 (1895).

[8] 114 U.S., 632-633.

[9] Id., 634.

[10] *See Wagner* v. *Covington*, 251 U.S. 95 (1919).

[11] *Brimmer* v. *Rebman*, 138 U.S. 78 (1891); *Patapsco Guano Co.* v. *North Carolina*, 171 U.S. 345 (1898); *Red "C" Oil Co.* v. *North Carolina*, 222 U.S. 380 (1912); *Savage* v. *Jones*, 225 U.S. 501 (1912); *Foote* v. *Maryland*, 232 U.S. 494 (1914).

[12] *Standard Oil Co.* v. *Graves*, 249 U.S. 389 (1919); *Askren* v. *Continental Oil Co.*, 252 U.S. 444 (1920); *Bowman* v. *Continental Oil Co.*, 256 U.S. 642 (1921); *Texas Co.* v. *Brown*, 258 U.S. 466 (1922).

these holdings were presently "qualified" in a sweeping opinion by Chief Justice Taft, reviewing the cases.[13] But taxation is one thing, prohibition another. In the field of the police power, where its applicability was not so much as suggested in *Brown* v. *Maryland*, the original package doctrine has been frequently invoked by the Court against state legislation, and, even today, perhaps retains a spark of life.[14]

***Local Sales: Peddlers.***—By the same token, local sales of goods brought into a State from another State are subject to a nondiscriminatory exercise of its taxing power. Such a tax, the Court has said, "has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected"; and this is true, even of goods immediately to be used in interstate commerce.[15] The commerce clause, therefore, does not prohibit a State from imposing special license taxes on merchants using profit-sharing coupons and trading stamps although the coupons may have been inserted in retail packages by the manufacturer or shipper outside the State and are redeemable outside the State, either by such manufacturer or shipper, or by some other agency outside the State,[16] nor yet a nondiscriminatory tax upon peddling of goods and sales thereof by peddlers even though the goods are foreign or interstate imports, since the sale occurs after foreign or interstate commerce thereof has ended.[17] And in *Kehrer* v. *Stewart* [18] it was held that a state tax upon resident managing agents of nonresident meatpacking houses did not conflict with the commerce clause, regardless of the fact that the greater portion of the business was interstate in character, the tax having been construed by the highest court of the State as applying only to the business of selling to local customers from the stock of "original packages" shipped into the State without a previous sale or contract to sell and kept and held for sale in the ordinary course of trade. Contrariwise, a tax on

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[13] *Sonneborn Bros.* v. *Cureton*, 262 U.S. 506 (1923). *Cf. Phipps* v. *Cleveland Rfg. Co.*, 261 U.S. 449 (1923).

[14] *See pp.* 204-205, 279.

[15] *Eastern Air Transport* v. *Tax Comm.*, 285 U.S. 147, 153 (1932).

[16] *Rast* v. *Van Deman & Lewis*, 240 U.S. 342 (1916). *See also Tanner* v. *Little*, 240 U.S. 369 (1916), and *Pitney* v. *Washington*, 240 U.S. 387 (1916), upholding a Washington statute imposing a prohibitive license tax upon merchants using trading stamps or coupons redeemable in merchandise.

[17] *Machine Co.* v. *Gage*, 100 U.S. 676 (1880); *Emert* v. *Missouri*, 156 U.S. 296 (1895); *Singer Sewing Machine* v. *Brickell*, 233 U.S. 304 (1914); *Wagner* v. *City of Covington*, 251 U.S. 95 (1919); *Caskey Baking Co.* v. *Virginia*, 313 U.S. 117 (1941).

[18] 197 U.S. 60 (1905); *see also Armour Packing Co.* v. *Lacy*, 200 U.S. 226 (1906).

sales discriminatory in its incidence against merchandise because of its origin in another State is *ipso facto* unconstitutional. The leading case is *Welton* v. *Missouri*,[19] in which a peddler's license tax confined to the sale of goods manufactured outside the State was set aside. The doctrine of *Welton* v. *Missouri* has been reiterated many times.[20]

***Drummer Cases: Robbins* v. *Shelby Taxing District.***—But there is one situation in which goods introduced into one State from another have until recent years enjoyed a special immunity from taxation by the former, and that is when they were introduced in consequence of a contract of sale. The leading case is *Robbins* v. *Shelby Taxing District*,[21] in which the Court, after a penetrating survey of commercial practices, ruled that "the negotiation of sales of goods"—in this instance by sample—"which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." In short, whereas in foreign commerce, importation is succeeded by the right to sell in the original package, in interstate commerce sale was succeeded by the right of importation, which continued until the goods reached the hands of the purchaser. The benefits of this holding were extended in a series of rulings in which it was held to apply whether solicitation of orders was or was not made with sample,[22] and to sales which were not, accurately speaking, consummated until the actual delivery of the goods, which was attended by local incidents. So, where a North Carolina agent of a Chicago firm took orders for framed pictures, which were then sent to him packed separately from the frames and then framed by him before delivery, the rule laid down in the *Robbins* case was held to apply throughout, with the result that North Carolina could tax or license no part of the transaction described.[23] So also it was held

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[19] 91 U.S. 275 (1876).

[20] *See Cook* v. *Pennsylvania*, 97 U.S. 566 (1878); *Guy* v. *Baltimore*, 100 U.S. 434 (1880); *Machine Co.* v. *Gage*, 100 U.S. 676 (1880); *Tiernan* v. *Rinker*, 102 U.S. 123 (1880); *Webber* v. *Virginia*, 103 U.S. 344 (1881); *Walling* v. *Michigan*, 116 U.S. 446 (1886); *Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908), where a property tax on lumber which discriminated in favor of the local product was voided; *Bethlehem Motors Co.* v. *Flynt*, 256 U.S. 421 (1921), where a license tax on distributors was held to be invalidated by the provision made for a rebate under conditions that could be met only by manufacturers within the taxing State.

[21] 120 U.S. 489, 497 (1887).

[22] *Corson* v. *Maryland*, 120 U.S. 502 (1887); *Asher* v. *Texas*, 128 U.S. 129 (1888); *Stountenburgh* v. *Hennick*, 129 U.S. 141 (1889); *Brennan* v. *Titusville*, 153 U.S. 289 (1894); *Stockard* v. *Morgan*, 185 U.S. 27 (1902); *Crenshaw* v. *Arkansas*, 227 U.S. 389 (1913); *Rogers* v. *Arkansas*, 227 U.S. 401 (1913); *Stewart* v. *Michigan*, 232 U.S. 665 (1914); *Western Oil Refg. Co.* v. *Lipscomb*, 244 U.S. 346 (1917); *Cheney Brothers Co.* v. *Massachusetts*, 246 U.S. 147 (1918).

[23] *Caldwell* v. *North Carolina*, 187 U.S. 622 (1903).

with regard to a sewing machine ordered by a customer in North Carolina and sent to her C.O.D.,[24] as well as to brooms sent in quantity for the fulfillment of a number of orders, and subject to rejection by the purchaser if deemed by him not up to sample.[25]

Said Justice Holmes in the case last referred to: " 'Commerce among the States' is a practical conception not drawn from the 'witty diversities' . . . of the law of sales. . . . The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, whatever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce." [1] Nor did it make any difference that the solicitor receive his compensation in form of down payment by the purchaser.[2] Moreover, sales under a mail order business, with delivery taking place within the State to a carrier for through shipment to another State to fill orders, were held to be beyond the taxing power of the first State.[3] The fact that a concern doing a strictly interstate business had goods on hand within the State which were capable of being used in in trastate commerce did not, the Court declared, take the business out of the protection of the commerce clause and allow the State to impose a privilege tax on such concern.

On the other hand, it was early held that the rule laid down in the *Robbins* case did not prevent a State from taxing a resident citizen who engaged in a general commission business, on the profits thereof, although the business consisted "for the time being, wholly or partially in negotiating sales between resident and nonresident merchants, of goods situated in another State." [4] Also, it has been held that a stamp tax on transfers of corporate stock, as applied to a sale between two nonresidents, of the stock of foreign railway corporations, was not an interference with interstate commerce.[5]

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[24] *Norfolk & West. Ry. Co.* v. *Sims*, 191 U.S. 441 (1903).

[25] *Rearick* v. *Pennsylvania*, 203 U.S. 507 (1906); *Dozier* v. *Alabama*, 218 U.S. 124 (1910); *Davis* v. *Virginia*, 236 U.S. 697 (1915).

[1] 203 U.S., 512.

[2] *Real Silk Mills* v. *Portland*, 268 U.S. 325 (1925).

[3] *Heyman* v. *Hays*, 236 U.S. 178 (1915). *See also Hump Hairpin Co.* v. *Emmerson*, 258 U.S. 290 (1922), holding that business done by a corporation through orders which were approved in a State where its tangible property and offices were located, but which were first taken by its salesmen in other States, was interstate, although the tax involved was sustained.

[4] *Ficklen* v. *Shelby County*, 145 U.S. 1, 21 (1892).

[5] *New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152 (1907); *cf. Nathan* v. *Louisiana*, 8 How. (49 U.S.) 73 (1850).

Likewise, the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery not necessitating interstate shipment was ruled not to be interstate commerce and as such exempt from taxation, although deliveries were sometimes made by interstate shipment.[6] And in *Banker Brothers* v. *Pennsylvania* [7] it was held that a tax upon a domestic corporation selling automobiles built by a foreign corporation under an arrangement by which the later agreed to build for, and sell to, the former, for cash, at a specified price less than list price, was not a tax on interstate transactions, there being nothing which connected the ultimate buyer with the manufacturer but a warranty and the buyer's agreement to pay the list price f.o.b. factory.

Similarly, in *Browning* v. *City of Waycross* [8] it was held that the business of erecting lightning rods within the limits of a town by the agent of a nonresident manufacturer on whose behalf such agent had solicited orders for the sale of the rods, and from whom he had received them when shipped into the State, was validly subjected to a municipal license tax. "It was not," said the Court, "within the power of the parties by the form of their contract to convert what was exclusively a local business . . . into an interstate commerce business . . .[9] Also, a municipal license tax upon persons engaged in the business of buying or selling cotton for themselves was found not to impose a forbidden burden upon interstate commerce even though the cotton was purchased with a view to ultimate shipment in some other State or country.[10] Nor was a gallonage tax imposed by a State upon a distributor of liquid fuel rendered repugnant to the commerce clause by the fact that the distributor caused fuel sold to customers in the State to be shipped from another State for delivery in tank cars—"deemed original packages"—on purchaser's siding, as agreed. Said the Court: "The contracts were executory and related to unascertained goods. . . . It does not appear that when they were made appellant had any fuels of the kinds covered, or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania." [11]

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[6] *Ware & Leland* v. *Mobile County*, 209 U.S. 405 (1908). *See also Brodnax* v. *Missouri*, 219 U.S. 285 (1911).

[7] 222 U.S. 210 (1911).

[8] 233 U.S. 16 (1914).

[9] Id., 23. *See also Superior Oil Co.* v. *Mississippi*, 280 U.S. 390 (1930).

[10] *Chassaniol* v. *City of Greenwood*, 291 U.S. 584 (1934).

[11] *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169, 173 (1935); *see also Minnesota* v. *Blasius*, 290 U.S. 1 (1933).

***The Robbins Case Today.***—In the cases reviewed in the preceding paragraph protestants against local taxation appealed, but unavailingly, to the *Robbins* case. So it would seem that the generative powers of that prolific precedent had begun to wane somewhat even before the Depression of the 1930's, an event which rendered judicial reaction against it still more pronounced. Indeed, by the Court's decision in *McGoldrick* v. *Berwind-White Co.,*[12] the authority of the entire line of cases descending from *Robbins* v. *Shelby Taxing District* was seriously impaired, for the time being, while a second holding the same year seemed to reduce the significance of the *Robbins* case itself to that of a reassertion of the elementary rule against discrimination. "The commerce clause," Justice Reed remarked, "forbids discrimination, whether forthright or ingenious." [13]

***Use and Sales Taxes.***—With a majority of the States on the verge of bankruptcy during the Depression of the 1930's, extensive recourse was had to sales taxes and, as an offset to these in favor of the local economy, "use" taxes on competing products coming from sister States. The basic decision sustaining the use tax, in this novel employment of it, was *Henneford* v. *Silas Mason Co.,*[14] in which was involved a state two per cent tax on the privilege of using products coming from sister States. Excepted from the tax, on the other hand, was any property, the sale or use of which had already been subjected to an equal or greater tax, whether under the laws of Washington or any other State. Stressing this provision in its opinion, the Court said: "Equality is the theme that runs through all the sections of the statute. . . . When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." [15]

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[12] 309 U.S. 33 (1940).

[13] *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455 (1940). Note, however, that the contacts an interstate business has with a State are an important factor in determining whether a tax is discriminatory. *See, e.g., National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967), a recent mail order house case, where the Court held that a State could not impose a use tax on an out-of-state business when the only contacts the foreign company has with the State are the United States postal system and common carriers. *See also General Motors Corp.* v. *Washington,* 377 U.S. 436, 448 (1964).

[14] 300 U.S. 577 (1937). *Cf. Hinson* v. *Lott,* 8 Wall. (75 U.S.) 148 (1869). Here was involved a tax of fifty cents per gallon on all spiritous liquors brought into the State. Comparing the tax with a similar one imposed upon liquors manufactured in the State, the Court upheld the statute. The taxes were complementary and were intended to effect equality.

[15] 300 U.S. 583–584. However, in *Halliburton Oil Co.* v. *Reilly,* 373 U.S. 64 (1963), the Court ruled that when a State collects its sales tax on the price of components purchased locally by a domestic company for assembling its own oil well service equipment, but imposes its use tax on the resale value of like equipment, includ-

ing the cost of labor and overhead, when assembled out-of-state for like use in the taxing jurisdiction, and similarly exempts from its sales tax isolated purchases of used equipment within its limits from companies not regularly engaged in the sale thereof, while collecting its use tax on the use therein of like equipment acquired through similar purchases out-of-state, an invalid discriminatory burden on commerce results.

Other use tax cases in the *Henneford* pattern are the following: *Bacon & Sons* v. *Martin*, 305 U.S. 380 (1939), was decided in a unanimous *per curiam* opinion. It involved a Kentucky statute which imposed a tax "on the 'receipt' of cosmetics in the State by any Kentucky retailer" equal to twenty per cent of the invoice price plus transportation cost, if any, to the Kentucky dealer. The Kentucky court held that "the imposition of the tax against the retailer is not on the act of receiving the cosmetics, but on the sale and use thereof, afer the retailer has received them." On this interpretation the Supreme Court sustained the tax. Obviously, other things being equal, there is little difference between a tax on receiving and a tax on possession a moment later. In *Felt & Tarrant Co.* v. *Gallagher*, 306 U.S. 62 (1939), a California use tax was upheld applicable to a non-resident corporation which solicited orders from California purchasers through agents for whom it hired offices in the State and took orders subject to the vendor's approval. In *Nelson* v. *Sears, Roebuck & Co.* and *Nelson* v. *Montgomery Ward*, 312 U.S. 359 and 373 (1941), it was held that a foreign corporation which maintained retail stores in Iowa could be validly required to collect an Iowa use tax in respect of mail orders sent by Iowa purchasers to out-of-state branches of the corporation and filled by direct shipment by mail or common carrier from those branches to the purchasers. In *General Trading Co.* v. *Tax Comm.*, 322 U.S. 335 (1944), it was held that a company carrying on no operations in Iowa other than the solicitation of orders by traveling salesmen was liable for the collection of the tax on goods sold to Iowa residents, even though the corporation was not licensed to do business in the State and the orders were forwarded for acceptance to Minnesota where they were filled by direct shipment to Iowa customers.

Although viewed by the dissenters as a departure from the *General Trading Company* case, the Court in *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954), held that Maryland could not compel collection of its use tax on sales to Maryland consumers by a Wilmington, Delaware, retailer who accepted no telephone or mail orders, who solicited customers only by local radio and newspaper advertising, and occasional direct mail distribution, and who, occasionally, delivered merchandise purchased on its own premises to such consumers by common carrier or by his own truck. According to the majority a State does not acquire jurisdiction over a foreign vendor who does not enter the taxing State through traveling sales agents conducting continuous local solicitation followed by delivery to the consumer, and, consistently with the common clause, cannot lay a use tax upon mere possession of goods in transit by the carrier or vendor upon entering the State. Four dissenters, Justices Douglas, Black, and Clark, and Chief Justice Warren, however, deemed the *General Trading Company* case conrolling and that jurisdiction was obtained when Maryland seized the vendor's delivery truck.

In *Northwestern State Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), the Court sustained over the dissents of Justices Frankfurter and Whittaker an income tax computed at a non-discriminatory rate on that portion of the net income derived solely from the corporation's interstate business which was reasonably attributable to its business activities within the State. The corporation had within the State an office and one or more salesmen who solicited within the State orders which were accepted and filled at the corporation's offices in another State.

In *Scripto* v. *Carson*, 362 U.S. 207 (1960), a Georgia corporation which had no office, place of business, property, or regular full time employees in Florida, but which effected sales to Florida residents by reliance upon ten Florida brokers, wholesalers, and jobbers who, upon a commission basis, solicited orders for appellant's pencils and forwarded same to Georgia where such orders were accepted, the merchandise shipped, and collections received, was held liable to collect the Florida

There being no actual discrimination in favor of Washington products, the tax was valid.

A companion piece of the *Henneford* case in motivation, although it occurred three years later, was *McGoldrick* v. *Berwind-White Coal Mining Co.*,[16] in which it was held that in the absence of congressional action, a New York City general sales tax was applicable to sales of coal under contracts entered into within the municipality and calling for delivery therein. Speaking for the majority, Justice Stone declared any "distinction . . . between a tax laid on sales made, without previous contract, after the merchandise had crossed the State boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing State," to be "without the support of reason or authority." [17] The *Robbins* case was held to be

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use tax. The contractual relation of the solicitors to appellant was dismissed as unimportant, and emphasis was placed on the fact that, except for confirmation of the orders in Georgia, the selling transactions took place in Florida in a manner akin to that noted in the *General Trading Company* case.

Congress responded to *Northwestern Cement* and *Scripto* by enacting 75 Stat. 41 (1961), amending 15 U.S.C. § 381 which established a minimum nexus requirement for a state net income tax on multistate businesses selling tangible personal property and authorized a comprehensive study of state taxation of interstate commerce. Nothing further developed and the Court's decision in *National Bellas Hess* v. *Department of Revenue*, 386 U.S. 753 (1967), holding that a State could not impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by mail or common carrier, thus modifying *Scripto*, reduced congressional interest in legislation. For an account of the development of proposed legislation which was not enacted, *see* Celler, "Development of a Congressional Program Dealing With State Taxation of Interstate Commerce," 36 Ford. L. Rev. 385 (1968). For the effect of § 381 in the context of liquor taxation, see *Heublein* v. *South Carolina Tax Comm.*, 409 U. S. 275 (1972).

In *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551 (1977), the Court sustained the imposition of a duty to collect and pay a use tax on the mail order sale of merchandise to California residents from the Society's offices in Maryland and the District of Columbia. The Society's activities in California consisted solely of the maintenance of two offices that solicited advertising copy for its monthly magazine; these offices performed no functions related to the mail order sales of maps, atlases, globes, and books upon which the use tax was imposed. The continuous presence of the two offices provided a sufficient nexus to justify the imposition of a duty to collect the use tax, the Court held. *Bellas Hess* was distinguished as involving a direct tax so that there must exist a nexus or relationship not only between the seller and the taxing State but also between the activity of the seller sought to be taxed and the seller's activity within the State: where there was a lesser burden, such as that of merely collecting a use tax on goods sold within the taxing State, the lesser nexus of the existence of the two offices in the State was constitutionally sufficient. Id., 559–561. *Miller Bros* was also distinguished by the Court, id., 558–559, 561–562, but Justice Blackmun thought the distinction unpersuasive and that the former case was undermined. Id., 562.

[16] 309 U.S. 33 (1940).

[17] Id., 53–54.

"narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. . . ." [18] Three Justices, speaking by Chief Justice Hughes, dissented. Three companion cases decided the same day were found to follow the *Berwind-White* pattern,[19] while a fourth was held not to, on the ground that foreign commerce was involved.[20] For the time being *Robbins* and family looked to be on the way out.

In *McLeod* v. *Dilworth Co.*,[21] a divided Court ruled that a sales tax could not be validly imposed by a State on sales to its residents which were consummated by acceptance of orders in, and shipment of goods from another State, in which title passed upon delivery to the carrier. Said Justice Frankfurter for the majority: "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, . . . A sales tax is a tax on the freedom of purchase. . . . A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing State to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end." [22] He also "distinguished" the *Berwind-White* case—just as it had "distinguished" the *Robbins* case—but not to the satisfaction of three of his brethren, who found the decision to mark a retreat from the *Berwind-White* case.[23]

*Nippert* v. *City of Richmond*,[24] involved a municipal ordinance imposing upon solicitors of orders for goods a license tax of fifty dollars and one-half of one per cent of the gross earnings, commissions, et cetera, for the preceding year in excess of $1,000. Speaking for the same majority that had decided *McLeod* v. *Dilworth Co.*, Justice Rutledge found that "as the case has been made, the issue is substantially whether the long line of so-called 'drummer cases' beginning with *Robbins* v. *Chelby County Taxing District*, 120 U.S. 489, shall be adhered to in result or shall now be overruled in the

[18] Id., 57, citing *Ficklen* v. *Shelby County*, 145 U.S. 1 (1892). In the latter it was held that the *Robbins* case did not apply to a firm of agents and brokers maintaining an office and samples throughout the year in the taxing district.

[19] *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70 (1940); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940).

[20] *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940).

[21] 322 U.S. 327 (1944).

[22] Id., 330.

[23] Id., 329-330, 332.

[24] 327 U.S. 416 (1946).

light of what attorneys for the city say are recent trends requiring that outcome." [25] The tax was held void, *Berwind-White* being not only "distinguished" this time, but also "explained." "The drummer," said Justice Rutledge, "is a figure representative of a by-gone day," citing Wright, *Hawkers and Walkers in Early America* (1927). "But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify." [1]

A year later a Mississippi "privilege tax" laid upon each person soliciting business for a laundry not licensed in the State was set aside directly on the authority of the *Robbins* case.[2] However, this renewed interest in *Robbins* has not been sustained.[3]

***Taxation of Carriage of Persons.***—Whether the carriage of persons from one State to another was a branch of interstate commerce was a question which the Court was able to side-step in *Gibbons* v. *Ogden.*[4] A quarter of a century later, however, an affirmative answer was suggested in the *Passenger Cases,*[5] in which a state tax on each passenger arriving on a vessel from a foreign country was set aside, though chiefly in reliance on existing treaties and acts of Congress. But similar cases arising after the Civil War were disposed of by direct recourse to the commerce clause.[6] Meantime, in 1865, the newly admitted State of Nevada, in an endeavor to prevent a threatened dissipation of its population, levied a special tax on railroad and stage companies for every passenger they carried out of the State, and in *Crandall* v. *Nevada,*[7] this act was held

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[25] Id., 417–418.

[1] Id., 435 n. 26. For a more recent holding on a license tax, *see Dunbar-Stanley Studios, Inc.* v. *Alabama,* 39[illegible] 3. 537 (1969), where the Court upheld a state license tax of $5 per week for the transient photographer when resident photographers paid $25 per year.

[2] *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389 (1952). As applied to a Georgia firm soliciting orders for groceries in an Alabama city, which are accepted in Georgia and shipped from the latter State, an Alabama city ordinance levying a flat-sum privilege tax on wholesale grocers located outside the city and delivering groceries at wholesale therein is void. *West Point Grocery Co.* v. *City of Opelika,* 354 U.S. 390 (1957).

[3] Compare *General Motors Corp.* v. *Washington,* 377 U.S. 436 (1964) with *Norton Co.* v. *Dept. of Revenue,* 340 U.S. 534 (1951).

[4] 9 Wheat. (22 U.S.) 1, 217–219 (1824).

[5] *Smith* v. *Turner,* 7 How. (48 U.S.) 283 (1849).

[6] *Henderson* v. *New York,* 92 U.S. 259 (1876); *People* v. *Compagnie Gen Transatlantique,* 107 U.S. 59 (1882).

[7] 6 Wall. (73 U.S.) 35 (1868).

void on the general ground that the National Government had at all times the right to require the services of its citizens at the seat of the government and they the correlative right to visit the seat of government, rights which, if the Nevada tax was valid, were at the mercy of any State, the power to tax being without limit. Reference was also made to the right of the government to transport troops at all times by the most expeditious method. Two of the Justices, however, rejected this line of reasoning and held the act to be void under the commerce clause.[8] But it was not until 1885 that the Court, in deciding *Gloucester Ferry Company* v. *Pennsylvania,*[9] stated flatly that "[c]ommerce among the States . . . includes the transportation of persons," [10] and hence was not taxable by the States, a proposition which is still good law.[11] However, a user charge designed to make airlines and their passengers pay a reasonable fee for utilization of state-provided facilities and which is calculated at a flat rate for each passenger enplaning at each airport within the State for domestic or interstate flights is not proscribed by the cases herein described.[12]

### State Taxation of Interstate Commerce Privilege: Foreign Corporations

***Doctrinal History.***—In the famous case of *Paul* v. *Virginia,*[1] it was held that a corporation chartered by one State could enter other States only with their assent, which might "be granted upon such terms and conditions as those States may think proper to impose"; [2] but along with this holding went the statement that "the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals." [3] And in the *State Freight-Tax Case* it was implied that no State can regulate or restrict the right of a "foreign" corporation—one chartered by another State—to carry on interstate commerce within its border,[4] an implication which soon

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[8] Id., 49.

[9] 114 U.S. 196 (1885).

[10] Id., 203.

[11] *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U.S. 204 (1894); *see also Edwards* v. *California,* 314 U.S. 160 (1941), the decision which represents the exact inverse of that in the *Crandall* case, being based by the majority on the commerce clause, while several of the Justices preferred to put it on the broader grounds invoked by Justice Miller in the *Crandall* case.

[12] *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines,* 405 U.S. 707 (1972).

[1] 8 Wall. (75 U.S.) 168 (1869).

[2] Id., 181.

[3] Id., 182.

[4] 15 Wall. (82 U.S.) 232, 233–234, 278–279 (1873).

became explicit. In *Leloup* v. *Port of Mobile,*[5] the Court had before it a license tax on a telegraph company which was engaged in both domestic and interstate business.

The general nature of the exaction did not suffice to save it. Said the Court: "The question is squarely presented to us . . . whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business in the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24, 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done." [6]

In *Crutcher* v. *Kentucky* [7] a like result was reached, without assistance from an act of Congress, with respect to a statute which provided that the agent of an express company not incorporated by the laws of that State should not carry on business there without first obtaining a license from the State and that, preliminary thereto, he must satisfy the auditor of the State that the company he represented was possessed of an actual capital of at least $150,000. The act was held to be a regulation of interstate commerce so far as applied to a corporation of another State in that business. "To carry on interstate commerce," said the Court, "is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." [8]

***License Taxes.***—The demand for what in effect is a license is, of course, capable of assuming various guises. In *Ozark Pipe Line* v. *Monier,*[9] an annual franchise tax on foreign corporations equal to

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[5] 127 U.S. 640 (1888).
[6] Id., 645.
[7] 141 U.S. 47 (1891).
[8] Id., 57.
[9] 266 U.S. 555 (1925).

one-tenth of one percent of the par value of their capital stock and surplus employed in business in the State was found to be a privilege tax and hence one which could not be exacted of a foreign corporation whose business in the taxing State consisted exclusively of the operation of a pipe line for transporting petroleum through the State in interstate commerce and of activities the sole purpose of which was the furtherance of its interstate business. Likewise, a Massachusetts tax based on "the corporate surplus" of a foreign corporation having only an office in the State for the transaction of interstate business was held in *Alpha Cement Co.* v. *Massachusetts* to be virtually an attempt to license interstate commerce.[10] In the same category of unconstitutional taxation of the interstate commerce privilege, the Court has also included the following: a state "franchise" tax on a foreign corporation, whose sole business in the State consisted in landing, storing, and selling in the original package goods imported by it from abroad, the tax being imposed annually on the doing of such business and measured by the value of the goods on hand,[11] a state privilege or occupation tax on every corporation engaged in the business of operating and maintaining telephone lines and furnishing telephone service in the State, of so much for each telephonic instrument controlled and operated by it, as applied to a company furnishing both interstate and intrastate service, and employing the same telephone, wires, et cetera, in both as integrated parts of its system,[12] a state occupation tax measured by the entire gross receipts of the business of a radio broadcasting station, licensed by the Federal Communications Commission, and engaged in broadcasting advertising "programs" for customers for hire to listeners within and beyond the State, since it did not "appear that any of the taxed income . . . [was] allocable to intrastate commerce," [13] a state occupation tax on the business of loading and unloading vessels engaged in interstate and foreign commerce,[14] an Indiana income tax imposed on the gross receipts from commerce inasmuch as the tax reached indiscriminately and without apportionment the gross income from both interstate commerce and intrastate activities,[15] an Arkansas statute making entry into

[10] 268 U.S. 203 (1925); followed in *Cudahy Co.* v. *Hinkle*, 278 U.S. 460 (1929). *Cf.*, however, *Western Live Stock* v. *Bureau*, 303 U.S. 250, 255 (1938).

[11] *Anglo-Chilean Corp.* v. *Alabama*, 288 U.S. 218 (1933).

[12] *Cooney* v. *Mountain States Tel. Co.*, 294 U.S. 384 (1935).

[13] *Fisher's Blend Station* v. *Tax Comm.*, 297 U.S. 650, 656 (1936).

[14] *Puget Sound Co.* v. *Tax Comm.*, 302 U.S. 90 (1937).

[15] *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938).

the State of motor vehicles carrying more than twenty gallons of gasoline conditional on the payment of an excise on the excess.[16]

***Doctrine of Western Union Tel. Co. v. Kansas as Later Modified.***—One of the most striking concessions ever made by the Court to the interstate commercial interest at the expense of the State's taxing power was that which appeared originally in 1910, in *Western Union Tel. Co.* v. *Kansas,*[17] which involved a percentage tax upon the total capitalization of all foreign corporations doing or seeking to do a local business in the State. The Court pronounced the tax, as to Western Union, a burden upon the company's interstate business and upon its property located and used outside the State, and hence void under both the commerce clause and the due process of law clause of the Fourteenth Amendment. The decision was substantially aided by the fact that the company had been doing a general telegraphic business within the State for more than fifty years without having been subjected to such an exaction.[18]

The doctrine of the case, however, soon cast off these initial limitations. In *Looney* v. *Crane Co.,*[19] a similar tax by the State of Texas was disallowed as to an Illinois corporation, engaged in its home State in the manufacture of hardware, but maintaining in Texas depots and warehouses from which orders were filled and sales made. Likewise, in *International Paper Co.* v. *Massachusetts,* it was clearly stated that "the immunity of interstate commerce from state taxation is not confined to what is done by the carriers in such commerce . . . [but] is universal and covers every class of

[16] *McCarroll* v. *Dixie Lines,* 309 U.S. 176 (1940).

[17] 216 U.S. 1 (1910). *Cf. Osborne* v. *Florida,* 164 U.S. 650 (1897), involving an express business; *Pullman Co.* v. *Adams,* 189 U.S. 420 (1903); *Allen* v. *Pullman Company,* 191 U.S. 171 (1903). Here state taxes levied on the local business of companies engaged also in interstate commerce were sustained "on the assumption" that the companies in question were free to abandon their local business.

[18] *See also Pullman Co.* v. *Kansas ex rel. Coleman,* 216 U.S. 56 (1910); *Ludwig* v. *Western Union Tel. Co.,* 216 U.S. 146 (1910); *Atchison T. & S.F. Ry. Co.* v. *O'Connor,* 223 U.S. 280, 285 (1912).

[19] 245 U.S. 178 (1917). *Cf. Baltic Mining Co.* v. *Massachusetts,* 231 U.S. 68 (1913); *Kansas City Ry.* v. *Kansas,* 240 U.S. 227 (1916); and *Kansas City M. & B. R.R. Co.* v. *Stiles,* 242 U.S. 111 (1916). In each of these a tax like that involved in *Looney* v. *Crane Co.* was sustained, in the first two because the statute set a maximum limit to the tax; in the third because the amount collected under the act was held to be "reasonable." The ideology of these decisions is clearly opposed to that of the cases treated in the text. The rule in *Looney* v. *Crane Co.* was held not applicable in the case of a West Virginia corporation doing business in Illinois and owning practically all of its property there. An Illinois tax on the local business, which was measured by the total capitalization of the company was sustained, it being shown further that the tax was little more than it would have been if levied at the same rate directly on the property of the company that was in Illinois. *Hump Hairpin Co.* v. *Emmerson,* 258 U.S. 290 (1922).

interstate commerce, including that conducted by merchants and trading companies." [20] On the same occasion the general proposition was laid down that "the power of a State to regulate the transaction of a local business within its borders by a foreign corporation . . . is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action." [21]

The precise standing of this doctrine is, nevertheless, seriously clouded by certain more recent holdings. In *Sprout* v. *City of South Bend,* [22] the doctrine was still applied, to disallow a license tax on concerns operating a bus interstate. Pointing to the fact that the ordinance made no distinction between businesses engaged exclusively interstate and those engaged intrastate or both interstate and intrastate, the Court said: "[I]n order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from interstate business." [23] Likewise, in *Clooney* v. *Mountain States Tel. Co.,* the Court asserted that to sustain a state occupation tax on one whose business is both interstate and intrastate, "it must appear . . . that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business." [24] Justice Brandeis, speaking for the Court in *Pacific Tel. & Tel. Co.* v. *Tax Comm.,* [25] asserted flatly: "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid must be held void merely because the local and interstate branches are for some reason inseparable." [1]

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[20] 246 U.S. 135, 142 (1918). *See also Locomobile Co. of America* v. *Massachusetts,* 246 U.S. 146 (1918); *Cheney Brothers Co.* v. *Massachusetts,* 246 U.S. 147 (1918); *Union Pac. R.R. Co.* v. *Pub. Service Comm.,* 248 U.S. 67 (1918).

[21] 246 U.S., 141.

[22] 277 U.S. 163 (1928).

[23] Id., 171.

[24] 294 U.S. 384, 393 (1935).

[25] 297 U.S. 403, 415 (1936).

[1] An annual license tax, ranging from $8.25 to $16.50 on each truck operating for hire within a city may be collected from a trucking concern whose vehicles daily carry goods within the city as well as between the city and points in neighboring States. The tax is directed at intrastate business only, although falling on instrumentalities of interstate commerce that are at once also those of intrastate commerce. However, only Justice Reed, together with Chief Justice Warren, deem *Pacific Tel. & Tel. Co.* v. *Tax Comm.,* 297 U.S. 403 (1936), to be controlling, whereas seven Justices would rest the instant holding on *New York Central R. Co.* v. *Miller,* 202 U.S. 584 (1906), and *Northeast Airlines, Inc.,* v. *Minnesota,* 322 U.S. 292 (1944). *City*

An occupation tax, like other taxes and expenses, lessens the benefit derived by interstate commerce from the joint operation with it of the intrastate business of the carrier, but it is not an undue burden on interstate commerce where, as in this case, the advantage to the carrier, and to the interstate commerce, of continuing the intrastate business is greatly in excess of the tax. And subsequent holdings in cases involving foreign corporations doing a mixed business, comprising both interstate and intrastate elements, have tended on the whole to restore the rule stated in *Paul* v. *Virginia,*[2] shortly after the Civil War, that the Constitution does not confer upon a foreign corporation the right to engage in local business in a State without its assent, which it may give on such terms as it chooses.[3]

### State Taxation of Property Engaged in, and of the Proceeds from, Interstate Commerce

***General Issue.***—In this area of constitutional law the principle asserted in the *State Freight Tax Case,*[1] that a State may not tax interstate commerce, confronted the principle that a State may tax all purely domestic business within its borders and all property "within its jurisdiction." Inasmuch as most large concerns prosecute both an interstate and a domestic business, while the instrumentalities of interstate commerce and the pecuniary returns from such commerce are ordinarily property within the jurisdiction of some State or other, the task before the Court has been to determine where to draw the line between the immunity claimed by interstate business, on the one hand, and the prerogatives claimed by local power on the other. This undertaking, at times, has involved it in self-contradiction, particularly as successive developments have brought into prominence novel aspects of its complex task, or have altered the perspective in which the interests competing for its protection have appeared. In this field the words of the late Justice Rutledge, spoken in 1946, are especially applicable: "For cleanly as the commerce clause has worked affirmatively on

*of Chicago* v. *Willett Co.*, 344 U.S. 574, 580–582 (1953). Dissenting, Justice Douglas reviewed the tax as an invalid exaction for the privilege of engaging in interstate commerce.

[2] 8 Wall. (75 U.S.) 168, 181 (1869). *See also Bank of Augusta* v. *Earle*, 13 Pet. (38 U.S.) 519 (1839), and *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U.S. 246 (1906).

[3] *See Atlantic Lumber Co.* v. *Comm.*, 298 U.S. 553 (1936); *Southern Gas Corp.* v. *Alabama*, 301 U.S. 148 (1937); *Atlantic Refining Co.* v. *Virginia*, 302 U.S. 22 (1937); *Coverdale* v. *Pipe Line Co.*, 303 U.S. 604 (1938); *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331 (1939); *Dept. of Treasury* v. *Wood Corp.*, 313 U.S. 62 (1941); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571 (1949). *Cf.*, however, *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *Memphis Gas Co.* v. *Stone*, 335 U.S. 80, 85–86 (1948).

[1] 15 Wall. (82 U.S.) 232 (1873).

the whole, its implied negative operation on state power has been uneven, at times highly variable. . . . Into what is thus left open for inference to fill, divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation. That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation." [2]

***Apportionment and Unit Rules.***—At the outset the Court appears to have thought that it could solve all difficulties by the simple device of falling back on Marshall's opinion in *Brown* v. *Maryland;* [3] on the same day that it set aside Pennsylvania's freight tax by appeal to that transcendent precedent, it sustained, by reference to the same authority, a Pennsylvania tax on the gross receipts of all railroads chartered by it, the theory being that such receipts had, by tax time, become "part of the mass of property of the State." [4] This precedent stood fourteen years, being at last superseded by a ruling in which substantially the same tax was held void as to a Pennsylvania chartered steamship company.[5] A year later the Court sustained Massachusetts in levying a tax on Western Union, a New York corporation, on account of property owned and used by it in the State, taking as the basis of the assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.[6] The tax was characterized by the Court as an attempt by Massachusetts "to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and the value of the capital so employed by it therein." [7]

And drawing on certain decisions in which it had sought to limit the principle of tax exemption as applied in the case of railroads chartered by the United States, it expressed concern that "the necessary powers of the States" should not be destroyed or "their efficient exercise" be prevented.[8] Three years later, Pennsyl-

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[2] *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408, 418 (1946).

[3] 12 Wheat. (25 U.S.) 419 (1827).

[4] *State Tax on Railway Gross Receipts Case (Reading R. Co.* v. *Pennsylvania).* 15 Wall. (82 U.S.) 284 (1873).

[5] *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U.S. 326 (1887).

[6] *Western Union Tel. Co.* v. *Massachusetts,* 125 U.S. 530 (1888).

[7] Id., 547.

[8] *See Union Pacific R. Co.* v. *Peniston,* 18 Wall. (85 U.S.) 5, 30–31 (1873).

vania, still in quest of revenue, was sustained in applying the Massachusetts idea to Pullman's Car Company, a "foreign" corporation.[9] Pointing to the fact that the company had at all times substantially the same number of cars within the State and continuously and constantly used there a portion of its property, the Court commended the State for taking "as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States. . . ." This, said the Court, was "a just and equitable method of assessment;" one which, "if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." [10]

And pursuing the same course of thought, the Court, in *Adams Express Company* v. *Ohio,*[11] sustained that State in taxing property worth less than $70,000.00 at a valuation of more than half a million, on the ground that the latter figure did not exceed, in relation to the total capital value of the company, the proportion borne by the railway mileage which the company covered in Ohio to the total mileage which it covered in all States. To the objection that "the intangible values" reached by the tax were derived from interstate commerce, the Court relied with the "cardinal rule . . . that whatever property is worth for purposes of income and sale it is also worth for purposes of taxation," [12] which obviously does not meet the issue. What the case indubitably establishes is that a State may tax property within its limits "as part of a going concern" and hence "at its value as it is in its organic relations," although those relations constitute interstate commerce.[13] In short, values created by interstate commerce *are* taxed.

Thus emerged the concept of an "apportioned" tax, or as it is called when applied to the problem of property valuation, the "unit rule," which till 1938 afforded the Court its chief reliance in the field of constitutional law now under review. The theory underlying the concept appears to be that it is always possible for a State to devise a formula whereby it may assign to property employed in interstate commerce within its limits, or to the proceeds from such

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[9] *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18 (1891).

[10] Id., 26.

[11] 165 U.S. 194 (1894), upon rehearing 166 U.S. 185 (1897).

[12] 166 U.S., 220.

[13] *See* Justice Holmes' language in *Galveston, H. & S.A. Ry. Co.* v. *Texas,* 210 U.S. 217, 225, 227 (1908). *See also Cudahy Packing Co.* v. *Minnesota,* 246 U.S. 450 (1918); *Pullman Co.* v. *Richardson,* 261 U.S. 330 (1923); and *Virginia* v. *Imperial Coal Co.,* 293 U.S. 15 (1934).

commerce, a value which it may tax or by which it may "measure" a tax, without unconstitutionally burdening or interfering with interstate commerce, while at the same time exacting from it a fair return for the protection which the State gives it. The question in each case is, of course, whether the State has guessed right.

***Apportioned Property Taxes.***—In reliance on the apportionment concept, the Court has at various times sustained, in the case of a sleeping car company, as we have seen, a valuation based on the ratio of the miles of track over which the company runs within the State to the whole track mileage over which it runs,[14] in the case of a railroad company, a valuation based on the ratio of its mileage within the State to its total mileage,[15] in the case of a telegraph company, a valuation based upon the ratio of its length of line within the State to its total length,[16] in the case of an express company a valuation based upon the ratio of miles covered by it in the State to the mileage covered by it in all States.[17] Also, a tax has been upheld as applied to a railroad line whose principal business was hauling ore from mines in the taxing State to terminal docks outside the State, where the line and the docks were treated by the railway as a unit, the charge for the dock service being absorbed in the charge per ton transported, and where the evidence did not show that the mileage value of the part of the line outside of the taxing State, with the docks included, was greater than the mileage value of part within it.[18] Nor does the commerce clause preclude the assessment of an interstate railway within a State by taking such part of the value of the railroad's entire system, less the value of its localized property, such as terminal buildings, shops and nonoperating real estate, as is represented by the ratio which the railroad's mileage within the State bears to its total mileage.[19] To the objection that the mileage formula was inapplicable in this instance because of the disparity of the revenue-producing capacity between the lines in and out of the State, the Court answered that mathematical exactitude in making an apportionment had never been a constitutional requirement. "Wherever," it explained, "the State's taxing authorities have been held to have intruded upon the protected domain of interstate commerce

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[14] *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891).

[15] *Pittsburgh, C., C. & St. L. Railroad Co.* v. *Backus*, 154 U.S. 421 (1894); *Cleveland, C., C. & St. L. Railway Co.* v. *Backus*, 154 U.S. 439 (1894).

[16] *Western Union Tel. Co.* v. *Taggart*, 163 U.S. 1 (1896). *See also Western Union Tel. Co.* v. *Massachusetts*, 125 U.S. 530 (1888).

[17] *Adams Express Co.* v. *Ohio*, 165 U.S. 194 (1897), upon rehearing 166 U.S. 185 (1897).

[18] *Great Northern Ry.* v. *Minnesota*, 278 U.S. 503 (1929).

[19] *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940).

in their use of a mileage formula, the special circumstances of the particular situation, in the view which this Court took of them, precluded a defensible utilization of the mileage basis." [20] The principle of apportionment is, moreover, applicable to the intangible property of a company engaged in both interstate and local commerce, as well as to its tangible property.[21]

***Franchise Taxes.***—Today the term "franchise tax" possesses no specific saving quality of its own. If the tax is merely a "just equivalent" of other taxes it is valid however calculated.[22] Conversely, when such taxes are in addition to other taxes then their fate will be determined by the same rules as would apply had the label been omitted.[23] More precisely, the rule governing this species of tax is ordinarily the apportionment concept, and if the basis of apportionment adopted by the taxing State is seen by the Court to be a fair and reasonable one, the tax will be sustained, otherwise, not.

Thus a franchise tax may be measured by such proportion of the company's net income as its capital invested in the taxing State and its business carried on there bear to its total capital and business,[24] also by the net income justly attributable to business done within the State although a part of this was derived from foreign or interstate commerce,[25] also by such proportion of the company's outstanding capital stock, surplus and undivided profits, plus its long-term obligations, as the gross receipts of its local business bear to its total gross receipts from its entire business,[1] also by such proportion of the company's total capital stock as the value of its property in the taxing State and of the business done there bears to the total value of its property and of its business.[2] On the other hand, a "franchise" tax on the unapportioned gross receipts of railroad companies engaged in interstate commerce, was held void,[3] as was also one which was measured by assigning to the

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[20] Id., 366, citing *Union Tank Line Co.* v. *Wright*, 249 U.S. 275 (1919); *Wallace* v. *Hines*, 253 U.S. 66 (1920); *Southern Ry. Co.* v. *Kentucky*, 274 U.S. 76 (1927).

[21] *Atlantic Lumber Co.* v. *Comr.*, 298 U.S. 553 (1936). *Cf. Alpha Cement Co.* v. *Massachusetts*, 268 U.S. 203 (1925).

[22] *Postal Telegraph Cable Co.* v. *Adams*, 155 U.S. 688, 697 (1895). *See also Illinois Cent. R.R.* v. *Minnesota*, 309 U.S. 157 (1940), in which was sustained a five percent gross earnings tax on all railroads operating in the State, payable in lieu of all other taxes and found to have "a fair relation to the property employed in the State."

[23] *New Jersey Tel. Co.* v. *Tax Board*, 280 U.S. 338 (1930).

[24] *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Comm.*, 266 U.S. 271 (1924).

[25] *Matson Nav. Co.* v. *State Board*, 297 U.S. 441 (1936). *See also International Shoe Co.* v. *Shartel*, 279, U.S. 429 (1929).

[1] *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331 (1939).

[2] *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947).

[3] *Galveston, H. & S.A. Ry. Co.* v. *Texas*, 210 U.S. 217 (1908).

company's property in the State the same proportion of the total value of its stocks and bonds as its mileage in the State bore to its total mileage, no account being taken of the greater cost of construction of the company's lines in other States or of its valuable terminals elsewhere.[4] More recently, in *Memphis Gas Co.* v. *Stone*,[5] a Mississippi franchise tax, measured by the value of capital invested or employed in the State, was sustained as applied to a pipeline company, a portion of whose line passed through the State, but which did no local business there. Three Justices, Reed, Douglas, and Murphy, held that the tax was on intrastate activities of the company in maintaining its facilities there, and was no more burdensome than the concededly valid *ad valorem* tax on the company's property in the State. Justice Rutledge held that the tax was valid because it did not discriminate against interstate commerce, nor invite multiple taxation, and Justice Black concurred in the judgment without opinion.

The doctrine that the privilege of doing interstate business is immune from state taxation was formally and expressly abandoned in *Complete Auto Transit* v. *Brady*.[6] Upholding a tax imposed on the privilege of doing business as applied to a corporation engaged in interstate transportation service in the taxing State, the Court abandoned the privilege concept because it bore "no relationship to economic realities" and did "not address the problems with which the Commerce Clause is concerned."

***Apportioned Gross Receipts Taxes: Multiple Taxation Test.***— Gross receipts taxes[7] have been classified as follows: (a) those

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[4] *Wallace* v. *Hines*, 253 U.S. 66 (1920).

[5] 335 U.S. 80 (1948). Followed in *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100 (1975).

[6] 430 U.S. 274 (1977).

[7] The first State to attempt to employ the apportionment device in order to tax gross receipts of companies engaged in interstate commerce was Maine, in connection with a so-called franchise tax which was levied on such proportion of the revenues of railroads operating in Maine as their mileage there bore to their total mileage. In *Maine* v. *Grand Trunk Ry. Co.*, 142 U.S. 217, 227-228, 234-235 (1891), which later was overruled, five Justices declared that "the privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy." Four dissenting Justices protested forcefully that this holding directly contradicted a whole series of decisions to the effect that the States are without power to tax interstate commerce, citing *Pickard* v. *Pullman Southern Car Co.*, 117 U.S. 34 (1886); *Leloup* v. *Port of Mobile*, 127 U.S. 640 (1888); *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891); *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U.S. 326 (1887). The overruling occurred 17 years later, when the Court overturned a

which were judged to be fairly apportioned; [8] (b) those which were justified on a "local incidence" theory, or the burden of which on interstate commerce was held to be "remote"; [9] (c) those which were justified as not inviting the danger of multiple taxation of interstate commerce.[10] Gross receipts taxes which, on the other hand, have been invalidated under the commerce clause have been placed in the following groups: (a) those which were held not to be fairly apportioned; [11] (b) those which were not apportioned at all and were bound to subject interstate commerce to the risk of multiple taxation; [12] (c) those in which a discriminatory element was detected in that they were directed exclusively at transportation or communication; [13] (d) those in which there was no discrimination but a possible multiple burden; [14] and, (e) of course, any tax which it disallows the Court is always free to stigmatize as an unconstitutional attempt to tax or license the interstate commerce privilege.[15]

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Texas gross receips tax drawn on the lines of the earlier Maine statute. The Maine tax, however, was described in the later ruling as having been in the nature of a commutation tax in lieu of all taxes, which the Texas tax was not. *Galveston, H. & S.A. Ry. Co.* v. *Texas*, 210 U.S. 217, 226 (1908).

[8] *Illinois Cent. R. Co.* v. *Minnesota*, 309 U.S. 157 (1940). *See also Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U.S. 379 (1903); *United States Express Co.* v. *Minnesota*, 223 U.S. 335 (1912). *See Freeman* v. *Hewit*, 329 U.S. 249, 265 n. 13 (1946) (Justice Rutledge concurring).

[9] *Western Live Stock* v. *Bureau*, 303 U.S. 250 (1938). *See also U.S. Express Co.* v. *Minnesota*, 223 U.S. 335 (1912); *Dept. of Treasury* v. *Wood Corp.*, 313 U.S. 62 (1941); *Dept. of Treasury* v. *Mfg. Co.*, 313 U.S. 252 (1941); *International Harvester Co.* v. *Dept. of Treasury*, 332 U.S. 340 (1944). *Cf. General Motors* v. *Washington*, 377 U.S. 436 (1964).

[10] *Western Live Stock* v. *Bureau*, 303 U.S. 250 (1938).

[11] *Oklahoma* v. *Wells Fargo & Co.*, 223 U.S. 298 (1912).

[12] *Phila. Steamship Co.* v. *Pennsylvania*, 122 U.S. 326 (1887); *Ratterman* v. *Western Union Tel. Co.*, 127 U.S. 411 (1888); *Western Union Tel. Co.* v. *Alabama*, 132 U.S. 472 (1889); *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). *Cf. Fargo* v. *Michigan*, 121 U.S. 230 (1887), as explained in *Western Live Stock* v. *Bureau*, 303 U.S. 250 (1938).

[13] Lockhart, "Gross Receipts Taxes on Interstate Transportation and Communication," 57 Harv. L. Rev. 40, 65, 66 (1943); *Galveston, H. & S.A. Ry. Co.* v. *Texas*, 210 U.S. 217 (1908); *New Jersey Tel. Co.* v. *Tax Board*, 280 U.S. 338 (1930). *But cf. Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940). In both the *Galveston* and *New Jersey Telephone* cases, although the taxable events all occurred within the taxing State, the possibility of multiple taxation was nevertheless present. *See also Puget Sound Co.* v. *Tax Comm.*, 302 U.S. 90 (1937), the decision which might have been rested upon the clause of the Constitution forbidding the State to tax exports. *See also Richfield Oil Corp.* v. *State Board*, 329 U.S. 69 (1946).

[14] *Fisher's Blend Station* v. *Tax Comm.*, 297 U.S. 650 (1936); *Western Live Stock* v. *Bureau*, 303 U.S. 250 (1938).

[15] *See pp.* 218-219.

To an appreciable degree the Depression of the 1930's also affected the Court's views about the allowable scope under the clause of the taxing power of the States, a majority of which were on the verge of bankruptcy. The more evident proofs of this fact occurred in relation to state taxation of the subject matter of interstate commerce, as is indicated above.[16] But a certain revision of doctrine, apparently temporary in nature, however, is to be seen in the connection with state taxes impinging on property engaged in interstate commerce and the revenues from such commerce, the principal manifestation of which is to be seen in the emphasis which was for a time given the "multiple taxation" test. Thus in his opinion in the *Western Live Stock Case,*[17] Justice Stone seemed to be engaged in an endeavor to erect this into an almost exclusive test of the validity, or invalidity, of state taxation affecting interstate commerce. "It was not," he there remarked, "the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of State tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way' . . . and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of State taxation which add to the cost of his business." [18] Then, citing cases, he continued: "All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional.

"The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . [or added to] with equal right by every State which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. . . . The multiplication of State taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove . . . ." [19] And speaking again

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[16] *See p.* 216.

[17] 303 U.S. 250 (1938).

[18] Id., 254.

[19] Id., 255–256.

for the Court eleven months later, in *Gwin, White & Prince Inc.* v. *Henneford,*[20] Justice Stone applied the test to invalidate a State of Washington tax. "Such a tax," said he, "at least when not apportioned to the activities carried on within the State . . . would, if sustained, expose it [interstate commerce] to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject." The tax thus discriminated against interstate commerce, and threatened to "reestablish the barriers to interstate trade with which it was the object of the commerce clause to remove." [21]

The adoption by the Court of the multiple taxation principle as an exclusive test of state taxing power in relation to interstate commerce would have enlarged the former, but this was not the sole reason for its temporary vogue with the Court or at least a section of it. Discontent with the difficulties and uncertainties of the apportionment rule also played a great part. Thus in his concurring opinion in the *Gwin* case, Justice Butler, speaking for himself and Justice McReynolds, after showing the instability of decisions in this area, contended that "the problems of conjectured 'multiple taxation' or 'apportionment' " should be left to Congress,[22] a suggestion which Justice Black, speaking also for Justices Frankfurter and Douglas a year later, made the basis of a dissenting opinion,[23] from the doctrine of which, however, Justice Frankfurter later recanted.[24]

In *Freeman* v. *Hewit,*[25] the Court held void as an "unconstitutional burden on interstate commerce" an Indiana gross income tax of the proceeds from certain securities sent outside the State to be sold. Justice Frankfurter spoke for the Court; Justice Rutledge concurred in an opinion deploring the majority's failure to employ the multiple taxation test; [1] three Justices dissented.[2] In *Joseph* v.

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[20] 305 U.S. 434 (1939). *Cf. General Motors* v. *Washington,* 377 U.S. 436 (1964).

[21] 305 U.S., 439–440.

[22] Id., 455.

[23] *See McCarroll* v. *Dixie Lines,* 309 U.S. 176, 188–189 (1940).

[24] *Freeman* v. *Hewit,* 329 U.S. 249 (1946).

[25] Ibid.

[1] The Court relied particularly on *Adams Mfg. Co.* v. *Storen,* 304 U.S. 307 (1938) in which the multiple taxation test had been used.

[2] Justice Black dissented without opinion. Justice Douglas, speaking also for Justice Murphy, contended that the sale had been local, and that the only interstate agency employed had been the mails, an argument which squares badly with the attitude of the same Justices in *United States* v. *South-Eastern Underwriters Assn.,* 322 U.S. 533 (1944).

*Carter & Weekes Co.*,[3] the Court held void the application of a Washington gross receipts tax to the receipts of a stevedoring company from loading and unloading vessels employed in interstate and foreign commerce, or to the privilege of engaging in such business measured by receipts. Said Justice Reed for the Court: "Although State laws do not discriminate against interstate commerce or . . . subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with [interstate] commerce." [4] This time Justice Rutledge was among the dissenters so far as interstate commerce was concerned.[5] In *Greyhound Lines* v. *Mealey*,[6] five members of the Court ruled that a New York tax on the gross income of public utilities doing business in the State could not be constitutionally imposed on a carrier's unapportioned receipts from continuous transportation between termini in the State over a route a material part of which passed through other States. Justice Frankfurter, speaking for the Court, held, however, that the tax was sustainable as to receipts apportioned to the mileage within the State.[7] Justice Rutledge concurred without opinion. Dissenting, Justice Murphy, for himself and Justices Black and Douglas, thought the tax was an essentially local activity and that the transportation through other States was "a mere geographic incident," conceding at the same time, that this view invited the other States involved to levy similar taxes and exposed the company to the danger of multiple taxation.

In *Interstate Pipe Line Co.* v. *Stone* [8] four Justices, Rutledge, Black, Douglas, and Murphy, endorsed the view that Mississippi was within her rights in imposing on a Delaware corporation, as a condition of doing local business, a privilege tax equal to two per cent of its intrastate business even though the exaction amounted to "a 'direct' tax on the 'privilege' of engaging in interstate commerce." As the fifth Justice contributing to the bare majority, by which the tax was sustained, Justice Burton construed it as being

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[3] 330 U.S. 422 (1947), reaffirming *Puget Sound Co.* v. *Tax Commissioner*, 302 U.S. 90 (1937). Overruled in *Washington Revenue Dept.* v. *Assn. of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

[4] 330 U.S. 433.

[5] Justices Murphy, Douglas, and Rutledge thought the decision correct as to receipts from foreign commerce. Speaking for them, Justice Douglas made an effort to resurrect *Maine* v. *Grand Trunk Ry. Co.*, 142 U.S. 217 (1891). Justice Black dissented without opinion. 330 U.S., 434, 445.

[6] 334 U.S. 653 (1948).

[7] Id., 663, citing *Western Live Stock* v. *Bureau*, 303 U.S. 250 (1938); and *Ratterman* v. *Western Union Tel. Co.*, 127 U.S. 411 (1888).

[8] 337 U.S. 662, 666, 668, 669 (1949).

levied only on the privilege of engaging in intrastate commerce, a conclusion which obviously ignores the question of the actual impact of the tax on interstate commerce.[9] Four dissenters, Justices Reed, Frankfurter, Jackson, and Chief Justice Vinson, reiterated that no State may "levy privilege, excise of ranchise taxes on a foreign corporation for the privilege of carrying on or the actual doing of solely interstate business . . . even though the tax is not discriminatory and is fairly apportioned between the corporation's intrastate and interstate business.[10]

***Taxes on Net Income.***—The leading case is *United States Glue Co.* v. *Oak Creek* [11] where it was held that the State of Wisconsin, in having a general income tax upon the gains and profits of a domestic corporation, was entitled to include in the computation the net income derived from transportations in interstate commerce. Pointing out the difference between such a tax and one on gross receipts, the Court said the latter "affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." Such a tax "constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted . . . because they happen to be engaged in commerce among the States." [12]

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[9] *See pp.* 213-214, 223-226.

[10] 337 U.S., 677-678, 680. In *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954), the Court voided the collection from an express company doing an exclusively interstate business of a gross receipts tax levied as a percentage of receipts earned on business passing through, into, or out of the taxing State; though labeled as a tax on the privilege of doing business in the State, the impact of the tax was squarely upon gross receipts and would have been imposed even if the company had no property in the State. Four Justices (Clark, Black, Douglas, and Warren, C.J.) dissented on the ground that, despite the label used, the tax was nondiscriminatory, fairly apportioned, and not excessive, and the incidence thereof was on the going concern value of physical assets. Subsequently, a franchise tax, levied on express companies in lieu of all taxes on their intangible property (express rights and going concern value) and rolling stock, and measured by gross receipts apportioned to operations in Virginia, including receipts derived from express transported through, into, or out of the State was enforced against a foreign corporation doing exclusively interstate business but owning property in Virginia. The tax was conceded to embrace a fair formula for measuring going concern value. *Railway Express Agency* v. *Virginia*, 358 U.S. 434 (1959). Justices Whittaker and Stewart dissented.

[11] 247 U.S. 321 (1918).

[12] Id., 329.

Adhering to this precedent, the Court has held that a tax upon the net income of a nonresident from business carried on by him in the State is not a burden on interstate commerce merely because the products of the business are shipped out of the State; [13] also that a tax which is levied upon the proportion of the net profits of a foreign corporation earned by operations conducted within the taxing State is valid, if the method of allocation employed be not arbitrary or unreasonable.[14] Where, however, the method of allocating the net income of a foreign corporation attributed to the State an amount of income out of all proportion to the business there transacted by the corporation, it was held void.[15] More recently, in *Northwestern States Portland Cement Co.* v. *Minnesota*,[16] foreign corporations, which maintained a sales office and employed salesmen in the taxing State for solicitation of orders for their merchandise which, upon acceptance of the orders at their home office in another jurisdiction, were shipped to customers in the taxing State, were held liable to pay the latter's income tax on that portion of the net income of their interstate business as was attributable to such solicitation.

A State may impose a tax upon the net income of property, as distinguished from the net income of the one who owns or operates it, although the property is used in interstate commerce; [17] it may impose a "franchise tax" measured by the net income justly attributable to business done by corporations within the State, although part of the income so attributable comes from interstate and for-

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[13] *Shaffer* v. *Carter*, 252 U.S. 37 (1920).

[14] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Comm.*, 266 U.S. 271 (1924).

[15] *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U.S. 123, 132, 133 (1931). In this case a North Carolina tax was assessed on the income of a New York corporation, which bought leather, manufactured it in North Carolina, and sold its products at wholesale and retail in New York. The Court observed: "The difficulty of making an exact apportionment is apparent and hence, when the State has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases." The decisions in the *Underwood* and *Bass* cases, *supra*, "are not authority for the conclusion that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State."

[16] 358 U.S. 450, 470, 483-485 (1959), including *Williams* v. *Stockham Valves & Fittings, Inc.* Dissenting, Justices Whittaker, Frankfurter, and Stewart contended that heretofore the Court had never conceded that a State was competent to tax the income of a foreign corporation derived solely from activities within the taxing jurisdiction that were exclusively part of the process of doing interstate commerce and were not attended by any severable, local state business. *Cf. General Motors* v. *Washington*, 377 U.S. 436 (1964).

[17] *Atlantic Coast Line* v. *Daughton*, 262 U.S. 413 (1923).

eign commerce;[18] a tax on corporate net earnings derived from business done wholly within the State may be applied to the income of a foreign pipeline corporation which is commercially domiciled there and which pipes natural gas into that State for delivery to, and sale by, a local distributing corporation to local consumers.[19] Indeed, it was asserted that even if the taxpayer's business were wholly interstate commerce, such a nondiscriminatory tax upon its net income "is not prohibited by the commerce clause," there being no showing that the income was not on net earnings partly attributable to the taxing State,[20] but a more recent holding appears to contradict this position.[21]

*Vessels.*—In *Gloucester Ferry Company* v. *Pennsylvania*,[22] the Court held inapplicable to a New Jersey corporation which was engaged solely in transporting passengers across the Delaware River and entered Pennsylvania only to discharge and receive passengers and freight, a statute which taxed the capital stock of all corporations doing business within the State. Such transactions, the Court held; were interstate commerce; nor were the company's vessels subject to taxation by Pennsylvania, their taxing *situs* being in the company's home State. The only property held by the company in Pennsylvania was the lease there of a wharf which could be taxed by the State according to its appraised value, and the State also could levy reasonable charges by way of tolls for the use of such facilities as it might furnish for the carrying on of commerce. This ruling rested on two earlier ones. In 1855, the Court had held that vessels registered in New York, owned by a New York corporation, and plying between New York City and San Francisco had the former city for their home port and were not taxable by California where they remained no longer than necessary to discharge passengers and freight;[23] in 1877, it had sustained Keokuk, Iowa in charging tolls for the use by vessels plying the Mississippi of wharves owned by the municipality, said tolls being reasonable and not discriminatory as between interstate and intrastate commerce.[24] Today it is still the general rule as to vessels plying be-

[18] *Matson Nav. Co.* v. *State Board*, 297 U.S. 441 (1936). *See also Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942), where the tax was sustained under the Fourteenth Amendment.

[19] *Memphis Gas Co.* v. *Beeler*, 315 U.S. 649 (1942).

[20] Id., 656–657.

[21] *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951). Overruled in *Complete Auto Transit* v. *Brady*, 430 U.S. 274 (1977).

[22] 114 U.S. 196 (1885).

[23] *Hays* v. *Pacific Mail Steamship Co.*, 17 How. (58 U.S.) 596 (1855).

[24] *Packet Co.* v. *City of Keokuk*, 95 U.S. 80 (1877); *see also Transportation Co.* v. *Parkersburg*, 107 U.S. 691 (1883).

tween ports of different States and engaged in the coastwise trade, that the domicile of the owner is deemed to be the *situs* of the vessel for the purposes of taxation,[25] unless the vessel has acquired actual *situs* in another State, by continuous employment there, in which event it may be taxed there.[1] Recently, however, this long standing rule has been amended by the addition to it of the apportionment rule as developed in the *Pullman* case. This occurred in *Ott* v. *Mississippi Barge Line*,[2] in which the Court sustained Louisiana in levying an *ad valorem* tax on vessels owned by an interstate carrier and used within the State, the assessment for the tax being based on the ratio between the number of miles of the carrier's lines within the State and its total mileage.

*Airplanes.*—When, however, it was confronted by an attempt on the part of the State of Minnesota to impose a personal property tax on the entire air fleet owned and operated by a company in interstate commerce although only a part of it was in the State on tax day, the Court found itself unable to recruit a majority for any of the above formulas.[3] Pointing to the fact that the company was a Minnesota corporation and that its principal place of business was located in the State, Justice Frankfurter for himself and two others wished to stress the prerogatives of the State of domicile.[4] Justice Black, concurring in his view, added the *caveat* that the taxing rights of other States should not be foreclosed and made reference to his "leave it to Congress" notion.[5] Justice Jackson, after speaking lightly of the apportionment theory,[6] joined the affirming brethren on the ground that the record seemed "to establish Minnesota as a 'home port' within the meaning of the old and somewhat neglected but to me wise authorities cited," to wit, the *Hays* case and those decided by analogy to it.[7] Four Justices, speaking by

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[25] *Ayer & Lord Co.* v. *Kentucky*, 202 U.S. 409 (1906). For a resume of the rules for taxing vessels *see Northwest Airlines* v. *Minnesota* 322 U.S. 292, 314–315 n. 2 (1944).

[1] *Old Dominion Steamship Co.* v. *Virginia*, 198 U.S. 299 (1905).

[2] 336 U.S. 169 (1949).

[3] *Northwest Air lines* v. *Minnesota*, 322 U.S. 292 (1944).

[4] He also invoked *New York Central Railroad Co.* v. *Miller*, 202 U.S. 584 (1906). *See p. 220* n. 14.

[5] 322 U.S., 301–302.

[6] "The apportionment theory is a mongrel one, a cross between desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce. It is a practical, but rather illogical, device to prevent duplication of tax burdens on vehicles in transit. It is established in our decisions and has been found more or less workable with more or less arbitrary formulae of apportionment. Nothing either in theory or in practice commends it for transfer to air commerce." Id., 306.

[7] Id., 308.

Chief Justice Stone dissented, urging the *Pullman* case [8] as an applicable model and the fact that "the rationale found necessary to support the present tax leaves other States free to impose comparable taxes on the same property." [9] In *Braniff Airways* v. *Nebraska Board* [10] the preceding decision was held not to preclude a State, other than that of the corporate domicile, from taxing on an apportioned basis the flight equipment of a foreign interstate carrier which derived ten percent of its revenue from 18 daily stops to pick up and discharge passengers in the taxing jurisdiction. A charge, calculated on the basis of a flat rate per each passenger enplaning at an airport in the State, designed to make the user of state-provided facilities pay a reasonable charge for their construction and maintenance, is permissible and may constitutionally be imposed on interstate and domestic users alike.[11]

***Motor Vehicles.***—In the matter of motor vehicle taxation, on the other hand, durable and consistent results have been achieved. This is because most such taxation has been readily classifiable as the exaction of a toll for the use of the State's highways, and the only question was whether the toll was exorbitant. Moreover, such taxation is apt to be designed not merely to raise revenue but to promote safety on the highways. In the leading case, *Hendrick* v. *Maryland*,[12] the Court took cognizance of the fact that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves"; [13] on this factual basis it has held that registration may be required by a State for out-of-State vehicles operated therein [14] or passing through from one State to another,[15] that a special fee may be exacted for the privilege of transporting motor vehicles on their own wheels in caravans,[16] unless excessive,[17] that taxes may also be imposed on carriers based on capacity [18] or mileage,[19] or as a flat fee,[20] but that a privilege tax

[8] *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891).
[9] 322 U.S., 369.
[10] 347 U.S. 590 (1954).
[11] *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. 707 (1972). Justice Douglas dissented.
[12] 235 U.S. 610 (1915).
[13] Id., 622.
[14] Ibid.
[15] *Kane* v. *New Jersey*, 242 U.S. 160 (1916).
[16] *Morf* v. *Bingaman*, 298 U.S. 407 (1936).
[17] *Ingels* v. *Morf*, 300 U.S. 290 (1937).
[18] *Clark* v. *Poor*, 274 U.S. 554 (1927); *Hicklin* v. *Coney*, 290 U.S. 169 (1933).
[19] *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245 (1928); *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932).
[20] *Aero Mayflower Transit Co.* v. *Georgia Comm.*, 295 U.S. 285 (1935).

on motor busses operated exclusively in interstate commerce, cannot be sustained unless it appears affirmatively in some way that it is levied only as compensation for use of the highways in the State or to defray the expense of regulating motor traffic.[21] Later decisions follow in the same general track,[22] the most recent one being *Capitol Greyhound Lines* v. *Brice*,[23] in which the Court passed upon a Maryland excise tax on the fair market value of motor vehicles used in interstate commerce as a condition to the issuance of certificates of title as prerequisites to the registration and operation of motor vehicles in the State.

Because the tax was applied to vehicles used in both interstate and intrastate commerce and the proceeds were used for road purposes and because the Court considered the tax, though actually separate, to be an adjunct of Maryland's mileage tax, it was able to find that the total charge varied substantially with the mileage travelled, and on that ground sustained it, being constant, it said, with "rough approximation rather than precision," no showing having been made that Maryland's taxes considered as a whole exceeded "fair compensation for the privilege of using State roads." Justice Frankfurter, who was joined by Justice Jackson, dissented, and in so doing contributed as an appendix to his opinion a useful analysis of decisions involving state taxation of motor vehicles engaged in interstate commerce, for highway purposes.[24]

***Regulatory Charges on Public Utilities.***—The principles governing decision in this class of cases were set out by Justice Roberts in 1937.[25] "In the exercise of its police power the State may provide for the supervision and regulation of public utilities, such as railroads, may delegate the duty to an officer or commission, and may exact the reasonable cost of such supervision and regulation from the utilities concerned and allocate the exaction amongst the members of the affected class without violating the rule of equality imposed by the Fourteenth Amendment.[1] The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regu-

[21] *Interstate Transit Inc.* v. *Lindsey*, 283 U.S. 183 (1931). *Cf. Sprout* v. *South Bend*, 277 U.S. 163 (1928).

[22] *See Dixie Ohio Co.* v. *Comm.*, 306 U.S. 72 (1939); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939); *Aero Mayflower Transit Co.* v. *Comrs.*, 332 U.S. 495, 503-504 (1947).

[23] 339 U.S. 542 (1950).

[24] Id., 561.

[25] *Great Northern Ry. Co.* v. *Washington*, 300 U.S. 154, 159-161 (1937).

[1] Citing: *Charlotte, C. & A. Railroad* v. *Gibbs*, 142 U.S. 386 (1892); *New York ex rel. New York Electric Lines Co.* v. *Squire*, 145 U.S. 175, 191 (1892).

lation of, interstate commerce, in violation of the commerce clause of the Constitution.[2] A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is *prima facie* reasonable.[3] If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law[4] it cannot stand either under the commerce clause or the Fourteenth Amendment.[5] The State is not bound to adjust the charge after the fact, but may, in anticipation, fix what the legislature deems to be a fair fee for the expected service, the presumption being that if, in practice, the sum charged appears inordinate the legislative body will reduce it in the light of experience.[6] Such a statute may, in spite of the presumption of validity, show on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation and may, for that reason, be void.[7] And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation.[8] If the exaction be clearly excessive it is bad *in toto* and the State cannot collect any part of it." [9]

***Insurance.***—The Supreme Court has never forgotten the lesson which was administered it by the Act of Congress of August 31, 1852,[10] which pronounced the Wheeling Bridge "a lawful structure," thereby setting aside the Court's determination to the contrary earlier the same year.[11] This lesson, stated in the Court's own language thirty years later, was: "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce. . . ." [12] A parallel to the Wheeling Bridge episode occurred in 1945.

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[2] Citing: *Atlantic & Pacific Tel. Co.* v. *Philadelphia*, 190 U.S. 160 (1903); *Mackay Telegraph Co.* v. *Little Rock*, 250 U.S. 94, 99 (1919).

[3] Citing: *Western Union Tel. Co.* v. *New Hope*, 187 U.S. 419, 425 (1903); *Pure Oil Co.* v. *Minnesota*, 248 U.S. 158, 162 (1918).

[4] Citing: *New Mexico ex rel. McLean* v. *Denver & Rio Grande R.R. Co.*, 203 U.S. 38, 55 (1906); *Cf. Red "C" Oil Co.* v. *North Carolina*, 222 U.S. 380, 393 (1912); *Western Union Tel. Co.* v. *New Hope*, 17 U.S. 419 (1903).

[5] Citing: *Brimmer* v. *Rebman*, 138 U.S. 78, 83 (1891); *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U.S. 64, 69 (1904); *Pure Oil Co.* v. *Minnesota*, 248 U.S. 158, 162 (1918).

[6] Citing: *Atlantic & Pacific Tel. Co.* v. *Philadelphia*, 190 U.S. 160, 164 (1903); *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U.S. 64, 69 (1904); *Foote & Co.* v. *Maryland*, 232 U.S. 494, 503, 504 (1914).

[7] Citing: *Foote & Co.* v. *Maryland*, 232 U.S. 494, 505 (1914); *Lugo* v. *Suazo*, 59 F.2d 386 (1932).

[8] Citing: *Western Union Tel. Co.* v. *New Hope*, 187 U.S. 419, 425 (1903); *Foote & Co.* v. *Maryland*, 232 U.S. 494, 507 (1914).

[9] Citing: *Postal Telegraph-Cable Co.* v. *New Hope*, 192 U.S. 55 (1904); *Foote* v. *Maryland*, 232 U.S. 494, 508 (1914).

[10] 10 Stat. 112, § 6. Sustained in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. (59 U.S.) 421 (1856).

[11] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. (54 U.S.) 518 (1852).

[12] *Transportation Co.* v. *Parkersburg*, 107 U.S. 691, 701 (1883).

Less than a year after the ruling in *United States* v. *South-Eastern Underwriters Assn.*[13] that insurance transactions across state lines constituted interstate commerce, thereby logically establishing their immunity from discriminatory state taxation, Congress passed the McCarran Act [14] authorizing state regulation and taxation of the insurance business. In *Prudential Ins. Co.* v. *Benjamin*,[15] a statute of South Carolina which imposed on foreign insurance companies, as a condition of their doing business in the State, an annual tax of three percent of premiums from business done in South Carolina, while imposing no similar tax on local corporations, was sustained. "Obviously," said Justice Rutledge for the Court, "Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways:

"One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several States in these respects. . . . The power of Congress over commerce exercised entirely without reference to coordinated action of the States is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. . . . This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the States, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective." [16]

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[13] 322 U.S. 533 (1944).

[14] 59 Stat., 33, 15 U.S.C. §§ 1011–15.

[15] 328 U.S. 408 (1946).

[16] Id., 429–430, 434–435. The Act restored state taxing and regulatory powers over the insurance business to their scope prior to South-Eastern Underwriters. Discriminatory state taxation otherwise cognizable under the commerce clause must, therefore, be challenged under other provisions of the Constitution. *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648 (1981).

***The Modern Standard: Interstate Commerce Must Pay Its Way.***—The modern cases largely dispense with characterizations of taxes as "direct" or "indirect," largely dispense with inquiry into the formal term by which the tax is labeled, and largely ignore the aspect of the business to which the tax is assessed. Rather, "[i]n reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" [1] Thus, the Court has rejected the notion that state taxes levied on interstate commerce are *per se* invalid,[2] and conversely it ignores any suggestion that a state tax affecting interstate commerce is immune from commerce clause scrutiny because it attaches only to a "local" or intrastate activity.[3]

The turning point on the road to the present occurred in 1959, when, in *Northern States Portland Cement Co.* v. *Minnesota*,[4] the Court upheld a non-discriminatory, fairly apportioned net income tax on an out-of-State corporation engaged solely in interstate commerce in the taxing State. It was the first time, outside the context of property taxation, that the Court had explicitly recognized that an exclusively interstate business could be subjected to the States' taxing power. "[I]t is axiomatic that the founders did not intend to immunize [interstate] commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State." [5]

Articulated in *Complete Auto Transit* v. *Brady* [6] were four factors which the Court distilled from its precedents but newly applied to determine whether a challenged state tax on interstate commerce is constitutional. Such a tax will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." [7]

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[1] *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981), quoting *Mobil Oil Corp.* v. *Comr. of Taxes*, 445 U.S. 425, 443 (1980).

[2] *Complete Auto Transit* v. *Brady*, 430 U.S. 274, 288 (1977); *Washington Revenue Dept.* v. *Assn. of Washington Stevedoring Cos.*, 435 U.S. 734, 745 (1978).

[3] *Nippert* v. *City of Richmond*, 327 U.S. 416, 423–424 (1946).

[4] 358 U.S. 450 (1959).

[5] Id., 461–462. The Court had used similar language in *Western Live Stock* v. *Bureau*, 303 U.S. 250, 254 (1938), but the contemporaneous consensus at the time of *Portland Cement* was that the Court's commitment was now firm.

[6] 430 U.S. 274 (1977).

[7] Id., 279. *See also Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 227–228 (1980); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 617 (1981). When the tax is levied on foreign commerce, two additional factors come into consideration—the danger of multiple taxation and the danger that a necessary federal

*Nexus* is a requirement that flows from both the commerce clause and the due process clause of the Fourteenth Amendment.[8] What is required is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." [8] Often surfacing in cases having to do with the imposition of an obligation by a State on an out-of-State vendor to collect use taxes on goods sold to purchasers in the taxing State, the Court has sustained the imposition on mail order sellers with retail outlets, solicitors, or property within the taxing State,[9] but it has denied the power to a State when the only connection is that the company communicates with customers in the State by mail or common carrier as part of a general interstate business.[10] The validity of general business taxes on interstate enterprises may also be determined by the nexus standard. However, again, only a minimal contact is necessary. Thus, maintenance of one full-time employee within the State (plus occasional visits by non-resident engineers) to make possible the realization and continuance of contractual relations seemed to the Court to make almost frivolous a claim of lack of sufficient nexus.[11]

*Apportionment.* This requirement is of long standing, but its importance has broadened as the scope of the States' taxing powers has enlarged. It is concerned with what formulas the States must use to claim a share of a multistate business' tax base for the taxing State, when the business carries on a single integrated enterprise both within and without the State. Generally speaking, this factor is both a commerce clause and a due process requisite, too, and its necessitates a rational relationship between the income attributed to the State and the intrastate values of the enterprise.[12]

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uniformity in foreign relations will be impaired—and a tax can pass the four-part test and still fail the additional test. *Japan Line* v. *County of Los Angeles*, 441 U.S. 434 (1979).

[8] *National Bellas Hess, Inc.* v. *Dept. of Revenue of Illinois*, 386 U.S. 753, 756 (1967).

[9] *Scripto* v. *Carson*, 362 U.S. 207 (1960); *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551 (1977).

[10] *National Bellas Hess, Inc.* v. *Department of Revenue of Illinois*, 386 U.S. 753 (1967).

[11] *Standard Pressed Steel Co.* v. *Dept. of Revenue*, 419 U.S. 560 (1975). *See also General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964).

[12] The recent cases are *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978); *Mobil Oil Corp.* v. *Comr. of Taxes*, 445 U.S. 425 (1980); *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980); *ASARCO* v. *Idaho State Tax Comm.*, 458 U.S. 307 (1982); *F. W. Woolworth Co.* v. *New Mexico Taxation & Revenue Dept.*, 458 U.S. 354 (1982).

*Discrimination.* The "fundamental principle" governing this factor is simple. " 'No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " [13] That is, a tax which by its terms or operation imposes greater burdens on out-of-state goods or activities than on competing in-state goods or activities will be struck down as discriminatory under the commerce clause.[14]

*Benefit Relationship.* Although in all the modern cases the Court has stated that a necessary factor to sustain state taxes having an interstate impact is that the levy be fairly related to benefits provided by the taxing State, it has declined to be drawn into any consideration of the amount of the tax or the value of the benefits bestowed. The test rather is whether, as a matter of the first factor, the business has the requisite nexus with the State; if it does, the tax meets the fourth factor simply because the business has enjoyed the opportunities and protections which the State has afforded it.[15]

## STATE POLICE POWER AND COMMERCE

### Foreign Commerce

In *Gibbons* v. *Ogden,*[1] cognizance was taken of the existence in the States of an "immense mass" of legislative power to be used for the protection of their welfare and the promotion of local interests.[2] In Marshall's opinion in *Brown* v. *Maryland* [3] this power was christened "the Police Power," a name which has since come to supply one of the great titles of constitutional law. Counsel for Maryland had argued that if the State was not permitted to *tax* imports in the original package before they left the hands of the importer, it would also be unable to prevent their introduction into its midst although they might comprise articles dangerous to the public health and safety. "The power to direct the removal of gunpowder," the Chief Justice answered, "is a branch of the police

[13] *Boston Stock Exchange* v. *State Tax Comm.*, 429 U.S. 318, 329 (1977), quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959).

[14] *Maryland* v. *Louisiana*, 451 U.S. 725, 753–760 (1981). But see *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 617–619 (1981).

[15] *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 620–629 (1981). There may be a different result when what is involved is a user charge to defray the costs of state-provided facilities. E.g., *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707 (1972).

[1] 9 Wheat. (22 U.S.) 1 (1824).

[2] Id., 203.

[3] 12 Wheat. (25 U.S.) 419 (1827).

power, which unquestionably remains, and ought to remain, with the States;" and the power to direct "the removal or destruction of infectious or unsound articles" fell within the same category.[4]

***State Curbs on Entry of Aliens.***—In short, the power to tax was one thing, the police power something quite different. To concede the former would be to concede a power which could be exercised to any extent and at the will of its possessor; [5] to concede the latter was to concede a power which was limited of its own inherent nature to certain necessary objectives. In *New York City* v. *Miln*,[6] however, the Court which came after Marshall inclined toward the notion of a power of internal police which was also unlimited, and on this ground it upheld a New York statute which required masters of all vessels arriving at the port of New York to make reports as to passengers carried, and imposed fines for failure to do so. "We are of opinion," the Court said, "that the act is not a regulation of commerce, but of police." But, when New York, venturing a step further, passed an act to authorize state health commissioners to collect certain fees from captains arriving in ports of that State, and when Massachusetts enacted a statute requiring captains of ships to give bonds as to immigrants landed, both measures were pronounced void, either as conflicting with treaties and laws of the United States or as invading the "exclusive" power of Congress to regulate foreign commerce.[7]

Following the Civil War, *New York City* v. *Miln* was flatly overruled, and a New York statute similar to the one sustained in 1837 was pronounced void as intruding upon Congress' powers.[8] Nothing was gained, said the Court, by invoking "[the police power] . . . it is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States." [9] At the same time a California statute requiring a bond from shipowners as a condition precedent to their being permitted to land persons whom a state commissioner of immigration might choose to consider as coming within certain enumerated classes, e.g., "debauched women," was also disallowed. Ruled the Court: If the right of the States to pass statutes to protect themselves in regard to the

[4] Id., 443–444.
[5] Id., 349–440.
[6] 11 Pet. (36 U.S.) 102 (1837).
[7] *Passenger Cases (Smith* v. *Turner)*, 7 How. (48 U.S.C.) 282 (1849).
[8] *Henderson* v. *New York*, 92 U.S. 259 (1876).
[9] Id., 272.

criminal, the pauper, and diseased foreigner, landing within their borders, exists at all, it is limited to such laws as are absolutely necessary for that purpose; and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States.[10]

***State Quarantine Laws.***—On the other hand, it has been repeatedly held that the States, in the absence of legislation by Congress, may enact quarantine laws even though in effect they thereby regulate foreign commerce, and furthermore that such legislation may be applied, in the interest of effective enforcement, beyond the mere exclusion of diseased persons. Thus, Louisiana was sustained in authorizing its Board of Health in its discretion to prohibit the introduction into any infected portion of the State of "persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease."[11] At the same time it was emphasized that all such legislation was subject to being supplanted by Congress at any time.

***State Game Protection Laws.***—The Court's tolerance of legal provisions, which might not standing alone be constitutional, when they are designed to make legislation within the police power practically enforceable, is also illustrated in connection with state game laws. In the case of *New York ex rel. Silz* v. *Hesterberg*,[12] the Court was confronted with a New York statute establishing a closed season for certain game, during which season it was a penal offense to take or possess any of the protected animals, fish or birds; and providing further that the ban should equally apply "to such fish, game or flesh coming from without the State as to that taken within the State." This provision was held to have been validly applied in the case of a dealer in imported game who had in his possession during the closed season "one dead body of an imported grouse . . . and taken in Russia." Again, the absence of conflicting legislation by Congress was adverted to.[13]

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[10] *Chy Lung* v. *Freeman*, 92 U.S. 275 (1876).

[11] *Compagnie Francaise De Navigation a Vapeur* v. *Louisiana State Bd. of Health*, 186 U.S. 380, 385 (1902). *See also Morgan* v. *Louisiana*, 118 U.S. 455 (1886); *Louisiana* v. *Texas*, 176 U.S. 1, 21 (1900).

[12] 211 U.S. 31, 36–37 (1908).

[13] As to concessions by the Court to the practical necessities of enforcement, *see also Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936); and *Whitfield* v. *Ohio*, 297 U.S. 431 (1936).

## Interstate Commerce

*General Principles.*—In *Southern Pacific Co.* v. *Arizona,*[1] Chief Justice Stone made the following systematic statement of principles which have guided the Court in the exercise of its power of judicial review of state legislation affecting interstate commerce: "Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Wardens*, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.[2] Thus the States may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress.[3] When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.[4]

"But ever since *Gibbons* v. *Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.[5] Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself,[6] or upon

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[1] 325 U.S. 761, 766–767 (1945).

[2] Citing: *Minnesota Rate Cases*, 230 U.S. 352, 399, 400 (1913); *S. Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 187 (1938); *California* v. *Thompson*, 313 U.S. 109, 113, 114 (1941); and cases cited; *Parker* v. *Brown*, 317 U.S. 341, 359, 360 (1943).

[3] Citing: *Cooley* v. *Board of Wardens*, 12 How. at 319 (1851); *S. Carolina Hwy. Dept.* v. *Barnwell Bros.*, *supra*, 303 U.S. at 185; *California* v. *Thompson*, *supra*, 313 U.S. at 113; *Duckworth* v. *Arkansas*, 314 U.S. 390, 394 (1941); *Parker* v. *Brown*, *supra*, 317 U.S. at 362, 363.

[4] Citing: *S. Carolina Hwy. Dept.* v. *Barnwell Bros.*, *supra*, 303 U.S. at 185 and cases cited; *Lone Star Gas Co.* v. *Texas*, 304 U.S. 224, 238 (1938); *Milk Board* v. *Eisenberg Co.*, 306 U.S. 346, 351 (1939); *Maurer* v. *Hamilton*, 309 U.S. 598, 603 (1940); *California* v. *Thompson*, *supra*, 313 U.S. at 113, 114 and cases cited.

[5] Citing: *Cooley* v. *Board of Wardens*, 12 How. at 319 (1851); *Leisy* v. *Hardin*, 135 U.S. 100, 108, 109 (1890); *Minnesota Rate Cases*, 230 U.S. at 399, 400 (1913); *Edwards* v. *California*, 314 U.S. 160, 176 (1941).

[6] Citing: *Brown* v. *Maryland*, 12 Wheat. 419, 447 (1827); *Minnesota Rate Cases*, 230 U.S. at 399, 400; *Penna.* v. *West Virginia*, 262 U.S. 553, 596 (1923); *Baldwin* v. *Seelig*, 294 U.S. 511, 522 (1935); *S. Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. at 185 (1938).

the presumed intention of Congress, where Congress has not spoken,[7] the result is the same.

"In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.[8]

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.[9]

"Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible,[10] or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.[11]

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[7] Citing: *Welton* v. *Missouri*, 91 U.S. 275, 282 (1876); *Hall* v. *DeCuir*, 95 U.S. 485, 490 (1878); *Brown* v. *Houston*, 114 U.S. 622, 631 (1885); *Bowman* v. *Chicago and Northwestern Railway Company*, 125 U.S. 465, 481, 482 (1888); *Leisy* v. *Hardin*, 135 U.S. at 109; *In re Rahrer*, 140 U.S. 545, 559, 560 (1891); *Brennan* v. *Titusville*, 153 U.S. 289, 302 (1894); *Covington and Cincinnati Bridge Co.* v. *Kentucky*, 154 U.S. 204, 212 (1894); *Graves* v. *N.Y. ex rel. O'Keefe*, 306 U.S. 466, 479 (1939); Dowling, "Interstate Commerce and State Power," 27 Va. Law Rev. 1 (1940).

[8] Citing: *Parker* v. *Brown*, 317 U.S. at 362; *Terminal Assn.* v. *Trainman*, 318 U.S. 1, 8 (1943); *see DiSanto* v. *Pennsylvania*, 273 U.S. 34, 44 (1927) (and compare *California* v. *Thompson*, 313 U.S. 109 (1941); *Illinois Gas Co.* v. *Public Service Co.*, 314 U.S. 498, 504, 505 (1942).

[9] Citing: *Cooley* v. *Board of Wardens*, 12 How. 299 (1851); *Kansas Southern Ry. Co.* v. *Kaw Valley Dist.*, 233 U.S. 75, 79 (1914); *South Covington Ry.* v. *Covington*, 235 U.S. 537, 546 (1915); *Missouri, Kans. & Tex. Ry. Co.* v. *Texas*, 245 U.S. 484, 488 (1918); *St. Louis & S.F. Ry Co.* v. *Pub. Serv. Comm.*, 254 U.S. 535, 537 (1921); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928); *Gwin, etc.* v. *Henneford*, 305 U.S. 434, 441 (1939); *McCarroll* v. *Dixie Lines*, 309 U.S. 176 (1940).

[10] Citing: *In re Rahrer*, 140 U.S. at 545, 561-562 (1891); *Adams Express Co.* v. *Kentucky*, 238 U.S. 190, 198 (1915); *Rosenberger* v. *Pacific Express Co.*, 241 U.S. 48, 50, 51 (1916); *Clark Distilling Co.* v. *West'n Md. Ry. Co.*, 242 U.S. 311, 325, 326 (1917); *Whitfield* v. *Ohio*, 297 U.S. 431, 438-440 (1936); *Ky. Whip & Collar Co.* v. *I.C.R. Co.*, 299 U.S. 334, 350, 351 (1937); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 679 (1945).

[11] Citing: *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 230 (1899); *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467 (1911); *Houston & Texas Ry.* v. *United States*, 234 U.S. 342 (1914); *American Express Co.* v. *Caldwell*, 244 U.S. 617, 626 (1917); *Illinois Cent. R.R. Co.* v. *Public Utilities Comm.*, 245 U.S. 493, 506 (1918);

"But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn,[12] and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.[13] Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce, across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

***State Railroad Regulation: Rates, Service, Safety, Length of Trains.***—In one of the *Granger* cases decided in 1877, the Court upheld the power of the legislature of Wisconsin, in the absence of legislation by Congress, to prescribe by law the maximum charges to be made by a railway company for fare and freight upon the transportation of persons and property within the State, or taken up outside the State and brought within it, or taken up inside and carried without it.[14] Ten years later, in *Wabash, S.L. & P. Ry. Co.* v. *Illinois* [15] this decision was reversed as to persons and property taken up within the State and transported out of it and as to persons and property brought into the State from outside. As to these, the Court held that the regulation of rates and charges must be uniform and that, therefore, the States had no power to deal with the subject even when Congress had not acted. Today, the States retain the power to regulate railway rates for the carriage of persons and property taken up and put down within their borders, but do so subject to the rule, which is enforced by the Interstate Commerce Commission, that such rates may not discriminate against interstate commerce.[16]

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*New York* v. *United States*, 257 U.S. 591, 601 (1922); *Commission* v. *Texas & N.O.R. Co.*, 284 U.S. 125, 130 (1931); *Penn. R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 459 (1936).

[12] Citing: *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, 441 (1939).

[13] Citing: *Terminal Assn.* v. *Trainmen*, 318 U.S. 1, 8 (1943); *Southern Railway Co.* v. *King*, 217 U.S. 524 (1910).

[14] *Peik* v. *Chicago & Nw. Ry. Co.*, 94 U.S. 164 (1877).

[15] 118 U.S. 557 (1886).

[16] *Wisconsin R.R. Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563 (1922).

In many respects, the power remains with the States to require by statute or administrative order a fair and adequate service for their inhabitants from railway companies, including interstate carriers operating within their borders, so long as the burdens thus imposed upon interstate commerce are, in the judgment of the Court, "reasonable." In an instructive brace of cases the Court was asked to say whether a carrier, in the interest of providing proper local facilities of commerce, could be required to stop its interstate trains. In one case a state regulation requiring all regular passenger trains operating wholly within the State to stop at all county seats was held to have been validly applied to interstate connection trains; [17] while in the other case a statute requiring *all* passenger trains to stop at county seats was held invalid, there being "other and ample accommodation." [18] Comparing these and similar decisions, the Court has stated "the applicable general doctrine" to be as follows: "(1) It is competent for a State to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement." [19] "There is, however," it later added, "no inevitable test of the instances; the facts in each must be considered." [20]

In the same way a state regulation requiring intersecting railways to make track connections was held valid,[21] as was also a regulation requiring equality of car service between shippers,[22] while

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[17] *Gladson* v. *Minnesota*, 166 U.S. 427 (1897), followed in *Lake Shore & Mich. South. Railway* v. *Ohio*, 173 U.S. 285 (1899), in which an Ohio statute requiring that "each company shall cause three, each way, of its regular trains carrying passengers, . . . Sundays excepted, to stop at a station, city or village, containing three thousand inhabitants, for a time sufficient to receive and let off passengers, . . ." was sustained.

[18] *Illinois Central Railroad Co.* v. *Illinois*, 163 U.S. 142, 153 (1896).

[19] *Chicago, B. & Q. Ry.* v. *Wisconsin R.R. Comm.*, 237 U.S. 220, 226 (1915); *St. Louis & S. F. Ry.* v. *Pub. Serv. Comm.*, 254 U.S. 535, 536–537 (1921).

[20] *St. Louis & S.F. Ry.* v. *Pub. Serv. Comm.*, 261 U.S. 369, 371 (1923).

[21] *Wisconsin, M. & P. R. R.* v. *Jacobson*, 179 U.S. 287 (1900).

[22] *Missouri Pacific Ry.* v. *Larabee Mills Co.*, 211 U.S. 612 (1909).

a regulation requiring the delivery of shipments on private sideways [23] and one requiring cars for local shipments to be furnished on demand, were held to be invalid.[24] In the first brace of decisions, the application of the local regulation to interstate commerce was found not to be "unduly" burdensome; in the second brace, the contrary conclusion was reached.

A class of regulations as to which the Court has exhibited marked tolerance, although it "incidentally" embraces interstate transportation within its operation, is that which purports to be furtherance of "public safety." [25] The leading case is *Smith* v. *Alabama*,[1] in which the Court held it to be within the police power of the State to require locomotive engineers to be examined and licensed and to enforce this requirement until Congress should decree otherwise in the case of an engineer employed exclusively in interstate transportation. Also upheld as applicable to interstate trains were a statute which forbade the heating of passenger cars by stoves,[2] a municipal ordinance restricting the speed of trains within city limits,[3] the order of a public utility commission requiring the elimination of grade crossings,[4] a statute requiring electric headlights of a specified minimum capacity,[5] a statute requiring three brakemen on freight trains of over twenty-five cars.[6] In the last case the Court admitted that "under the evidence," there was "some room for controversy" whether the statute was necessary, but thought it "not so unreasonable as to justify the Court in adjudging it" to be "merely an arbitrary exercise of power" and "not germane" to objects which the State was entitled to accomplish.[7] And the Court sustained, though again in somewhat doubtful terms, the order of a state railroad commission requiring a terminal railroad which served both interstate and local commerce to provide caboose cars for its employees.[8]

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[23] *McNeill* v. *Southern Railway Co.*, 202 U.S. 543 (1906).

[24] *St. Louis S. W. Ry.* v. *Arkansas*, 217 U.S. 136 (1910).

[25] *See*, e.g., the Court's language in *Hannibal & St. J. R. Co.* v. *Husen*, 95 U.S. 465, 470 (1878); *New York, N.H. & H. Co.* v. *New York*, 165 U.S. 628, 631 (1897); *Lake Shore & M. S. Ry.* v. *Ohio*, 173 U.S. 285, 292 (1899); *Hennington* v. *Georgia*, 163 U.S. 299 (1896); *Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U.S. 352, 402–410 (1913).

[1] 124 U.S. 465 (1888); *See also Nashville, C. & S.L. Ry.* v. *Alabama*, 128 U.S. 96 (1888); *McCall* v. *California*, 136 U.S. 104 (1890); *Missouri, K. & T. Ry.* v. *Haber*, 169 U.S. 613, 633 (1898).

[2] *New York, N.H., & H. Co.* v. *New York*, 165 U.S. 628 (1897). *See also Chicago, M. & S.P. Ry. Co.* v. *Solan*, 169 U.S. 133, 137 (1898).

[3] *Erb* v. *Morasch*, 177 U.S. 584 (1900).

[4] *Erie R.R. Co.* v. *Public Util. Commrs.*, 254 U.S. 394 (1921).

[5] *Atchison T. & S.F. Ry. Co.* v. *Railroad Comm.*, 283 U.S. 380 (1931).

[6] *Chicago, R.I. & Pac. Ry. Co.* v. *Arkansas*, 219 U.S. 453 (1911).

[7] Id., 453, 466. *See also St. L. & Iron Mtn. Ry.* v. *Arkansas*, 240 U.S. 518 (1916); *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249 (1931).

[8] *Terminal Assn.* v. *Trainmen*, 318 U.S. 1 (1943).

At times, indeed, the Court has made surprising concession to local views that had nothing to do with safety. In *Hennington* v. *Georgia,*[9] it sustained a Georgia statute forbidding freight trains to run on Sunday. Whether such an act would pass muster today is doubtful. Also earlier statutes reinforcing the legal liability of railroads as common carriers and the carriers of passengers were sustained in the absence of legislation by Congress.[10]

"The principle that, without controlling Congressional action, a State may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.' " So stated Chief Justice Stone in his summarizing opinion in *Southern Pacific Co.* v. *Arizona.*[11] Among others he listed the following instances in which state legislation was invalidated on the basis of this rule: "In the *Kaw Valley* case[12] the Court held that the State was without constitutional power to order a railroad to remove a railroad bridge over which its interstate trains passed, as a means of preventing floods in the district and of improving its drainage, because it was 'not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other States, but merely that it would be helped by raising them.' And in *Seaboard Air Line Ry.* v. *Blackwell,*[13] it was held that the interference with interstate rail transportation resulting from a State statute requiring as a safety measure that trains come almost to a stop at grade crossings, outweigh the local interest in safety, when it appeared that compliance increased the scheduled running time more than six hours in a distance of one hundred and twenty-three miles."[14] And "more recently in *Kelly* v. *Washington,*"[15] the Chief Justice continued, "we have pointed out that when a State goes beyond safety measures which are permissible because only local in their effect upon interstate commerce, and 'attempts to impose particular standards as to structure, design, equipment and operation [of vessels plying interstate] which in the judgment of its

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[9] 163 U.S. 299 (1896). Compare *South Covington & C. St. Ry. Co.* v. *Covington,* 235 U.S. 537 (1915); *Denver & R.G. Railway Co.* v. *Denver,* 250 U.S. 241 (1919).

[10] *Chicago, M. & S.P. Ry. Co.* v. *Solan,* 169 U.S. 133 (1898); *Richmond & Alleghe-ny R. Co.* v. *Tobacco Co.,* 169 U.S. 311 (1898).

[11] 325 U.S. 761, 779–780 (1945).

[12] *Kansas City Southern Ry.* v. *Kaw Valley Dist.,* 233 U.S. 75, 79 (1914).

[13] 244 U.S. 310 (1917).

[14] *Cf. Southern Railway Co.* v. *King,* 217 U.S. 524 (1910), where the crossings were fewer and the burden to interstate commerce was shown not to be unduly heavy.

[15] 302 U.S. 1, 15 (1937).

authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.' " [16]

Applying the test of these precedents, the Chief Justice concluded that Arizona, in making it unlawful to operate within the State a railroad train of more than fourteen passenger or seventy freight cars, had gone "too far"; and in support of this conclusion he recited the following facts: "In Arizona, approximately 93% of the freight traffic and 95% of the passenger traffic is interstate. Because of the Train Limit Law appellant is required to haul over 30% more trains in Arizona than would otherwise have been necessary. The record showed a definite relationship between operating costs and the length of trains, the increase in length resulting in a reduction of operating costs per car. The additional cost of operation of trains complying with the Train Limit Law in Arizona amounted for the two railroads traversing that State to about $1,000,000 a year. The reduction in train lengths also impedes efficient operation. More locomotives and more manpower are required; the necessary conversion and reconversion of train lengths at terminals and the delay caused by breaking up and remaking long trains upon entering and leaving the State in order to comply with the law, delayed the traffic and diminishes its volume moved in a given time, especially when traffic is heavy.

"At present the seventy freight car laws are enforced only in Arizona and Oklahoma, with a fourteen car passenger car limit in Arizona. The record here shows that the enforcement of the Arizona statute results in freight trains being broken up and reformed at the California border and in New Mexico, some distance from the Arizona line. Frequently it is not feasible to operate a newly assembled train from the New Mexico yard nearest to Arizona, with the result that the Arizona limitation governs the flow of traffic as far as El Paso, Texas. For similar reasons the Arizona law often controls the length of passenger trains all the way from Los Angeles to El Paso.

"If one State may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the State exacting it because of the neces-

[16] 325 U.S., 780, 781.

sity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the the regulating State. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.

"The trial court found that the Arizona law had no reasonable relation to safety, and made train operation more dangerous. Examination of the evidence and the detailed findings makes it clear that this conclusion was rested on facts found which indicate that such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced. In considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation. The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts." [17]

The lesson to be extracted from *Southern Pacific Co.* v. *Arizona* is a threefold one: (1) Where uniformity is judged by the Court to be "essential for the functioning of commerce, a State may not interpose its regulation"; (2) in resolving this question the Court will canvass what it considers to be relevant facts extensively; (3) its task is, however, in the last analysis, one of weighing competing values.

The lesson of *Southern Pacific* was further exemplified by the more recent holding in *Morgan* v. *Virginia,*[18] in which the Court was confronted with a state statute which, in providing for the segregation of white and Negro passengers, required passengers to change seats from time to time as might become necessary to increase the number of seats available to the one race or the other. First, reciting the rule of uniformity, Justice Reed, for the Court, said: "Congress, within the limits of the Fifth Amendment, has authority to burden [interstate] commerce if that seems to it a desira-

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[17] *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 771–776 (1945).

[18] 328 U.S. 373, 380, 386 (1946).

ble means of accomplishing a permitted end. . . . As no State law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid."

The Court's most recent confrontation with state laws in this area came in a recurrence of the "full crew" issue.[19] In the latest case, the railroads contended that recent technological developments had reduced the necessity of the required number of crewmen and that the marginal safety factor inadequately balanced the additional costs and other burdens imposed on the railroads by the state laws. The Court, with only Justice Douglas dissenting on another issue,[20] rejected these arguments, holding that the evidence with regard to safety was so extensive and so conflicting that, in the absence of a clear showing of discrimination, it was a legislative responsibility to make decisions on the basis of it; further, said the Court, the only burden which the railroads could really make out was the necessity to stop or slow down at state borders to take on and drop off additional crew members and the Court could not say that the advantage in reduced accidents did not outweigh that burden.[21]

***Motor Vehicles: Valid State Regulations.***—Cases arising under this caption further illustrate the competition for judicial recognition between the interstate commerce interest and local interests,

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[19] "Full crew" laws had previously been upheld as safety measures three times by the Court against contentions that they unconstitutionally burdened interstate commerce. *Chicago, R.I. & P. Railroad Co.* v. *Arkansas*, 219 U.S. 453 (1911); *St. Louis, Iron Mt. & S. Railroad Co.* v. *Arkansas*, 240 U.S. 518 (1916); *Missouri Pacific Co.* v. *Norwood*, 283 U.S. 249 (1931). An earlier decision in this latest case was *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I. & P. Railroad Co.*, 382 U.S. 423 (1966), in which the Court held that Congress had not preempted such state laws.

[20] Justice Douglas thought that Congress had preempted the field. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R. I. & P. Railroad Co.*, 382 U.S. 423, 438 (1966).

[21] *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I. & P. Railroad Co.*, 393 U.S. 129 (1968).

especially that of public safety. A new element enters the problem, however, which lends some added weight to the claims of the police power, the fact, namely, that motor vehicles use highways furnished and maintained by the State.

A State is entitled to enact a comprehensive scheme for the licensing and regulation of motor vehicles using its highways with a view to insuring itself of reasonable compensation for the facilities afforded and to providing adequate protection of the public safety, and such scheme may embrace out-of-state vehicles using the State's highways.[22] Thus, legislation limiting the net loads of trucks using the State's highways is valid,[23] as are also, in the absence of national legislation on the subject, state regulations limiting the weight and width of the vehicles themselves, provided such regulations are applied without discrimination as between vehicles moving in interstate commerce and those operating only intrastate.[24] Similarly, a State may deny a certificate of public convenience and necessity to one desiring to operate a common carrier over a particular highway to an out-of-state destination in an adjacent State, on the ground that the specified route is already congested. So it was held in *Bradley* v. *Public Utility Commission,*[25] in which the Court took cognizance of the full hearing accorded the appellant and of his failure to choose another route, although he was at liberty to do so.[1]

And in *Maurer* v. *Hamilton,*[2] a Pennsylvania statute prohibiting the operation over its highways of any motor vehicle carrying any other vehicle over the head of the operator was upheld in the absence of conflicting congressional legislation. Similarly, in *Welch Co.* v. *New Hampshire,*[3] a statute of that State establishing maximum hours for drivers of motor vehicles was held not to be superseded by the Federal Motor Carrier Act prior to the effective date of regulations by the Interstate Commerce Commission dealing with the subject. Nor was pendency before the Interstate Com-

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[22] *Hendrick* v. *Maryland,* 235 U.S. 610 (1915); *Kane* v. *New Jersey,* 242 U.S. 160 (1916).

[23] *Sproles* v. *Binford,* 286 U.S. 374 (1932). *See also Morris* v. *Duby,* 274 U.S. 135 (1927).

[24] *South Carolina Hwy. Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938).

[25] 289 U.S. 92 (1933).

[1] Permits exacted by Arkansas of contract carriers hauling Tennessee manufacturer's products to customers in nearby States, not being in conflict with the Federal Motor Carrier Act, impose no undue burden on commerce and are a permissible means whereby a State is enabled to identify users of its highways. *Fry Roofing Co.* v. *Wood,* 344 U.S. 157 (1952).

[2] 309 U.S. 598 (1940).

[3] 306 U.S. 79 (1939).

merce Commission of an application under the Motor Carrier Act for a license to operate a motor carrier in interstate commerce found to supersede as to the applicant the authority of a State to enforce "reasonable regulations" of traffic upon its highways. "In the absence of the exercise of federal authority," said the Court, "and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected." [4] And for the same reason New York City was entitled to apply to trucks engaged in the delivery of goods from New Jersey a traffic regulation forbidding the operation on the streets of an advertising vehicle.[5] Said Justice Douglas for the Court: "Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce." [6]

Also, the Court has consistently sustained state regulations requiring motor carriers to provide adequate insurance protection for injuries caused by the negligent operation of their vehicles.[7]

***Motor Vehicles: Invalid State Regulations.***—A state law which imposed upon all persons engaged in transporting for hire by motor vehicle over the public highways of the State the burdens and duties of common carriers and required them to furnish bonds to secure the payment of claims and liabilities resulting from injury to property carried may not be validly applied to a private carrier engaged exclusively in hauling from one State to another State the goods of particular factories under standing contracts with their owners, the said carrier enjoying neither a special franchise nor using the eminent domain power.[8] On the other hand, a state stat-

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[4] *Eichholz* v. *Public Service Comm.*, 306 U.S. 268, 274 (1939), citing *Cooley* v. *Port Wardens*, 12 How. (53 U.S.) 299 (1851).

[5] *Railway Express* v. *City of New York*, 336 U.S. 106 (1949).

[6] Id., 111.

[7] *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932); *Stephenson* v. *Binford*, 287 U.S. 251 (1932); *Hicklin* v. *Coney*, 290 U.S. 169 (1933). Until the Federal Government intervenes, as it has done in the case of railroad carriers, Arizona may award compensation to the widow of a California driver of an interstate vehicle who was killed in Arizona and was covered under the California compensation law. The burden cast upon the carrier to obtain insurance coverage in every State in which it operates is insubstantial. *Collins* v. *American Buslines*, 350 U.S. 528 (1956).

[8] *Michigan Comm.* v. *Duke*, 266 U.S. 570 (1925). *See also Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932).

ute which prohibited common carriers for hire from using the highways of the State between fixed termini or over regular routes without having first obtained from a director of public works a certificate of public convenience, was primarily not a regulation to secure safety on the highways or to conserve them, but a ban on competition and, as applied to a common carrier by motor vehicle of passengers and freight purely in interstate commerce, was both violation of the commerce clause and defeated the express purpose of congressional legislation rendering federal aid for the construction of interstate highways.[9]

When the Interstate Commerce Commission construed a carrier's certificate as authorizing intrastate Virginia traffic routed through Bluefield, West Virginia, Virginia, if it was convinced that the carrier's interstate operation was not *bona fide* but merely a subterfuge to escape its jurisdiction, must litigate its contentions before the Commission and withhold imposition of its fines, for assessment of the latter would be tantamount to a partial suspension of the carrier's federal certificate.[10] Similarly, in imposing penalties for violations of its laws regulating weight loads, a State cannot disrupt a federally licensed activity by electing to suspend an interstate carrier's right to use its highways. The Interstate Commerce Commission is competent to protect the State.[11] Also invalid as an unreasonable burden on interstate commerce was a state law requiring trucks and trailers to be equipped with rear fender mudguards which were different from those permitted in 45 States and were illegal in another.[12]

***The Present Approach.***—Arguably, the Court in more recent years has stiffened the scrutiny with which it reviews state regulation of interstate carriers purportedly for safety reasons.[13] Difficulty attends any evaluation of the possible developing approach, inasmuch as the Court has spoken with several voices. A close reading, however, indicates that while the Court is most reluctant to invalidate regulations that touch upon safety and that if safety justifications are not illusory it will not second-guess legislative judgment, nonetheless the Court will not accept, without more, state asser-

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[9] *Buck* v. *Kuykendall*, 267 U.S. 307 (1925). *See also Bush Co.* v. *Maloy*, 267 U.S. 317 (1925); *Interstate Busses* v. *Holyoke St. R. Co.* 273 U.S. 45 (1927). To the same effect is *City of Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77 (1958); *Railroad Transfer Service* v. *City of Chicago*, 386 U.S. 351 (1967).

[10] *Service Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959).

[11] *Castle* v. *Hayes Freight Lines*, 348 U.S. 61 (1954).

[12] *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959).

[13] *Raymond Motor Transp.* v. *Rice*, 434 U.S. 429 (1978); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

tions of safety motivations. "Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." Rather, the asserted safety purpose must be weighed against the degree of interference with interstate commerce. "This 'weighing' . . . requires . . . 'a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." [14] The approach of the Court "feels" qualitatively different.

***Transportation Agencies: State Regulation.***—The special characteristics of motor travel have brought about a reversal of the Court's attitude toward state control of transportation agencies. Sustaining in 1941 a California statute requiring that agents engaged in negotiating for the transportation of passengers in motor vehicles over the highways of the State take out a license, Justice (later Chief Justice) Stone, speaking for the Court, said: "In *Di-Santo* v. *Pennsylvania*,[15] this Court took a different view. . . . [I]t held that a Pennsylvania statute requiring others than railroad or steamship companies, who engage in the intrastate sale of steamship tickets or of orders for transportation to and from foreign countries, to procure a license by giving proof of good moral character and filing a bond as security against fraud and misrepresentation to purchasers, was an infringement of the Commerce Clause. Since the decision in that case this Court has been repeatedly called upon to examine the constitutionality of numerous local regulations affecting interstate motor vehicle traffic. It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the States to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and convenient use of its highways, provided only that the regulation does not in any other respect unnecessarily obstruct interstate commerce." [16]

***Navigation: State Regulation.***—In *Gibbons* v. *Ogden* [17] the Court, speaking by Chief Justice Marshall, held that New York leg-

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[14] *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 67–671 (1981), quoting *Raymond Motor Transp.* v. *Rice*, 434 U.S. 429, 441, 443 (1978). Both cases invalidated state prohibitions of the use of 65-foot single-trailer trucks on state highways.

[15] 273 U.S. 34 (1927). *See also McCall* v. *California*, 136 U.S. 104 (1890).

[16] *California* v. *Thompson*, 313 U.S. 109, 115–116 (1941).

[17] 9 Wheat. (22 U.S.) 1 (1824). A modern application of *Gibbons* v. *Ogden* is *Douglas* v. *Seacoast Products*, 431 U.S. 265 (1977), in which the Court, in reliance on the present version of the licensing statute utilized by Chief Justice Marshall, struck down state laws curtailing the operations of federally licensed vessels. In the course of the *Douglas* opinion, the Court observed that "[a]lthough it is true that the

islation which excluded from the navigable waters of that State steam vessels enrolled and licensed under an act of Congress to engage in the coasting trade was in conflict with the act of Congress and hence void. In *Willson* v. *Blackbird Creek Marsh Co.*[18] the same Court held that, in the absence of an act of Congress, "the object of which was to control State legislation over those small navigable creeks into which the tide flows," the State of Delaware was entitled to incorporate a company vested with the right to erect a dam across such a creek. From these two cases the Court in *Cooley* v. *Port Wardens*[19] extracted the rule that, in the absence of conflicting legislation by Congress, States were entitled to enact legislation adapted to the local needs of interstate and foreign commerce, that a pilotage law was of this description, and was, accordingly, constitutionally applicable, until Congress acted to the contrary, to vessels engaged in the coasting trade. In the main, these three holdings have controlled the decision of cases under the above and the following caption, there being generally no applicable act of Congress involved. But the power which the rule attributed to the States, they must use "reasonably," something they have not always done in the judgment of the Court.

Thus an Alabama statute which required that owners of vessels using the public waters of the enacting State be enrolled, pay fees, file statements as to ownership, *et cetera,* was held to be inapplicable to vessels licensed under the act of Congress to engage in the coasting trade,[20] as was also a Louisiana statute ordering masters and wardens of the port of New Orleans to survey the hatches of all vessels arriving there and to enact a fee for so doing.[21] "The

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Court's view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly re-enacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as *Gibbons.* We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny." Id., 278–279.

[18] 2 Pet. (27 U.S.) 245, 252 (1829).

[19] 12 How. (53 U.S.) 299 (1851). A modern echo of *Cooley* is *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 179–180 (1978), in which the Court, *inter alia,* sustained a state requirement that vessels not satisfying certain design requirements be escorted by tugboats in Puget Sound. Noting the requirement's similarity "to a local pilotage requirement," the Court, following *Cooley,* pronounced it "not the type of regulation that demands a uniform national rule." But in an apparent departure from *Cooley,* the Court also observed that it did not appear that "the requirement impedes the free and efficient flow of interstate and foreign commerce . . ."

[20] *Foster* v. *Davenport,* 22 How. (63 U.S.) 244 (1859); *Sinnot* v. *Davenport,* 22 How. (63 U.S.) 227 (1860). *See also Lord* v. *Steamship Co.,* 102 U.S. 541 (1881).

[21] *Foster* v. *Master and Wardens of the Port of New Orleans,* 94 U.S. 246 (1877).

unreason and the oppressive character of the act" was held to take it out of the class of local legislation protected by the rule of the *Cooley* case.[22] Similarly, while control by a State of navigable waters wholly within its borders has been often asserted to be complete in the absence of regulation by Congress,[23] Congress may assume control at any time,[24] and when such waters connect with other similar waters "so as to form a waterway to other States or foreign nations, [they] cannot be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by Congress." [25]

On the other hand, in *Kelly* v. *Washington,*[1] the Court sustained the State in applying to motor-driven tugs operating in navigable waters of the United States legislation which provided for the inspection and regulation of every vessel operated by machinery if the same was not subject to inspection under the laws of the United States. It was conceded that there was "elaborate" federal legislation in the field, but it was asserted that the Washington statute filled a gap. "The principle is thoroughly established," said Chief Justice Hughes for the Court, "that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " [2] In like manner, the Detroit Smoke Abatement Code was held not to burden interstate commerce unduly when invoked to curb emission of dense black smoke from vessels docked in Detroit harbor, notwithstanding that such vessels were operated in interstate commerce and contained equipment conforming to comprehensive federal regulations designed to afford protection against navigational perils. The latter did not preempt the field so as to forestall diverse municipal health regulations.[3] And in *Bob-Lo Excursion Co.* v. *Michigan,*[4] the Court, elbowing

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[22] Id., 247–248.

[23] *Transportation Co.* v. *Chicago,* 99 U.S. 635, 643 (1879); *Williamette Iron Bridge Co.* v. *Hatch,* 125 U.S. 1 (1888); *Illinois* v. *Economy Power Co.,* 234 U.S. 497 (1914).

[24] *Economy Light Co.* v. *United States,* 256 U.S. 113 (1921).

[25] *Harman* v. *City of Chicago,* 147 U.S. 396, 412 (1893).

[1] 302 U.S. 1 (1937).

[2] Id., 10.

[3] *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960). Justices Douglas and Frankfurter dissented on the ground that federal approval of boilers and fuel precluded subjection of the vessels to a variety of local regulations requiring additional equipment.

[4] 333 U.S. 28 (1948).

aside a decision of many years standing,[5] ruled that the commerce clause does not preclude a State, in the absence of federal statute or treaty, from forbidding racial discrimination by one carrying passengers by vessel to and from a port in the United States to an island situated in Canadian territory.

***Bridges, Dams, Ferries, Wharves: State Regulation.***—The holding in *Willson* v. *Blackbird Creek Marsh Co.*[6] has been invoked by the Court many times in support of state legislation permitting the construction across navigable streams of dams, booms, and other shore protections,[7] as well as in support of state legislation authorizing the erection of bridges and the operation of ferries across such streams.[8] Bridges, it is true, may obstruct some commerce, but they may more than compensate for this by aiding other commerce.[9] In Justice Field's words in *Huse* v. *Glover,*[10] it should not be forgotten that "the State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. . . . How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned." [11] The same principle was applied to the construction of piers and wharves in a navigable stream,[12] as well as to harbor improvements by a State for the aid and protection of navigation,[13] and reasonable tolls may be charged for the use of such aids, and reasonable regulations laid down governing their employment.[14]

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[5] *Hall* v. *DeCuir,* 95 U.S. 485 (1878).

[6] 2 Pet. (27 U.S.) 245 (1829).

[7] *Pound* v. *Turck,* 95 U.S. 459 (1878); *Lindsay and Phelps Company* v. *Mullen,* 176 U.S. 126 (1900).

[8] *Gilman* v. *Philadelphia,* 3 Wall. (70 U.S.) 713 (1866).

[9] Id., 729. *See also Escanaba Co.* v. *Chicago,* 107 U.S. 678 (1883); *Cardwell* v. *American Bridge Company,* 113 U.S. 205 (1885).

[10] 119 U.S. 543 (1886).

[11] Id., 548–549.

[12] *Packet Co.* v. *Keokuk,* 95 U.S. 80 (1877); *Ouachita Packet Co.* v. *Aiken,* 121 U.S. 444 (1887).

[13] *Prosser* v. *Northern Pacific Railroad,* 152 U.S. 59 (1894); *see also Sands* v. *Manistee River Imp. Co.,* 123 U.S. 288 (1887); *Gring* v. *Ives,* 222 U.S. 365 (1912).

[14] *Packet Co.* v. *Keokuk,* 95 U.S. 80 (1877); *Transportation Co.* v. *Parkersburg,* 107 U.S. 691 (1883).

A State may license individuals to operate a ferry across an interstate river bounding its territory or may incorporate a company for the purpose.[15] A neighbor State may not make the securing of its consent and license a condition precedent to the operation of such a ferry to one of its towns.[16] Earlier the right of a State to regulate the rates to be charged by an interstate bridge company for passage across its structure was denied by a closely divided Court.[17] The ruling does not, however, control the regulation of rates to be charged by an interstate ferry company. These the chartering State may, in the absence of action by Congress, regulate except in the case of ferries operated in connection with railroads,[18] as to which Congress has acted with the result of excluding all state action.[19] A State may also regulate the rates of a vessel plying between two points within the State although the journey is over the high seas, although again action by Congress may supersede state action at any time.[20]

***Telegraph and Telephones: State Regulation.***—An Indiana statute which required telegraph companies to deliver dispatches by messenger to the persons to whom they were addressed if the latter resided within one mile of the telegraph station or within the city or town where it was located, and which prescribed the order of preference to be given various kinds of messages was held to be an unconstitutional interference with interstate commerce,[21] as was also the order of the Massachusetts Public Service Commission interfering with the transmission to firms within the State's borders of continuous quotations of the New York Stock Exchange by means of ticker service.[22] But a Virginia statute which imposed a penalty on a telegraph company for failure in its "clear common-law duty" of transmitting messages without unreasonable delay, was held, in the absence of legislation by Congress, to be valid,[23] as was also a Michigan statute which prohibited the stipulation by a company against liability for nonperformance of such duty.[24] How-

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[15] *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 215 (1885); *Conway* v. *Taylor*, 1 Black (66 U.S.) 603 (1862); *Wiggins Ferry Co.* v. *East St. Louis*, 107 U.S. 365 (1883).

[16] *Mayor of Vidalia* v. *McNeely*, 274 U.S. 676 (1927). *See also Helson* v. *Kentucky*, 279 U.S. 245, 249 (1929).

[17] *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U.S. 204 (1894).

[18] *Port Richmond Ferry* v. *Hudson County*, 234 U.S. 317 (1914).

[19] *New York, C. & H. R. Co.* v. *Hudson County*, 227 U.S. 248 (1913).

[20] *Wilmington Transp. Co.* v. *Cal. R.R. Comm.*, 236 U.S. 151 (1915).

[21] *Western Union Telegraph Co.* v. *Pendleton*, 122 U.S. 347 (1887).

[22] *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105 (1918).

[23] *Western Union Telegraph Co.* v. *Crovo*, 220 U.S. 364 (1911).

[24] *Western Union Telegraph Co.* v. *Milling Co.*, 218 U.S. 406 (1910).

ever, a South Carolina statute which sought to make mental anguish caused by the negligent nondelivery of a telegram a cause of action was held to be, as applied to messages transmitted from one State to another or to the District of Columbia, an unconstitutional attempt to regulate interstate commerce.[25]

A State had no authority to interfere with the operation of the lines of telegraph companies constructed along postal routes within its borders under the authority of the Post Road Act of 1866,[1] nor to exclude altogether a company proposing to take advantage of the act,[2] but that act did not deprive the State or a municipality of the right to subject telegraph companies to reasonable regulations, and an ordinance regulating the erection and use of poles and wires in the streets did not interfere with the exercise of authority under that act.[3] The jurisdiction conferred by The Transportation Act of 1920 upon the Interstate Commerce Commission, and since transferred to the Federal Communications Commission, over accounts and depreciation rates of telephone companies did not, in the absence of exercise by the federal agency of its power, operate to curtail the analogous state authority,[4] nor was an unconstitutional burden laid upon interstate commerce by the action of a state agency in requiring a telephone company to revise its intrastate toll rates so as to conform to rates charged for comparable distances in interstate service.[5]

***Gas and Electricity: State Regulation.***—The business of piping natural gas from one State to another to local distributors which sell it locally to consumers was declared to be a branch of interstate commerce which a State may not regulate.[6] Similarly, an order by a state commission fixing rates on electric current generated within the State and sold to a distributor in another State, imposed an unconstitutional burden on interstate commerce, although the regulation of such rates would necessarily benefit local consumers of electricity furnished by the same company.[7] In the absence, on the other hand, of contrary regulation by Congress a State may regulate the sale to consumers in its cities of natural gas produced in and transmitted from another State,[8] nor did Con-

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[25] *Western Union Telegraph Co.* v. *Brown*, 234 U.S. 542 (1914).

[1] *Essex* v. *New England Tel. Co.*, 239 U.S. 313 (1915).

[2] *Pensacola Tel. Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1 (1878).

[3] *Western Union Telegraph Co.* v. *Richmond*, 224 U.S. 160 (1912). *See also Postal Telegraph-Cable Co.* v. *Richmond*, 249 U.S. 252 (1919).

[4] *Northwestern Bell Tel. Co.* v. *Ry. Comm.*, 297 U.S. 471 (1936).

[5] *Bell Tel. Co.* v. *Utility Comm.*, 309 U.S. 30 (1940).

[6] *Missouri ex rel. Barrett* v. *Kansas Gas Co.*, 265 U.S. 298 (1924).

[7] *Public Utility Comm.* v. *Attleboro Co.*, 273 U.S. 83 (1927).

[8] *Pennsylvania Gas Co.* v. *Pub. Service Comm.*, 252 U.S. 23 (1920); *Public Utilities Comm.* v. *Landon*, 249 U.S. 236 (1919).

gress, by the Natural Gas Act of 1938, impose any such contrary regulation.[9]

A State was held free by the same act to require a gas company engaged in interstate commerce to obtain a certificate of convenience before selling directly to customers in the State.[10] And where a pipe line was used to distribute both gas that was brought in from without the State and gas that was produced and used within the State, and the two were commingled, but their proportionate quantities were known, an order by the state commission directing the gas company to continue supplying gas from the line to a certain community did not burden interstate commerce.[11] The transportation of natural gas from sources outside the State to local consumers in its municipalities ceased to be interstate commerce at the point where it passed from a pressure producing station into local distributing stations, and from that point was subject to state regulation.[12]

A state public utilities commission was held to be entitled to require a natural gas distributing company seeking an increase of rates to show the fairness and reasonableness of the rate paid by it to the pipe line company from which it obtained its supplies, both companies being subsidiaries of a third.[13] A state agency was permitted to require a company which sold natural gas to local consumers and distributing companies, transporting it in pipe lines from other States, to file contracts, agreements, et cetera, for sales and deliveries to the distributing companies,[14] nor did the fact that a natural gas pipe line from the place of production to the distributing points in the same State cut across a corner of another State render it improper, in determining maximum rates for gas sold by the owner of the pipe li.. to distributing companies, to include the value of the total line in the rate base.[15] A State, as a conservation measure, may fix the minimum prices at the wellhead on natural gas produced in the State and sold interstate.[16]

***Foreign Corporations: State Regulation.***—A State may require that a foreign corporation, as a condition of its being admitted to do a local business, obtain a license and in connection therwith furnish information as to its home office State or country, the location

[9] *Panhandle Pipe Line Co.* v. *Public Service Comm.*, 332 U.S. 507 (1947).
[10] *Panhandle Pipe Line Co.* v. *Michigan Comm.*, 341 U.S. 329 (1951).
[11] *Peoples Natural Gas Co.* v. *Public Serv. Comm.*, 270 U.S. 550 (1926).
[12] *East Ohio Gas Co.* v. *Tax Comm.*, 283 U.S. 465 (1931).
[13] *Western Distrib. Co.* v. *Pub. Serv. Comm.*, 285 U.S. 119 (1932).
[14] *Arkansas Gas Co.* v. *Dept. of Pub. Utilities*, 304 U.S. 61 (1938).
[15] *Lone Star Gas Co.* v. *Texas*, 304 U.S. 224 (1938).
[16] *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179 (1950).

of its principal office, the names of its officers and directors, and other specified information, and pay a reasonable license fee.[17] But no registration could be required of an out-of-state corporation whose business in the host State is purely interstate in character.[18] A corporation engaging solely in an interstate business may not be excluded from the courts of a State because of a failure to register and qualify to do business in that State.[19]

In *Exxon Corp.* v. *Governor of Maryland,*[20] a state law prohibiting integrated oil companies from owning retail gasoline stations within the State was sustained against charges of intentional discrimination against interstate commerce and of impermissible burdening of such commerce. First, while the statute itself made no distinction between in-state and out-of-state firms, it was the fact that no integrated oil companies were based in Maryland and thus the only companies affected by the statute were out-of-state firms. But not all out-of-state companies were affected; some companies operating in interstate commerce and retailing gasoline in Maryland were not integrated oil companies and could continue to operate as before. Although the burden of the law fell on *some* interstate companies, that fact alone, in the absence of the giving to in-state dealers a competitive advantage over out-of-state dealers, did not demonstrate discrimination against interstate commerce. Second, the law was held not to be an impermissible burden on interstate commerce, although it assuredly would shift some interstate business from some concerns to others and change the market structure in existence. The commerce clause does not protect particular firms nor particular structures or methods; it is the interstate market as a whole and only commerce as such that is protected.

### State Police Power and the Subject Matter of Interstate Commerce

***State Quarantine Laws.***—"Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action. In view of the

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[17] *Bank of Augusta* v. *Earle,* 13 Pet. (38 U.S.) 519 (1839); *Hanover Fire Ins. Co.* v. *Harding,* 272 U.S. 494 (1926); *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202 (1944).

[18] *Crutcher* v. *Kentucky,* 141 U.S. 47 (1891); *International Textbook Co.* v. *Pigg,* 217 U.S. 91 (1910).

[19] *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282 (1921); *Allenberg Cotton Co.* v. *Pittman,* 419 U. S. 20 (1974). But see *Eli Lilly & Co.* v. *Sav-On Drugs,* 366 U. S. 276 (1961), in which a company in effect doing business within the State was held to have been validly denied access to the state courts to sue on an interstate transaction in the absence of a certificate to do business in the State.

[20] 437 U.S. 117, 125–129 (1978).

need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States and has repeatedly acquiesced in the enforcement of State laws. . . . Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health . . ., but the power of the State to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question." [1] "State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and imposition are valid when reasonable in their requirements and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the State and held for sale in the original imported packages." [2]

In two earlier cases, a statute which prohibited the driving of all Texan, Mexican, and Indian cattle into the State during certain seasons of the year was held void,[3] while a statute making anybody in the State who had Texas cattle which had not wintered north of a certain line liable for damage through the communication of disease from these to other cattle was sustained,[4] as were also the regulations of a sanitary commission which excluded all cattle, horses, and mules, from the State at a certain period when anthrax was prevalent.[5] Reviewing previous cases in the one last cited, the Court declared their controlling principle to be simply whether the police power of the State had been exerted to exclude *"beyond what is necessary for any proper quarantine,"* a question predominantly of fact, and one therefore to be determined for each case with only general guidance from earlier decisions.[6]

Most recent cases conform to the same pattern. Among measures sustained were the following: an Ohio statute forbidding the sale in that State of condensed milk unless made from unadulterated milk,[7] a New York statute penalizing the sale with intent to de-

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[1] *Minnesota Rate Cases (Simpson* v. *Shepard),* 230 U.S. 352, 406 (1913).
[2] Id., 408.
[3] *Hannibal & St. J. R. Co.* v. *Husen,* 95 U.S. 465 (1878).
[4] *Kimmish* v. *Ball,* 129 U.S. 217 (1889).
[5] *Smith* v. *St. Louis and Southwestern Ry.,* 181 U.S. 248 (1901).
[6] Id., 255 (emphasis by Court).
[7] *Hebe Co.* v. *Shaw,* 248 U.S. 297 (1919).

fraud of preparations falsely represented to be Kosher,[8] a New York statute requiring that cattle shall not be imported for dairy or breeding purposes unless accompanied by the certificate of a proper sanitary official in the State of origin in order to prevent the spread of an infectious disease,[9] an order of a State Department of Agriculture, pursuant to a state law, regulating the standards of containers in which agricultural products may be marketed within the State,[10] a state statute restricting the processing of fish found within the waters of the State with the purpose of conserving it for food, even though it also operated upon fish brought into the State from without,[11] the price fixing and licensing provisions of a state Milk and Cream Act, not applicable to transactions in interstate commerce, by declaration of the act,[12] a Maine statute requiring the registration with the State Health Department of cosmetic preparations for the purpose of ascertaining whether the products were harmless,[13] an Indiana Animals Disposal Act requiring that animal carcasses, not promptly disposed of by the owner, be delivered to the representative of a disposal plant licensed by the State and prohibiting their transportation on the public highways for any other purpose,[14] a Pennsylvania statute providing for the licensing and bonding of all milk dealers and fixing a minimum price to be paid producers, as applied to a dealer purchasing milk within the State for shipment to points outside it.[15]

Striking down a state statute that forbade the importation of most solid or liquid waste into the State for disposal in landfills, while the State permitted the continued disposal of domestic wastes in those landfills, the Court distinguished previous cases that had upheld quarantine measures directed at interstate commerce. Those quarantine laws, the Court said "banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." The movement of the wastes into the State occasioned no risk to health; rather, the harms arose after its disposal in landfills and at that point there was no basis to distinguish out-of-state waste from domestic waste.[16]

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[8] *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497 (1925).
[9] *Mintz* v. *Baldwin*, 289 U.S. 346 (1933).
[10] *Pacific States Co.* v. *White*, 296 U.S. 176 (1935).
[11] *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936).
[12] *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937).
[13] *Bourjois, Inc.* v. *Chapman*, 301 U.S. 183 (1937).
[14] *Clason* v. *Indiana*, 306 U.S. 439 (1939).
[15] *Milk Control Board* v. *Eisenberg Farm Products Co.*, 306 U.S. 346 (1939).
[16] *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 628–629 (1978).

***State Inspection Laws.***—The application of state inspection laws to imports from outside the State has been sustained as warranted by local interests and as not discriminating against out-of-state products, in the following instances: a North Carolina statute providing that "every bag, barrel, or other package" of commercial fertilizer offered for sale in the State should bear a label truly describing its chemical composition, which must comply with certain requirements, and charging 25 cents per ton to meet the cost of inspection,[17] an Indiana statute forbidding the sale in the original package of concentrated feeding stuffs prior to inspection and analysis for the purpose of ascertaining whether certain minimum standards as to composition had been met,[18] a Minnesota statute requiring as a precondition of its being offered for sale in the State the inspection of illuminating oil and gasoline,[19] a Kansas statute forbidding any moving picture film or reel to be exhibited in the State unless it had been examined by the State Superintendent of Instruction and certified by him as moral and instructive and not tending to debase or corrupt the morals.[20]

A Minnesota statute, on the other hand, which forbade the sale in any city of the State of any beef, mutton, lamb, or pork which had not been inspected on the hoof by local inspectors within twenty-four hours of slaughter was held void.[21] Its "necessary operation," said the Court, was to ban from the State wholesome and properly inspected meat from other States.[22] Also a Virginia statute which required the inspection and labelling of all flour brought into the State for sale was disallowed because flour produced in the State was not subject to inspection.[23] A Florida statute providing for the inspection of all cement imported into the State and enacting a fee therefor, but making no provision for the inspection of the local product, met a like fate,[24] as did also a city ordinance which sought to exclude a foreign corporation from selling milk in that city solely because its pasteurization plants were more than five miles away.[25]

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[17] *Patapsco Guano Co.* v. *North Carolina*, 171 U.S. 345 (1898).

[18] *Savage* v. *Jones*, 225 U.S. 501 (1912), followed in *Corn Products Rfg. Co.* v. *Eddy*, 249 U.S. 427 (1919).

[19] *Pure Oil Co.* v. *Minnesota*, 248 U.S. 158 (1918).

[20] *Mutual Film Corp.* v. *Kansas*, 236 U.S. 248 (1915).

[21] *Minnesota* v. *Barber*, 136 U.S. 313 (1890); *see also Brimmer* v. *Rebman*, 138 U.S. 78 (1891).

[22] 136 U.S., 322.

[23] *Voight* v. *Wright*, 141 U.S. 62 (1891).

[24] *Hale* v. *Blimco Trading Co.*, 306 U.S. 375 (1939).

[25] *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951). See also *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

***State Conservation and Embargo Measures: Fish, Animals, Agricultural Products, Natural Resources.***—In *Geer* v. *Connecticut,*[1] the Court sustained the right of the State to forbid the shipment beyond its borders of game taken within the State on the ground, in part, that a State has an underlying property right in wild things found within its limits and so is entitled to qualify the right of individual takers thereof to any extent it chooses. A similar ruling was laid down in a later case as to the prohibition by a State of the transportation out of it of water from its important streams.[2] This doctrine did not long remain undiluted, as in *West* v. *Kansas Gas Co.,*[3] the Court invalidated a statute that prevented the interstate transfer of natural gas produced within the State, and in *Pennsylvania* v. *West Virginia,*[4] it voided a law according a preference to citizens of that State in the purchase of natural gas produced therein. The former cases were unconvincingly distinguished on the basis of the difference in products, but the principal ground was that "the business welfare of the State" is subordinated by the commerce clause to that of the nation as a whole. If the States had the power asserted, Justice McKenna said in the *Kansas Gas* case, "a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? . . . And yet we have said that 'in matters of foreign and interstate commerce there are no State lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all the States and that of each State is made greater by a division of its resources . . . with every other State, and those of every other State with it." [5]

Though existing in some form of limbo, *Geer* and *McCarter* themselves were not formally overruled for decades.[6] In *Hughes* v. *Oklahoma,*[7] the Court traced the demise of the public ownership theory and recast it as " 'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve

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[1] 161 U.S. 519 (1896).

[2] *Hudson Water Co.* v. *McCarter,* 209 U.S. 349 (1908).

[3] 221 U.S. 229 (1911).

[4] 262 U.S. 553 (1923).

[5] *West* v. *Kansas Gas Co.,* 221 U.S. 229, 255 (1911).

[6] On *Geer*'s debilitation, see *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928); *Toomer* v. *Witsell,* 334 U.S. 385 (1948). On *McCarter*'s, see *City of Altus* v. *Carr,* 255 F. Supp. 828 (D.C.W.D. Tex.), *aff'd.* 385 U.S. 35 (1966).

[7] 441 U.S. 322 (1979).

and regulate the exploitation of an important resource.'" [8] Announcing that it would continue to respect legitimate state concerns for conservation and protection of wild animals, the Court discerned no legitimate purpose of conservation to be served by a prohibition of interstate transportation of minnows caught in state waters, with no comparable limitation on in-state use of minnows. Subsequently, state restrictions on the interstate transportation of ground water obtained from wells within the State were found subject to commerce clause scrutiny and while state interests in the subject matter were substantial the regulatory scheme was not saved by its conservation and preservation rationales.[9] State regulations and restrictions in this area must meet the same standards applicable to other burdens on commerce.[10]

Promotion of domestic products is a legitimate state interest, but it must be accomplished with no more than an incidental burdening of interstate commerce. Thus, in *Sligh* v. *Kirkwood,*[11] the Court upheld the application to oranges, which were intended for the interstate market, of a Florida statute prohibiting the sale, shipment, or delivery for shipment of any citrus fruits which were immature or otherwise unfit for consumption. The burden imposed upon interstate commerce was held to be incidental merely to the effective enforcement of a measure intended to safeguard the health of the people of the State. Moreover, said the Court, "we may take judicial notice of the fact that the raising of citrus fruits is one of the greatest industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market." [12]

An overstraying of the mark was found in two other similar cases, however. An order issued under a state statute governing the packaging and shipment of fruits and vegetables which was applied to a grower of a superior brand of cantaloupes to require him to package the fruits within the State, and so mark them, instead of shipping them to its regular plant in another State, was held to be an invalid burden on interstate commerce.[13] The Court observed

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[8] Id., 334, quoting *Toomer* v. *Witsell,* 334 U.S. 385, 402 (1948). See also *Baldwin* v. *Montana Fish and Game Comm.,* 436 U.S. 371, 384–387 (1978); *Douglas* v. *Seacoast Products,* 431 U.S. 265, 284–285 (1977).

[9] *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U.S. 941 (1982).

[10] *Hughes* v. *Oklahoma,* 441 U.S. 322, 331 (1979); *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U.S. 941, 954 (1982).

[11] 237 U.S. 52 (1915). *See also Pacific States Box & Basket Co.* v. *White,* 296 U.S. 176 (1935); *Parker* v. *Brown,* 317 U.S. 341 (1943).

[12] *Sligh* v. *Kirkwood,* 237 U.S. 52, 61 (1915).

[13] *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). But *compare Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422 (1936) (law restricting processing of fish, both that

that the interest which the State was seeking to protect—the enhancement of the State's reputation as a producer of superior fruits—was so minimal that it did not begin to balance against the burden imposed on the grower. The facial neutrality of another law was found to impermissibly—and perhaps intentionally—burden interstate commerce. A North Carolina statute required that all closed containers of apples shipped into or sold in the State bear the applicable United States grade or none at all; Washington State had a stringent grading system equivalent to or superior to the federal standard. Balancing the state interest in consumer protection against the burden imposed on interstate commerce, the Court failed to discern a sufficient state interest that permitted the imposition of increased costs of doing business on Washington producers, who would have had to alter marketing practices to comply, whereas North Carolina producers would not, and the removal of the market advantages Washington has had with the state grading marks displayed over ungraded domestic apples.[14]

Certain recent cases have had to deal with state regulation of the milk business. In *Baldwin* v. *Seelig*,[15] the refusal of a license to a dealer who had procured his milk at a lower minimum price than producers were guaranteed in New York was set aside as an unconstitutional interference with interstate commerce. However, a Pennsylvania statute requiring dealers to obtain licenses was sustained as to one who procured milk from neighboring farms and shipped it all into a neighboring State for sale.[16] The purpose of the act, explained Justice Roberts, was to control "a domestic situation in the interest of the welfare of the producers and consumers," and its application to the kind of case before the Court was essential to its effective enforcement and affected interstate commerce only incidentally.[17] But when a distributor of milk in Massachusetts, who already had two milk stations in Eastern New York, was refused a license for a third on the ground, among others, that the further diversion of milk to Massachusetts would deprive the local market of a supply needed during the short season, a narrowly di-

taken in waters of the State and that brought into State in fresh condition, sustained as food conservation measure).

[14] *Hunt* v. *Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977). The Court noticed but did not rely on evidence that the law was designed to protect domestic apple growers. Id., 352. Basis for the decision was the Court's finding that the statute did "remarkably little" in furthering the goal of consumer protection, id., 353, and nondiscriminatory alternatives existed to further that goal. Id., 354.

[15] 294 U.S. 511 (1935).

[16] *Milk Control Board* v. *Eisenberger Farm Products Co.*, 306 U.S. 346 (1939).

[17] Id., 352.

vided Court interposed its veto on the basis of *West* v. *Kansas Gas Co.*[18]

***The Modern Standard: Balancing.***—The present approach of the Court to state regulations that have an impact on interstate commerce has been unusually clearly delineated in recent cases. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[19] A corollary to this standard is that the commerce clause denies the States the power to isolate themselves economically, so that protectionism, intentional discrimination against interstate commerce, is met with virtually a per se rule of invalidity.[20] But where nondiscriminatory, legitimate objectives are credibly advanced, the more flexible approach quoted is the one now followed.

In *Exxon Corp.* v. *Governor of Maryland,*[21] a state law prohibiting integrated oil companies from owning retail gasoline stations within the State was sustained against charges of intentional discrimination against interstate commerce and of impermissible burdening of such commerce. First, while the statute itself made no distinction between in-state and out-of-state firms, it was the fact that no integrated oil companies were based in Maryland and thus the only companies affected by the statute were out-of-state firms.

[18] *H. P. Hood & Sons* v. *Dumond*, 336 U.S. 525 (1949). In *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976), the Court invalidated a state regulation providing that milk and milk products from another State could be sold in the State only if the other State accepted milk or milk products produced and processed in the first State on a reciprocal basis. A State's interest in combatting discrimination against its products is insufficient to justify its own burdening of interstate commerce. See also *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964).

[19] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371–372 (1976); *Raymond Motor Transp.* v. *Rice*, 434 U.S. 429, 440–442 (1978); *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); *Lewis* v. *BT Investment Mgrs.*, 447 U.S. 27, 36–37 (1980); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 670–671 (1981); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982).

[20] *H. P. Hood & Sons* v. *Dumond*, 336 U.S. 525, 537–538 (1949); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 623–624 (1978); *Lewis* v. *BT Investment Mgrs.*, 447 U.S. 27 (1980).

[21] 437 U.S. 117, 125–129 (1978). *See also Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 470–474 (1981).

But not all out-of-state companies were affected; some companies operating in interstate commerce and retailing gasoline in Maryland were not integrated oil companies and could continue to operate as before. Although the burden of the law fell on *some* interstate companies, that fact alone, in the absence of the giving to in-state dealers a competitive advantage over out-of-state dealers, did not demonstrate discrimination against interstate commerce. Second, the law was held not to be an impermissible burden on interstate commerce, although it assuredly would shift some interstate business from some concerns to others and change the market structure in existence. The commerce clause does not protect particular firms nor particular structures or methods; it is the interstate market as a whole and only commerce as such that is protected.

***The State Proprietary Activity Exception.***—In a case of first impression, the Court held unaffected by the commerce clause—"the kind of action with which the Commerce Clause is not concerned"—a Maryland bounty scheme by which the State paid scrap processors for each "hulk" automobile destroyed. As first enacted, the bounty plan did not distinguish between in-state and out-of-state processors, but it was subsequently amended to operate in such a manner that out-of-state processors were substantially disadvantaged. The Court held that where a State enters into the market itself as a purchaser, in effect, of a potential article of interstate commerce, it does not in creating a burden upon that commerce by restricting its trade to its own citizens or businesses within the State violate the commerce clause.[22]

Affirming and extending somewhat this precedent, the Court held that a State operating a cement plant could in times of shortage (as well presumably as any time) confine the sale of cement by the state plant to residents of the State.[23] "The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." [24] It is yet unclear how far this concept of the State as market participant rather than market regulator will be extended.

***State Laws Regulating Alcoholic Beverages.***—The original package doctrine made its debut in *Brown* v. *Maryland,*[25] where it was

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[22] *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976).
[23] *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980).
[24] Id., 436–437.
[25] 12 Wheat. (25 U.S.) 419 (1827).

applied to remove from the reach of the state taxing power imports from abroad still in the hands of the importer in the original package. This rule the Court, overriding a dictum in Marshall's opinion in *Brown* v. *Maryland*,[1] rejected outright after the Civil War as to imports from sister States.[2] However, when in the late eighties and the early nineties statewide Prohibition laws began making their appearance, the Court seized upon the rejected dictum and began applying it as a brake on the operation of such laws with respect to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce." While holding that a State was entitled to prohibit the manufacture and sale within its limits of intoxicants,[3] even for an outside market—manufacture being no part of commerce[4]—it contemporaneously laid down the rule, in *Bowman* v. *Chicago & Northwestern Railway Co.*,[5] that so long as Congress remained silent in the matter, a State lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the shipment into it of intoxicants from a sister State, and this holding was soon followed by another to the effect that, so long as Congress remained silent, a State had no power to prevent the sale in the original package of liquors introduced from another State.[6] The effect of the latter decision was soon overcome by an act of Congress, the so-called Wilson Act, repealing its alleged silence,[7] but the *Bowman* decision still stood, the act in question being interpreted by the Court not to subject liquors from sister States to local authority until their arrival in the hands of the person to whom consigned.[8] Not until 1913 was the effect of the decision in the *Bowman* case fully nullified by the Webb-Kenyon Act,[9] which placed intoxicants entering a

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[1] Id., 449.

[2] *Woodruff* v. *Parham*, 8 Wall. (75 U.S.) 123 (1869). There were later some departures from the rule, apparently due to inattention, in cases involving oil. *Standard Oil Co.* v. *Graves*, 249 U.S. 389 (1919); *Askren* v. *Continental Oil Co.*, 252 U.S. 444 (1920); *Bowman* v. *Continental Oil Co.*, 256 U.S. 642 (1921); *Texas Co.* v. *Brown*, 258 U.S. 466 (1922). These cases were "qualified," and in fact disavowed in *Sonneborn Bros.* v. *Cureton*, 262 U.S. 506, 520 (1923). *Cf.* the contemporary case of *Wagner* v. *Covington*, 251 U.S. 95 (1919) where the true rule is followed.

[3] *Mugler* v. *Kansas*, 123 U.S. 623 (1887).

[4] *Kidd* v. *Pearson*, 128 U.S. 1 (1888).

[5] 125 U.S. 465 (1888).

[6] *Leisy* v. *Hardin*, 135 U.S. 100 (1890).

[7] 26 Stat. 313 (1890), sustained in *In re Rahrer*, 140 U.S. 545 (1891).

[8] *Rhodes* v. *Iowa*, 170 U.S. 412 (1898).

[9] 37 Stat. 699 (1913), sustained in *Clark-Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.S. 311 (1917). *See also Dept. of Revenue* v. *Beam Distillers*, 377 U.S. 341 (1964).

State from another State under the control of the former for all purposes whatsoever.

National Prohibition [10] cast these conflicts into the shadows and the second clause of the Twenty-first Amendment [11] significantly altered the terms of the conflict.

***State Laws Regulating Oleomargarine and Cigarettes.***—The immunity temporarily conferred by the original package doctrine upon liquors was extended to cigarettes [12] and, with an instructive exception, to oleomargarine. The exception was made in *Plumley* v. *Massachusetts*,[13] in which the Court held that a statute of that State forbidding the sale of oleomargarine colored to look like butter could validly be applied to oleomargarine brought from another State and still in the original package. The justification of the statute to the Court's mind was that it sought "to suppress false pretenses and promote fair dealing in the sale of an article of food." Nor did *Leisy* v. *Hardin* [14] apply, said Justice Harlan for the Court, because the beer in that case was "genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer." That decision was never intended, he continued, to hold that "a State is powerless to prevent the sale of articles manufactured in or brought from another State, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy. . . ." [15]

Obviously, the argument was conclusive only on the assumption that a State has a better right to prevent frauds than it has to prevent drunkenness and like evils, and doubtless that was the way the Court felt about the matter at that date. On the one hand, the liquor traffic was a very ancient, if not an altogether venerable, institution, while oleomargarine was then a relatively novel article of commerce whose wholesomeness was suspect. Moreover, laws designed to secure fair dealing and condemnatory of fraud followed closely the track of the common law, while anti-liquor laws most decidedly did not. The real differentiation of the two cases had to be sought in historical grounds.

Yet the States may not put unreasonable burdens upon interstate commerce even in oleomargarine. Thus, a Pennsylvania stat-

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[10] *See* the Eighteenth Amendment.

[11] The second section forbids the transportation or importation into any State for delivery or use of any intoxicating liquors in violation of the laws of the jurisdiction into which the alcohol is taken.

[12] *Austin* v. *Tennessee*, 179 U.S. 343 (1900).

[13] 155 U.S. 461 (1894).

[14] 135 U.S. 100 (1890).

[15] 155 U.S., 468, 474.

ute forbidding the sale of this product altogether was pronounced invalid insofar as it operated to prevent the introduction of such oleomargarine from another State and its sale in the original package,[16] as was also a New Hampshire statute which required that all oleomargarine marketed in the State be colored pink.[17]

***Demise the Original Package Doctrine.***—What importance has the original package doctrine today as a restraint on state legislation affecting interstate commerce? The answer seems to be very little, if any. We have seen above that the second section of the Twenty-first Amendment has bestowed on the States great powers over interstate commerce in intoxicating liquors. In *Whitfield* v. *Ohio,*[18] moreover, the Court upheld a state law prohibiting the sale in open market of convict-made goods including sales of goods imported from other States and still in the original package. While the decision is based on the Hawes-Cooper Act of 1929,[19] which follows the pattern of the Wilson Act, Justice Sutherland speaking for the Court, took pains to disparage the "unbroken-package doctrine as applied to interstate commerce . . . as more artificial than sound." [20] Indeed, earlier cases made it clear that the enforcement of state quarantine and inspection acts, otherwise constitutional, was not to be impeded by the doctrine in any way.[21]

***State Curbs on the Interstate Movement of Persons.***—Prior to the Civil War, the slaveholding States, ever fearful of a slave uprising, adopted legislation meant to exclude from their borders free Negroes whether hailing from abroad or from sister States, and in 1823 a South Carolina Negro Seamen's Act embodying this objective was held void by Justice William Johnson, himself a South Carolinian, in a case arising in the Carolina circuit and involving a British Negro sailor.[22] The basis of the ruling, which created a tremendous uproar in Charleston,[23] was the commerce clause and certain treaties of the United States. There followed two rulings of Attorneys General, the earlier by Attorney General Wirt, denouncing such legislation as unconstitutional,[24] the latter by Attorney Gen-

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[16] *Schollenberger* v. *Pennsylvania,* 171 U.S. 1 (1898).

[17] *Collins* v. *New Hampshire,* 171 U.S. 30 (1898).

[18] 297 U.S. 431 (1936).

[19] 45 Stat. 1084 (1929).

[20] 297 U.S., 440. *See also* Justice Cardozo's remarks in *Baldwin* v. *Seelig,* 294 U.S. 511, 526–527 (1935).

[21] *Cf. Plumley* v. *Massachusetts,* 155 U.S. 461 (1894); *Savage* v. *Jones,* 225 U.S. 501 (1912); *Corn Products Rfg. Co.* v. *Eddy,* 249 U.S. 427 (1919).

[22] *Elkison* v. *Deliesseline,* 8 Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823).

[23] For interesting particulars, *see* 1 C. Warren, *The Supreme Court In United States History* (Boston: 1935), 624–627.

[24] 1 *Ops. Att'y Gen.* 659 (1824).

eral Berrien, sustaining it.[25] And in *New York City* v. *Miln* [1] the Court, speaking by Justice Barbour of Virginia, asserted, six years after Nat Turner's rebellion, the power of the States to exclude undesirables in sweeping terms, which, in the *Passenger Cases*,[2] decided in 1840, a narrowly divided Court considerably qualified. Shortly after the Civil War, the Court overturned a Nevada statute which sought to halt the further loss of population by a special tax on railroads on every passenger carried out of the State.[3] This time only two Justices invoked the commerce clause; the majority, speaking by Justice Miller, held the measure to be an unconstitutional interference with a right of national citizenship, a holding today translatable, in the terminology of the Fourteenth Amendment, as an abridgment of a privilege or immunity of citizens of the United States.

Against this background the Court in *Edwards* v. *California*,[4] held void a statute which penalized the bringing into that State, or the assisting to bring into it, any nonresident knowing him to be "an indigent person." Five Justices, speaking by Justice Byrnes, held the act to be even as to "persons who are presently destitute of property and without resources to obtain the necessities of life, and who have no relatives or friends able and willing to support them," [5] an unconstitutional interference with interstate commerce. "The State asserts," Justice Byrnes recited, "that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon 'the wisdom, need, or appropriateness' of the legislative efforts of the States to solve such difficulties. . . . But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: 'The Constitution

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[25] 2 *Ops. Att'y Gen.* 426 (1831).
[1] 11 Pet. (36 U.S.) 102 (1837).
[2] *Smith* v. *Turner*, 7 How. (48 U.S.) 283 (1849).
[3] *Crandall* v. *Nevada*, 6 Wall. (73 U.S.) 35 (1868).
[4] 314 U.S. 160 (1941).
[5] Id., 172.

was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division'." [6] Four of the Justices would have preferred to rest the holding of unconstitutionality on the rights of national citizenship under the privileges and immunities clause of the Fourteenth Amendment.[7]

## CONCURRENT FEDERAL AND STATE JURISDICTION

### The General Issue: Preemption

Since the turn of the century federal legislation under the commerce clause has penetrated deeper and deeper into areas once occupied by the regulatory power of the States. One result is that state laws on subjects about which Congress has legislated have been more and more frequently attacked as being incompatible with the acts of Congress.[1] Three results are possible in such instances and the Court has utilized all three at various times. *First,* it might be, as suggested by Webster in his argument in *Gibbons* v. *Ogden,*[2] that when Congress acts upon a particular phase of interstate commerce, its action appropriates the entire field so that no room is left for supplementary state legislation.[3] *Second,* it might be that, in the absence of conflict between specific provisions of the state and congressional measures involved, the state regulation may be permitted to supplement the federal regulation.[4] *Third,* it might be that the state legislation involved is found to conflict with the congressional act and thus be invalidated.[5]

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[6] Id., 173, 177. Justice Cardozo's words, quoted by Justice Byrnes, occur in *Baldwin* v. *Seelig,* 294 U.S. 511, 523 (1935).

[7] Id., 177 (Justice Douglas, with whom Justices Black and Murphy concurred), 181 (Justice Jackson). In *United States* v. *Guest,* 383 U.S. 745, 758, 759 (1966), Justice Stewart observed that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution" and that while "there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel . . . [a]ll [the Justices] have agreed that the right exists." *Cf. Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (voiding durational residency requirements on eligibility for welfare assistance as burdening the right of travel).

[1] The attacks, of course, are premised on the supremacy clause. *Supra, pp.* 915–938

[2] 9 Wheat. (22 U.S.) 1, 8–18 (1824).

[3] For a decision taking a view close to this position, *see Campbell* v. *Hussey,* 368 U.S. 297 (1961).

[4] E.g., *Florida Lime & Avocado Growers* v. *Paul,* 373 U.S. 132 (1963); *Rice* v. *Santa Fe Elevator Co.,* 331 U.S. 218 (1947).

[5] E.g., *Warren Trading Post Co.* v. *Arizona Tax Comm.,* 380 U.S. 685 (1965).

"The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." [6] As Justice Black once explained in a much quoted exposition of the matter: "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [7] Or as Justice Brennan once wrote: "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." [8]

Most of the early cases stemming from state legislation affecting interstate railway transportation fall in the first class set out above, while illustrations of the second class usually comprise legislation intended to promote public health and safety and fair dealing. More recent cases are difficult of classification, especially those partaking of possible classification in the first and third categories.

***Railroad Regulation.***—Few acts passed by Congress proved to be more destructive of state legislation than the Hepburn Act of 1906,[9] amending the Interstate Commerce Act. Thus, a state statute authorizing the issuance of transportation in payment for printing and advertising was held to be in conflict with the unqualified prohibition by Congress of free interstate transportation.[10] Similarly, a state law penalizing a carrier for refusing to

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[6] *Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 285–286 (1971).

[7] *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

[8] *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963).

[9] 34 Stat. 584, 49 U.S.C. § 1 *et seq.*

[10] *Chicago, I. & L. Ry. Co.* v. *United States*, 219 U.S. 486 (1911).

accept freight for transportation whenever tendered at a regular station was held to conflict with the congressional provision barring transportation of passengers or freight unless the rates, fares, and charges were filed and published in accordance with the Act.[11] Moreover, the Court held, the Act precluded a State from regulating the delivery of cars for interstate shipments,[12] from authorizing recovery of a penalty for delay in giving notice of the arrival of freight,[13] or from authorizing a penalty for failure to deliver freight at depots and warehouses within a stated time limit.[14] The Carmack Amendment,[15] which placed on the initial carrier the responsibility for loss of or injury to cargo, was held to have superseded all state statutes limiting recovery for loss or injury to goods in transportation to an agreed or declared value.[16] Contemporaneous legislation dealing with employer liability for employee injuries, and similar matters, was held to have displaced all state legislation so far as interstate commerce was concerned.[17]

However, the States were still able to regulate the time and manner of payment of the employees of railroad, including those engaged in interstate commerce, Congress not having legislated on the subject.[18] The States were also permitted to enforce a number of safety regulations,[19] including "full crew" laws requiring a minimum number of employees aboard an operating train.[20]

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[11] *Southern Ry. Co.* v. *Reid*, 222 U.S. 424 (1912); *Southern Ry. Co.* v. *Burlington Lumber Co.*, 225 U.S. 99 (1912).

[12] *Chicago, R.I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U.S. 426 (1913).

[13] *St. Louis, Iron Mt. & S. Ry.* v. *Edwards*, 227 U.S. 265 (1913).

[14] *Yazoo & Mississippi R.R.* v. *Greenwood Grocery Co.*, 227 U.S. 1 (1913).

[15] 34 Stat. 595 (1906), 49 U.S.C. § 20(11), (12).

[16] *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913). *See also Adams Express Co.* v. *New York*, 232 U.S. 14 (1914); *Chicago, R.I. & P. Ry. Co.* v. *Cramer*, 232 U.S. 490 (1914); *Atchison, T. & S.F. Ry.* v. *Harold*, 241 U.S. 371 (1916); *Missouri Pacific R. Co.* v. *Porter*, 273 U.S. 341 (1927).

[17] *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Southern Ry. Co.* v. *Railroad Comm.*, 236 U.S. 439 (1915).

[18] *Erie Railroad Co.* v. *New York*, 233 U.S. 671 (1914).

[19] *Lehigh Valley Railroad Co.* v. *Board of Public Utility Comm.*, 278 U.S. 24 (1928); *Southern Railway Co.* v. *King*, 217 U.S. 524 (1910); *Smith* v. *Alabama*, 124 U.S. 465 (1888); *New York, N.H. & H. Railroad Co.* v. *New York*, 165 U.S. 628 (1897). *But see Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

[20] *Chicago, R.I. & P. Railroad Co.* v. *Arkansas*, 219 U.S. 453 (1911); *St. Louis, Iron Mt. & S. Railroad Co.* v. *Arkansas*, 240 U.S. 518 (1916); *Missouri Pacific Railroad Co.* v. *Norwood*, 283 U.S. 249 (1931); *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P. Railroad Co.*, 382 U.S. 423 (1966). *And see Brotherhood of Locomotive Firemen* v. *Chicago, R.I. & P. Railroad Co.*, 393 U.S. 129 (1968) (dismissing other constitutional challenges).

***Quarantine Cases.***—The Court has been deferential to exercises of the state police power to protect health and safety and to prevent fraud. Thus, a state law prohibiting sale of any food or drug colored or coated to appear better than it is, as applied to imported coffee, was held permissible in the face of federal law prohibiting the importation of adulterated or imported food,[21] a state law regulating the sale of concentrated commercial feeding stuff, requiring certificate and label disclosure of ingredients and providing for inspection and analysis, was found to coexist with the federal Pure Food and Drug Act,[22] and a state law requiring lard compounds, unless sold in bulk, to be put up in pails or containers holding specified net weights was found not repugnant to the Food and Drug Act.[23] On the other hand, a state law requiring certain commodities offered for sale to bear the label required by state law and no other conflicted with the federal statute requiring articles to be labeled in accordance with its standards, even though the goods in question might have been removed from the containers in which they were shipped into the State.[24] When the Court held that federal law had so occupied the field that a State could not prevent the importation of plants with a disease not covered by federal agricultural regulations, Congress amended the federal statute to permit the States to impose quarantines in such overlooked cases.[25]

***Preemption Standards.***—" 'The purpose of Congress is the ultimate touchstone.' " [1] Since preemption cases, when the statute contains no express provision,[2] theoretically turn on statutory construction, generalizations about them can carry one only so far. Each case must construe a different federal statute with a distinct legislative history. If the statute and the legislative history is silent or unclear, the Supreme Court has developed over time general criteria which it purports to utilize in determining the preemptive effect of federal legislation.

The "clear and manifest purpose of Congress" to preempt "may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that

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[21] *Crossman* v. *Lurman*, 192 U.S. 189 (1904).

[22] *Savage* v. *Jones*, 225 U.S. 501 (1912).

[23] *Armour & Co.* v. *North Dakota*, 240 U.S. 510 (1916).

[24] *McDermott* v. *Wisconsin*, 228 U.S. 115 (1913).

[25] *Oregon-Washington Co.* v. *Washington*, 270 U.S. 87 (1926). *See* 44 Stat. 250 (1926).

[1] *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978), quoting *Retail Clerks* v. *Schmerhorn*, 375 U. S. 96, 103 (1963).

[2] For an instance of express preemption, *see Jones* v. *Rath Packing Co.*, 430 U.S. 519, 528–532 (1977).

Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . ." [3] "Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law." [4] Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," [5] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [6]

"Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakably so ordained." [7] However, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." [8]

In the final conclusion, "the generalities" which may be drawn from the cases do not decide them. Rather, "the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances." [9]

Recitation of some of the cases merely reveals the truth of this observation. Thus, in *Florida Lime & Avocado Growers* v. *Paul*,[10] a five-to-four majority upheld a state law prescribing higher standards for avocados sold in the State than the federal standards governing the harvesting of avocados, as applied to another State's produce, because it was possible to comply with both federal and state standards, the federal standard being the minimum one and

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[3] *Fidelity Federal Savings & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141, 153 (1982), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[4] *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

[5] *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 142–143 (1963).

[6] *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

[7] *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963); *Chicago & Northwestern Transp. Co.*, v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

[8] *Free* v. *Bland*, 369 U.S. 633, 666 (1962).

[9] *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 211 (1944) (per Justice Frankfurter).

[10] 373 U.S. 132 (1963).

compliance with the standard of the State being automatic compliance with the federal. But the Court voided a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal law permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the State allowed no such deviation. Although it was possible for a producer to satisfy the federal standard while satisfying the tougher state standard, the Court discerned that to do so defeated one purpose of the federal requirement—the facilitating of value comparisons by shoppers. Because different producers in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers would not be comparing packages containing identical amounts of flour solids.[11]

Other examples reveal problematical results. Thus, a state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which textually presupposed federal-state cooperation.[12] On the other hand, a comprehensive regulation of the design, size, and movement of oil tankers in Puget Sound was found, save in one respect, to be either expressly or implicitly preempted by federal law and regulations. Critical to the determination was the Court's conclusion that Congress, without actually saying so, had intended to mandate exclusive standards and a single federal decisionmaker for safety purposes in vessel regulation.[13] Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.[14]

***Federal Versus State Labor Laws.***—One group of cases which has caused the Court much difficulty over the years concerns the effect of federal labor laws on state power to govern labor-management relations. Although the Court some time ago reached a settled rule, changes in membership on the Court have opened the issue again.

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[11] *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 532–543 (1977).
[12] *Askew* v. *American Waterways Operators*, 411 U.S. 325 (1973).
[13] *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).
[14] *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973).

With the enactment of the National Labor Relations Act, and subsequent amendments Congress declared a national policy in labor-management relations and established the NLRB to carry out that policy. It became the Supreme Court's responsibility to determine what role state law on labor-management relations was to play. At first, the Court applied a test of determination whether the state regulation was in direct conflict with the national regulatory scheme. Thus, in one early case, the Court held that an order by a state board which commanded a union to desist from mass picketing of a factory and from assorted personal threats was not in conflict with the national law which had not been invoked and which did not touch on some of the union conduct in question.[15] A "cease and desist" order of a state board implementing a state provision making it an unfair labor practice for employees to conduct a slowdown or to otherwise interfere with production while on the job was found not to conflict with federal law,[16] while another order of the board was also sustained in its prohibition of the discharge of an employee under a maintenance of membership clause inserted in a contract under pressure from the War Labor Board and which violated state law.[17]

On the other hand, a state statute requiring business agents of unions operating in the State to file annual reports and to pay an annual fee of one dollar was voided as in conflict with federal law.[18] And state statutes providing for mediation and outlawing public utility strikes were similarly voided as being in specific conflict with federal law.[19] A somewhat different approach was noted in several cases in which the Court held that the federal act had so occupied the field in certain areas as to preclude state regulation.[20]

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[15] *Allen-Bradley Local No. 1111* v. *WERB*, 315 U.S. 740 (1942).

[16] *United Automobile Workers* v. *WERB*, 336 U.S. 245 (1949). Overruled in *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976).

[17] *Algoma Plywood Co.* v. *WERB*, 336 U.S. 301 (1949).

[18] *Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1945).

[19] *United Automobile Workers* v. *O'Brien*, 339 U.S. 454 (1950); *Bus Employees* v. *WERB*, 340 U.S. 383 (1951). *See also Bus Employees* v. *Missouri*, 374 U.S. 74 (1963).

[20] *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953); *Bethlehem Steel Co.* v. *New York Employment Relations Board*, 330 U.S. 767 (1947). Of course, where Congress clearly specifies, the Court has had no difficulty. Thus, in the NLRA, Congress provided, 29 U.S.C. § 164(b), that state laws on the subject could override the federal law on union security arrangements and the Court sustained those laws. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *AFL* v. *American Sash & Door Co.*, 335 U.S. 538 (1949). When Congress in the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provided that the federal law on union security was to override contrary state laws, the Court sustained that determination. *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956). The Court has held that state courts may adjudicate questions relating to the permissibility of particular types of union security arrange-

The latter approach was predominant through the 1950's as the Court voided state court action in enjoining [21] or awarding damages [22] for peaceful picketing, in awarding of relief by damages or otherwise for conduct which constituted an unfair labor practice under federal law,[23] or in enforcing state antitrust laws so as to affect collective bargaining agreements [24] or to bar a strike as a restraint of trade,[25] even with regard to disputes over which the NLRB declined to assert jurisdiction because of the degree of effect on interstate commerce.[1] In *San Diego Building Trades Council* v. *Garmon*,[2] the Court enunciated the rule, based on its previous decade of adjudication. "When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." [3]

For much of the period since *Garmon*, the dispute in the Court concerned the scope of the few exceptions permitted in the *Garmon* principle. First, when picketing is not wholly peaceful but is attended by intimidation, violence, and obstruction of the roads affording access to the struck establishment, state police powers have been held not disabled to deal with the conduct and narrowly-drawn injunctions directed against violence and mass picketing have been permitted [4] as well as damages to compensate for harm growing out of such activities.[5]

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ments under state law even though the issue involves as well an interpretation of federal law. *Retail Clerks International Association* v. *Schermerhorn*, 375 U.S. 96 (1963).

[21] *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953); *United Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62 (1956); *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20 (1957); *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963).

[22] *San Diego Building Trades Council* v. *Garmon*, 353 U.S. 26 (1957).

[23] *Guss* v. *Utah Labor Board*, 353 U.S. 1 (1959).

[24] *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959).

[25] *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

[1] *Guss* v. *Utah Labor Board*, 353 U.S. 1 (1957). The "no-man's land" thus created by the difference between the reach of Congress' commerce power and the NLRB's finite resources was closed by 73 Stat. 541, 29 U.S.C. § 164(c), which authorized the States to assume jurisdiction over disputes which the Board had indicated through promulgation of jurisdictional standards that it would not treat.

[2] 359 U.S. 236 (1959).

[3] Id., 245. The rule is followed in, e.g., *Radio & Television Technicians* v. *Broadcast Service of Mobile*, 380 U.S. 255 (1965); *Hattiesburg Building & Trades Council* v. *Broome*, 377 U.S. 126 (1964); *Longshoremen Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970); *Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). *Cf. Nash* v. *Florida Industrial Comm.*, 389 U.S. 235 (1967).

[4] *United Automobile Workers* v. *WERB*, 351 U.S. 266 (1956); *Youngdahl* v. *Rainfair*, 355 U.S. 131 (1957).

[5] *United Automobile workers* v. *Russell*, 356 U.S. 634 (1958); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1954).

A 1958 case permitted a successful state court suit for reinstatement and damages for lost pay because of a wrongful expulsion, leading to discharge from employment, based on a theory that the union constitution and by-laws constitute a contract between the union and the members the terms of which can be enforced by state courts without the danger of a conflict between state and federal law.[6] The Court subsequently narrowed the interpretation of this ruling by holding in two cases that members who alleged union interference with their existing or prospective employment relations could not sue for damages but must file unfair labor practice charges with the NLRB.[7] *Gonzales* was said to be limited to "purely internal union matters".[8] Finally, *Gonzales* was abandoned in a five-to-four decision in which the Court held that a person who alleged that his union had misinterpreted its constitution and its collective bargaining agreement with the individual's employer in expelling him from the union and causing him to be discharged from his employment because he was late paying his dues.[9] While it was not likely that in *Gonzales* a state court resolution of the scope of duty owed the member by the union would implicate principles of federal law, Justice Harlan wrote for the Court, state court resolution in this case involved an interpretation of the contract's union security clause, a matter on which federal regulation is extensive.[10]

One other exception has been based, like the violence cases, on the assumption that it concerns areas traditionally left to local law into which Congress would not want to intrude. In *Linn* v. *Plant Guard Workers*,[11] the Court permitted a state court adjudication of a defamation action arising out of a labor dispute. And in *Letter Carriers* v. *Austin*,[12] the Court held that federal law preempts state defamation laws in the context of labor disputes to the extent that the State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of truth or falsity.

However, a state tort action for the intentional infliction of emotional distress occasioned through an alleged campaign of per-

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[6] *International Assn. of Machinists* v. *Gonzales*, 356 U.S. 656 (1954).

[7] *Journeymen Local 100* v. *Borden*, 373 U.S. 690 (1963); *Iron Workers Local 207* v. *Perko*, 373 U.S. 701 (1963).

[8] 373 U.S., 697; 373 U.S. 705.

[9] *Amalgamated Assn. of Street Electric Railway & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971).

[10] Id., 296.

[11] 383 U.S. 53 (1966).

[12] 418 U.S. 264 (1974).

sonal abuse and harassment of a member of the union by the union and its officials was held not preempted by federal labor law. Federal law was not directed to the "outrageous conduct" alleged and NLRB resolution of the dispute would neither touch upon the claim of emotional distress and physical injury nor award the plaintiff any compensation. But state court jurisdiction, in order that there not be interference with the federal scheme, must be premised on tortious conduct either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.[13]

A significant retrenchment of *Garmon* occurred in *Sears, Roebuck & Co.* v. *Carpenters,*[14] in the context of state court assertion of jurisdiction over trespassory picketing. Objecting to the company's use of nonunion work in one of its departments, the union picketed the store, using the company's property, the lot area surrounding the store, instead of the public sidewalks to walk on. After the union refused to move its pickets to the sidewalk, the company sought and obtained a state court order enjoining the picketing on company property. Depending upon the union motivation for the picketing, it was either arguably prohibited or arguably protected by federal law, the trespassory nature of the picketing being one factor the NLRB would have looked to in determining at least the protected nature of the conduct. The Court held, however, that under the circumstances, neither the arguably prohibited nor the arguably protected rationale of *Garmon* was sufficient to deprive the state court of jurisdiction.

First, as to conduct arguably prohibited by NLRA, the Court seemingly expanded the *Garmon* exception recognizing state court jurisdiction for conduct that touches interests "deeply rooted in local feeling" [15] in holding that where there exists "a significant state interest in protecting the citizens from the challenged conduct" and there exists "little risk of interference with the regulatory jurisdiction" of the NLRB, state law is not preempted. Here, there was obviously a significant state interest in protecting the company from trespass; the second, "critical inquiry" was whether the controversy presented to the state court was identical to or different from that which could have been presented to the Board. The Court concluded that the controversy was different. The Board would have been presented with determining the motivation of the

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[13] *Farmer* v. *Carpenters,* 430 U.S. 290 (1977).

[14] 436 U.S. 180 (1978).

[15] *San Diego Bldg Trades Council* v. *Garmon,* 359 U.S. 236, 244 (1959).

picketing and the location of the picketing would have been irrelevant; the motivation was irrelevant to the state court and the situs of the picketing was the sole inquiry. Thus, there was deemed to be no realistic risk of state interference with Board jurisdiction.[16]

Second, in determining whether the picketing was protected, the Board would have been concerned with the situs of the picketing, since under federal labor laws the employer has no absolute right to prohibit union activity on his property. Preemption of state court jurisdiction was denied, nonetheless, in this case on two joined bases. One, preemption is not required in those cases in which the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. In this case, the union could have filed with the Board when the company demanded removal of the pickets, but did not, and the company could not file with the Board at all. Two, even if the matter is not presented to the Board, preemption is called for if there is a risk of erroneous state court adjudication of the protection issue that is unacceptable, so that one must look to the strength of the argument that the activity is protected. While the state court had to make an initial determination that the trespass was not protected under federal law, the same determination the Board would have made, in the instance of trespassory conduct, the risk of erroneous determination is small, because experience shows that a trespass is far more likely to be unprotected than protected.[17]

Introduction of these two balancing tests into the *Garmon* rationale substantially complicates determining when state courts do not have jurisdiction and will no doubt occasion much more litigation in state courts than has previously existed.

Another series of cases involves not a Court-created exception to the *Garmon* rule but the applicability and interpretation of § 301 of the Taft-Hartley Act,[18] which authorizes suits in federal, and state,[19] courts to enforce collective bargaining agreements. The Court has held that in enacting § 301, Congress authorized actions based on conduct arguably subject to the NLRA, so that the *Garmon* preemption doctrine does not preclude judicial enforcement of duties and obligations which would otherwise be within the exclusive jurisdiction of the NLRB so long as those duties and

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[16] *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 190–198 (1978).

[17] Id., 199–207.

[18] 61 Stat. 156 (1947), 29 U.S.C. § 185(a).

[19] *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962). The state courts must, however, apply federal law. *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962).

obligations are embodied in a collective bargaining agreement, perhaps as interpreted in an arbitration proceeding.[20]

Finally, the Court has indicated that with regard to some situations, Congress has intended to leave the parties to a labor dispute free to engage in "self-help" so that conduct which is not subject to federal law is nonetheless withdrawn from state control.[21]

## COMMERCE WITH INDIAN TRIBES

Congress' power to regulate commerce "with the Indian tribes," once almost rendered superfluous by Court decision,[1] has now been resurrected and made largely the basis for informing judicial judgment with respect to controversies concerning the rights and obligations of the Indians. Although Congress in 1871 forbade the further making of treaties with Indian tribes,[2] cases disputing the application of the old treaties and especially their effects upon attempted state taxation and regulation of on-reservation activities continue to be a staple of the Court's docket.[3] But this clause is one of the two bases now found sufficient to empower Federal Government authority over Indians. "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." [4] Forsaking reliance upon other theories and rationales, the Court has established the preemption doctrine as the analytical framework within which to judge the permissibility of assertions of state jurisdiction over the Indians. However, the "semi-autonomous status" of Indian tribes erects an "independent

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[20] *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

[21] *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976). And *cf New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U.S. 519 (1979).

[1] *United States* v. *Kagama*, 118 U.S. 375 (1886). Rejecting the commerce clause as a basis for congressional enactment of a system of criminal laws for Indians living on reservations, the Court nevertheless sustained the act on the ground that the Federal Government had the obligation and thus the power to protect a weak and dependent people. *Cf. United States* v. *Holiday*, 3 Wall. (70 U.S.) 407 (1866); *United States* v. *Sandoval*, 231 U.S. 28 (1913).

[2] 16 Stat. 544, 566, 25 U.S.C. § 71.

[3] E.g., *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165 (1977); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979); *Montana* v. *United States*, 450 U.S. 544 (1981).

[4] *McClanahan* v. *Arizona Tax Comm.*, 411 U.S. 164, 172 n. 7 (1973). *See also Morton* v. *Mancari*, 417 U.S. 535, 551–553 (1974); *United States* v. *Mazurie*, 419 U.S. 544, 553–556 (1974); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n. 2 (1976); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980); *Ramah Navajo School Board* v. *Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982).

but related" barrier to the exercise of state authority over commercial activity on an Indian reservation.[5] Thus, the question of pre-emption is not governed by the standards of preemption developed in other areas. "Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts, inform the pre-emption analysis that governs this inquiry. . . . As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." [6]

The scope of state taxing powers—the conflict of the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations" [7]—has been often litigated. Absent cession of jurisdiction or other congressional consent, States possess no power to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.[8] Off-reservation Indian activities require an express federal exemption to deny state taxing power.[9] Subjection to taxation of non-Indians doing business with Indians on the reservation involves a close analysis of the federal statutory framework, although the operating premise in recent years has been to deny state power because of its burdens upon the development of tribal self-sufficiency as promoted through federal law and its interference with the tribes' ability to exercise its sovereign functions.[10]

Since *Worcester* v. *Georgia,*[11] it has been recognized that Indian tribes are unique aggregations possessing attributes of sov-

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[5] *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 142–143 (1980); *Ramah Navajo School Board* v. *Bureau of Revenue of New Mexico,* 458 U.S. 832, 837–838 (1982). "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." Id., 837, quoting *White Mountain, supra,* 143.

[6] *Ramah Navajo School Board* v. *Bureau of Revenue of New Mexico,* 458 U.S. 832, 838 (1982).

[7] *McClanahan* v. *Arizona Tax Comm.,* 411 U.S. 164, 165 (1973).

[8] *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973); *McClanchan* v. *Arizona Tax Comm.,* 411 U.S. 164 (1973); *Moe* v. *Confederated Salish & Kooyenai Tribes,* 425 U.S. 463 (1976); *Bryan* v. *Itasca County,* 426 U.S. 373 (1976); *Washington* v. *Confederated Colville Tribes,* 447 U.S. 134 (1980).

[9] *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148–149 (1973).

[10] *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980); *Central Machinery Co.* v. *Arizona Tax Comm.,* 448 U.S. 160 (1980); *Ramah Navajo School Board* v. *Bureau of Revenue of New Mexico,* 458 U.S. 832 (1982).

[11] 6 Pet. (31 U.S.) 515 (1832).

ereignty over both their members and their territory.[12] They are, of course, no longer possessed of the full attributes of sovereignty,[13] having relinquished some part of it by their incorporation within the territory of the United States and their acceptance of its protection. By specific treaty provision, they yielded up other sovereign powers, and Congress has removed still others. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." [14]

While the power of Congress over Indian affairs is broad, it is not limitless.[15] The Court has promulgated a standard of review that defers to the legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . " [16] A more searching review is warranted when it is alleged that the Federal Government's behavior toward the Indians has been in contravention of its obligation and that it has in fact taken property from a tribe which it had heretofore guaranteed to the tribe, without either compensating the tribe or otherwise giving the Indians the full value of the land.[17]

Clause 4. *The Congress shall have Power* * * * To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

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[12] *United States* v. *Wheeler*, 435 U.S. 313 (1978) (inherent sovereign power to punish tribal offenders). Among the fundamental attributes of sovereignty which a tribe possesses unless divested of it by federal law is the power to tax non-Indians entering the reservation to engage in economic activities. *Washington* v. *Confederated Colville Tribes*, 447 U.S. 134 (1980); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982). But tribes possess no criminal authority over non-Indians. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[13] *United States* v. *Kagama*, 118 U.S. 375, 381 (1886); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978).

[14] *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978).

[15] "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion), quoted with approval in *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 84 (1977).

[16] *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). The Court applied the standard to uphold a statutory classification that favored Indians over non-Indians. But in *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977), the same standard was used to sustain a classification that disfavored, although inadvertently, one group of Indians as against other groups. While Indian tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" statute covering them. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978).

[17] *United States* v. *Sioux Nation*, 448 U.S. 371 (1980).

## NATURALIZATION AND CITIZENSHIP

### Nature and Scope of Congress' Power

Naturalization has been defined by the Supreme Court as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." [1] In the *Dred Scott* case,[2] the Court asserted that the power of Congress under this clause applies only to "persons born in a foreign country, under a foreign government." [3] These dicta are much too narrow to describe the power which Congress has actually exercised on the subject. The competence of Congress in this field merges, in fact, with its indefinite, inherent powers in the field of foreign relations. "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries." [4]

Congress' power over naturalization is an exclusive power; no State has the power to constitute a foreign subject a citizen of the United States.[5] But power to naturalize aliens may be, and was early, devolved by Congress upon state courts of record.[6] And States may confer the right of suffrage upon resident aliens who have declared their intention to become citizens and many did so until recently.[7]

Citizenship by naturalization is a privilege to be given, qualified, or withheld as Congress may determine and which an individual may claim as a right only upon compliance with the terms which Congress imposes.[8] This interpretation makes of the natural-

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[1] *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892).

[2] *Scott* v. *Sandford*, 19 How. (60 U.S.) 393 (1857).

[3] Id., 417, 419.

[4] *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915).

[5] *Chirac* v. *Chirac*, 2 Wheat. (15 U.S.) 259, 269 (1817); *United States* v. *Wong Kim Ark*, 169 U.S. 649, 701 (1898).

[6] The first naturalization act, 1 Stat. 103 (1790), so provided. *See* 8 U.S.C. § 1421. In *Holmgren* v. *United States*, 217 U.S. 509 (1910), it was held that Congress may provide for the punishment of false swearing in the proceedings in state courts.

[7] *Spragins* v. *Houghton*, 3 Ill. 377 (1840); *Stewart* v. *Foster*, 2 Binn. (Pa.) 110 (1809). *See* K. Porter, *A History of Suffrage in the United States* (New York: 1918), ch. 5.

[8] *United States* v. *Macintosh*, 283 U.S. 605, 615 (1931); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707–708 (1893). A *caveat* to this statement is that with regard to persons naturalized in the United States the qualification may only be a condition precedent and not a condition subsequent, *Schneider* v. *Rusk*, 377 U.S. 163 (1964), whereas persons born abroad who are made citizens at birth by statute if one or both of their parents are citizens are subject to conditions subsequent. *Rogers* v. *Bellei*, 401 U.S. 815 (1971).

ization power the only power granted in Section 8 of Article I which is unrestrained by constitutional limitations on its exercise. Thus, the first naturalization act enacted by the first Congress restricted naturalization to "free white persons[s]" [9] which was expanded in 1870 so that persons of "African nativity and . . . descent" were entitled to be naturalized.[10] Orientals were specifically excluded from eligibility in 1882 [11] and the courts enforced these provisions without any indication that constitutional issues were thereby raised.[12] Though these exclusions are no longer law, present naturalization statutes continue and expand on provisions designed to bar subversives, dissidents, and radicals generally from citizenship.[13]

Although the usual form of naturalization is through individual application and official response on the basis of general congressional rules, naturalization is not so limited. Citizenship can be conferred by special act of Congress,[14] it can be conferred collectively either through congressional action, such as the naturalization of all residents of an annexed territory or of a territory made a State,[15] or through treaty provision.[16]

**Categories of Citizens: Birth and Naturalization**

The first sentence of § 1 of the Fourteenth Amendment contemplates two sources of citizenship and two only: birth and naturalization.[1] This contemplation is given statutory expression in

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[9] 1 Stat. 103 (1790).

[10] Act of July 14, 1870, § 7, 16 Stat. 254, 256.

[11] Act of May 6, 1882, § 1, 22 Stat. 58.

[12] *Cf. Ozawa* v. *United States*, 260 U.S. 178 (1922); *United States* v. *Bhagat Singh Thind*, 261 U.S. 204 (1923); *Toyota* v. *United States*, 268 U.S. 402 (1925); *Morrison* v. *California*, 291 U.S. 82 (1934). The Court refused to review the only case in which the constitutional issue was raised and rejected. *Kharaiti Ram Samras* v. *United States*, 125 F. 2d 879 (C.A. 9, 1942), *cert. den.*, 317 U.S. 634 (1942).

[13] The Alien and Sedition Act of 1798, 1 Stat. 570, empowered the President to deport any alien he found dangerous to the peace and safety of the Nation. In 1903, Congress provided for denial of naturalization and for deportation for mere belief in certain doctrines, i.e., anarchy. Act of March 3, 1903, 32 Stat. 1214. *See United States ex rel. Turner* v. *Williams*, 194 U.S. 279 (1904). The range of forbidden views was broadened in 1918. Act of October 15, 1918, § 1, 40 Stat. 1012. The present law is found in 8 U.S.C. § 1424 and is discussed *infra*, *pp.* 298–299.

[14] E.g., 77 Stat. 5 (1963) (making Sir Winston Churchill an "honorary citizen of the United States.").

[15] *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135 (1892); *Contzen* v. *United States*, 179 U.S. 191 (1900).

[16] *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135, 164, 168–169 (1892).

[1] *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898).

§ 301 of the Immigration and Nationality Act of 1952,[2] which itemizes those categories of persons who are citizens of the United States at birth; all other persons in order to become citizens must pass through the naturalization process. The first category merely tracks the language of the first sentence of § 1 of the Fourteenth Amendment in declaring that all persons born in the United States and subject to the jurisdiction thereof are citizens by birth.[3] But there are six other categories of citizens by birth. they are: (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe, (3) a person born outside the United States of citizen parents one of whom has been resident in the United States, (4) a person born outside the United States of one citizen parent who has been continuously resident in the United States for one year prior to the birth and of a parent who is a national but not a citizen, (5) a person born in an outlying possession of the United States of one citizen parent who has been continuously resident in the United States or an outlying possession for one year prior to the birth, (6) a person of unknown parentage found in the United States while under the age of five unless prior to his twenty-first birthday he is shown not to have been born in the United States, and (7) a person born outside the United States of an alien parent and a citizen parent who has been resident in the United States for a period of ten years, provided the person is to lose his citizenship unless he resides continuously in the United States for a period of five years between his fourteenth and twenty-eighth birthdays.

Subsection (7) citizens must satisfy the condition subsequent of five years continuous residence within the United States between the ages of fourteen and twenty-eight, a requirement held to be constitutional,[4] which means in effect that for constitutional purposes according to the prevailing interpretation there is a difference between persons born or naturalized *in*, that is, *within*, the United States and persons born outside the confines of the United States who are statutorily made citizens.[5] The principal difference

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[2] 66 Stat. 235, 8 U.S.C. § 1401.

[3] § 301(a)(1), 8 U.S.C. § 1401(a)(1).

[4] *Rogers* v. *Bellei*, 401 U.S. 815 (1971).

[5] *Compare Schneider* v. *Rusk*, 377 U.S. 163 (1964); *Afroyim* v. *Rusk*, 387 U.S. 253 (1967). It will be noted that in practically all cases persons statutorily made citizens at birth will be dual nationals, having the citizenship of the country where they were born. Congress has never required a citizen having dual nationality to elect at some point one and forsake the other but it has enacted several restrictive statutes limiting the actions of dual nationals which have occasioned much litigation. E.g., *Savorgnan* v. *United States*, 338 U.S. 491 (1950); *Kawakita* v. *United States*, 343 U.S. 717 (1952); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Schneider* v. *Rusk*, 377 U.S. 163 (1964); *Rogers* v. *Bellei*, 401 U.S. 815 (1971).

is that the former persons may not be involuntarily expatriated whereas the latter may be, subject only to due process protections.[6]

**The Naturalization of Aliens**

Although, as has been noted, throughout most of our history there were significant racial and ethnic limitations upon eligibility for naturalization, the present law prohibits any such discrimination.

"The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married." [1] However, any person "who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches . . . opposition to all organized government, or "who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches the overthrow by force or violence or other unconstitutional means of the Government of the United States" or who is a member of or affiliated with the Communist Party, or other communist organizations, or other totalitarian organizations is ineligible.[2] These provisions moreover are "applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes." [3]

Other limitations on eligibility are also imposed. Eligibility may turn upon the decision of the responsible officials whether the petitioner is of "good moral character." [4] The immigration and nationality laws themselves include a number of specific congressional determinations that certain persons do not possess "good moral character," including persons who are "habitual drunkards," [5] adulterers,[6] polygamists or advocates of polygamy,[7] gamblers,[8] con-

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[6] *Cf. Rogers* v. *Bellei*, 401 U.S. 815, 836 (1971); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Perez* v. *Brownell*, 356 U.S. 44, 58–62 (1958).

[1] § 311, 66 Stat. 239 (1952), 8 U.S.C. § 1422.

[2] § 313(a), 66 Stat. 240 (1952), 8 U.S.C. § 1424(a). Whether "mere" membership is sufficient to constitute grounds for ineligibility is unclear. Compare *Galvan* v. *Press*, 347 U.S. 522 (1954), with *Berenyi* v. *Immigration Director*, 385 U.S. 630 (1967).

[3] § 313(c), 66 Stat. 241 (1952), 8 U.S.C. § 1424(c).

[4] § 316(a)(3), 66 Stat. 242, 8 U.S.C. § 1427(a)(3).

[5] § 101(f)(1), 66 Stat. 172, 8 U.S.C. § 1101(f)(1).

[6] § 101(f)(2), 66 Stat. 172, 8 U.S.C. § 1101(f)(2).

[7] § 212(a)(11), 66 Stat. 182, 8 U.S.C. § 1182(a)(11).

[8] § 101(f) (4) and (5), 66 Stat. 172, 8 U.S.C. § 1101(f) (4) and (5).

victed felons,[9] and homosexuals.[10] In order to petition for naturalization, an alien must have been resident for at least five years and to have possessed "good moral character" for all of that period.

The process of naturalization culminates in the taking in open court of an oath "(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by law." [11]

Any naturalized person who takes this oath with mental reservations or conceals beliefs and affiliations which under the law disqualify one for naturalization, is subject, upon these facts being shown in a proceeding brought for the purpose, to have his certificate of naturalization cancelled.[12] Moreover, if within five years of his naturalization a person joins an organization or becomes in any way affiliated with one which was a disqualification for naturalization if he had been a member at the time, the fact is made *prima facie* evidence of his bad faith in taking the oath and grounds for instituting proceedings to revoke his admission to citizenship.[13]

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[9] § 101(f) (7) and (8), 66 Stat. 172, 8 U.S.C. § 1101(f) (7) and (8).

[10] § 212(a)(4), 66 Stat. 182, 8 U.S.C. § 1182(a)(4), barring aliens afflicted with "psychopathic personality," a congressional euphemism including homosexuality. *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118 (1967).

[11] § 337(a), 66 Stat. 258 (1952), 8 U.S.C. § 1448(a). In *United States* v. *Schwimmer*, 279 U.S. 644 (1929), and *United States* v. *Macintosh*, 283 U.S. 605 (1931), a divided Court held that clauses (3) and (4) of the oath, as then prescribed, required the candidate for naturalization to be willing to bear arms for the United States, thus disqualifying conscientious objectors. These cases were overturned, purely as a matter of statutory interpretation by *Girouard* v. *United States*, 328 U.S. 61 (1946), and Congress codified the result, 64 Stat. 1017 (1950), as it now appears in the cited statute.

[12] § 340(a), 66 Stat. 260 (1952), 8 U.S.C. § 1451(a). *And see Johannessen* v. *United States*, 225 U.S. 227 (1912). Congress has imposed no time bar applicable to proceedings to revoke citizenship, so that many years after naturalization has taken place a naturalized citizen remains subject to divestment upon proof of fraud. *Costello* v. *United States*, 365 U.S. 265 (1961); *Polites* v. *United States*, 364 U.S. 426 (1960); *Knauer* v. *United States*, 328 U.S. 654 (1946); *Fedorenko* v. *United States*, 449 U. S. 490 (1981).

[13] § 340(c), 66 Stat. 261 (1952), 8 U.S.C. § 1451(c).

**Rights of Naturalized Persons**

Chief Justice Marshall early stated in dictum that "[a] naturalized citizen . . . becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." [1] A similar idea was expressed in *Knauer* v. *United States,*[2] "Citizenship obtained through naturalization is not a second-class citizenship. . . . [It] carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government."

Despite these dicta, it is clear that particularly in the past but currently as well a naturalized citizen has been and is subject to requirements not imposed on native-born citizens. Thus, as we have noted above, a naturalized citizen is subject at any time to have his good faith in taking the oath of allegiance to the United States inquired into and to lose his citizenship if lack of such faith is shown in proper proceedings.[3] And the naturalized citizen within five years of his naturalization will join a questionable organization at his peril.[4] In *Luria* v. *United States,*[5] the Court sustained a statute making *prima facie* evidence of bad faith a naturalized citizen's assumption of residence in a foreign country within five years after the issuance of a certificate of naturalization.

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[1] *Osborn* v. *Bank of the United States,* 9 Wheat. (22 U.S.) 737, 827 (1824). One must be aware, however, that this language does not appear in any case having to do with citizenship or naturalization or the rights of naturalized citizens and its force may be therefore questioned. Compare *Afroyim* v. *Rusk,* 387 U.S. 253, 261 (1967) (Justice Black for the Court: "a mature and well-considered dictum . . ."), with id., 275–276 (Justice Harlan dissenting: the dictum, "cannot have been intended to reach the question of citizenship."). The issue in *Osborn* was the right of the Bank to sue in federal court. Osborn had argued that the fact that the bank was chartered under the laws of the United States did not make any legal issue involving the bank one arising under the laws of the United States for jurisdictional purposes; to argue the contrary, Osborn contended, was like suggesting that the fact that persons were naturalized under the laws of Congress meant such persons had an automatic right to sue in federal courts, unlike natural-born citizens. The quoted language of Marshall's rejects this attempted analogy.

[2] 328 U.S. 654, 658 (1946).

[3] *Johannessen* v. *United States,* 225 U.S. 227 (1912); *Knauer* v. *United States,* 328 U.S. 654 (1946); *Costello* v. *United States,* 365 U.S. 265 (1961).

[4] *See* 8 U.S.C. § 1451(c).

[5] 231 U.S. 9 (1913). The provision is still law. 8 U.S.C. § 1451(d).

But in *Schneider* v. *Rusk*,[6] the Court voided a statute which provided that a naturalized citizen should lose his United States citizenship if following naturalization he resided continuously for three years in his former homeland. "We start," Justice Douglas wrote for the Court, "from the premise that the rights of citizenship of the native-born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President." [7] The failure of the statute, the Court held, was that it impermissibly distinguished between native-born and naturalized citizens, denying the latter the equal protection of the laws.[8] "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native-born. This is an assumption that is impossible for us to make. . . . A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance." [9]

The *Schneider* equal protection rationale was abandoned in the next case in which the Court held that the Fourteenth Amendment forbade involuntary expatriation of naturalized persons.[10] But in *Rogers* v. *Bellei*,[11] the Court refused to extend this holding to persons statutorily naturalized at birth abroad because one of their parents was a citizen and similarly refused to apply *Schneider*. Thus, one who failed to honor a condition subsequent had his citizenship revoked. "Neither are we persuaded that a condition subsequent in this area impresses one with 'second-class citizenship.' That cliché is too handy and too easy, and, like most clichés, can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on

[6] 377 U.S. 163 (1964).

[7] Id., 165.

[8] While there is no equal protection clause specifically applicable to the Federal Government, it is established that the due process clause of the fifth Amendment forbids discrimination in much the same manner as the equal protection clause of the Fourteenth Amendment. *Infra.*, *pp.* 1295–1297.

[9] *Schneider* v. *Rusk*, 377 U.S. 163, 168–169 (1964).

[10] *Afroyim* v. *Rusk*, 387 U.S. 253 (1967).

[11] 401 U.S. 815 (1971).

what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not 'second-class.' " [12]

It is not clear where the progression of cases has left us in this area. Clearly, naturalized citizens are fully entitled to all the rights and privileges of those who are citizens because of their birth here. But it seems equally clear that with regard to retention of citizenship, naturalized citizens are not in the secure position of citizens born here.[13]

On another point, the Court has held that, absent a treaty or statute to the contrary, a child born in the United States who is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, does not thereby lose his American citizenship and that it is not necessary for him to make an election and return to the United States.[14] On still another point, it has been held that naturalization is so far retroactive as to validate an acquisition of land prior to naturalization as to which the alien was under a disability.[15]

**Expatriation: Loss of Citizenship**

The history of the right of expatriation, voluntarily on the part of the citizen or involuntarily under duress of statute, is shadowy in United States constitutional law. Justice Story, in the course of an opinion [1] and Chancellor Kent, in his writings,[2] accepted the ancient English doctrine of perpetual and unchangeable allegiance to the government of one's birth, a citizen being precluded from renouncing his allegiance without permission of that government. The pre-Civil War record on the issue is so vague because there was wide disagreement on the basis of national citizenship in the first place, with some contending that national citizenship was derivative from state citizenship, which would place the power of providing for expatriation in the state legislatures, and with others contending for the primacy of national citizenship, which would

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[12] Id., 835–836.

[13] At least there is a difference so long as *Afroyim* prevents Congress from making expatriation the consequence of certain acts when done by natural born citizens as well. *See infra, pp.* 305–306.

[14] *Perkins* v. *Elg*, 307 U.S. 325 (1939). The qualifying phrase "absent a treaty or statute . . ." is error now, so long as *Afroyim* remains in effect. *But note Rogers* v. *Bellei*, 401 U.S. 815, 832–833 (1971).

[15] *Governeur* v. *Robertson*, 11 Wheat. (24 U.S.) 332 (1826); *Osterman* v. *Baldwin*, 6 Wall. (73 U.S.) 116 (1867); *Manuel* v. *Wulff*, 152 U.S. 505 (1894).

[1] *Shanks* v. *DuPont*, 3 Pet. (28 U.S.) 242, 246 (1830).

[2] 2 J. Kent, *Commentaries* (New York: 1827), 49–50.

place the power in Congress.[3] The citizenship basis was settled by the first sentence of § 1 of the Fourteenth Amendment, but expatriation continued to be a muddled topic. An 1868 statute specifically recognized "the right of expatriation" by individuals, but it was directed to affirming the right of foreign nationals to expatriate themselves and to become naturalized United States citizens.[4] An 1865 law provided for the forfeiture of the "rights of citizenship" of draft-dodgers and deserters, but whether the statute meant to deprive such persons of citizenship or of the civil rights is unclear.[5] Beginning in 1940, however, Congress did enact laws designed to strip of their citizenship persons who committed treason,[6] deserted the armed forces in wartime,[7] left the country to evade the draft,[8] or attempted to overthrow the Government by force or violence.[9] In 1907, Congress provided that female citizens who married foreign citizens were to have their citizenship held "in abeyance" while they remained wedded but to be entitled to reclaim it when the marriage was dissolved.[10]

About the simplest form of expatriation, the renunciation of citizenship by a person, there is no constitutional difficulty. "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." [11] But while the Court has hitherto insisted on the voluntary character of the renunciation, it has sustained the power of Congress to prescribe conditions and circumstances the voluntary entering into of which constitutes renunciation; the

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[3] J. tenBroek, *Anti-Slavery Origins of the Fourteenth Amendment* (New York: 1951), 71–94; *see generally* J. Roche, *The Early Development of United States Citizenship* (New York: 1949).

[4] Act of July 27, 1868, 15 Stat. 223. While the Act's preamble rhetorically proclaims the "natural and inherent right of all people" to expatriate themselves, its title is "An Act concerning the Rights of American Citizens in foreign States" and its operative parts are concerned with that subject. It has long been taken, however, as a general proclamation of United States recognition of the right of United States citizens to expatriate themselves. *Mackenzie* v. *Hare*, 239 U.S. 299, 309 (1915); *Mandoli* v. *Acheson*, 344 U.S. 133, 135–136 (1952). *Cf. Savorgnan* v. *United States*, 338 U.S. 491, 498 n. 11 (1950).

[5] The Enrollment Act of March 3, 1865, § 21, 13 Stat. 487, 490. The language of the section appears more consistent with a deprivation of civil rights than of citizenship. Note also that § 14 of the Wade-Davis Bill, pocket-vetoed by President Lincoln, specifically provided that any person holding office in the Confederate Government "is hereby declared not to be a citizen of the United States." 6 J. Richardson, *Messages and Papers of the Presidents* (Washington: 1899), 223.

[6] Nationality Act of 1940, 54 Stat. 1169.

[7] Ibid.

[8] 58 Stat. 746 (1944).

[9] 68 Stat. 1146 (1954).

[10] 34 Stat. 1228 (1907), repealed by 42 Stat. 1021 (1922).

[11] *Perkins* v. *Elg*, 307 U.S. 325, 334 (1939).

person need not intend to renounce so long as he intended to do what he did in fact do.[12]

The Court first encountered the constitutional issue of forced expatriation in the rather anomalous form of the statute [13] which placed in limbo the citizenship of any American female who married a foreigner. Sustaining the statute, the Court relied on the congressional foreign relations power exercised in order to prevent the development of situations which might entangle the United States in embarrassing or hostile relationships with a foreign country. Noting too the fictional merging of identity of husband and wife, the Court thought it well within congressional power to attack certain consequences to these actions, despite the woman's contrary intent and understanding at the time she entered the relationship.[14]

Beginning in 1958, the Court has had a running encounter with the provisions of the 1952 Immigration and Nationality Act which prescribe expatriation for a lengthy series of actions.[15] In 1958, a five-to-four decision sustained the power to divest a dual national of his United States citizenship because he had voted in a election in the other country of which he was a citizen.[16] But at

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[12] *Mackenzie* v. *Hare*, 239 U.S. 299, 309, 311-312 (1915); *Savorgnan* v. *United States*, 338 U.S. 491, 506 (1950).

[13] 34 Stat. 1228 (1907).

[14] *Mackenzie* v. *Hare*, 239 U.S. 299 (1915).

[15] *See generally* 8 U.S.C. §§ 1481-1489. Among the acts for which loss of citizenship is prescribed are (1) obtaining naturalization in a foreign state, (2) taking an oath of allegiance to a foreign state, (3) serving in the armed forces of a foreign state without authorization and with consequent acquisition of foreign nationality, (4) assuming public office under the government of a foreign state for which only nationals of that state are eligible, (5) voting in an election in a foreign state, (6) formally renouncing citizenship before a United states foreign service officer abroad, (7) formally renewing citizenship within the United States in time of war, subject to approval of the Attorney General, (8) being convicted and discharged from the armed services for desertion in wartime, (9) being convicted of treason or of an attempt to overthrow forcibly the Government of the United States, (10) fleeing or remaining outside the United States in wartime or a proclaimed emergency in order to evade military service, and (11) residing abroad if a naturalized citizen, subject to certain exceptions, for three years in the country of his birth or in which he was formerly a national or for five years in any other foreign state. Several of these sections have been declared unconstitutional. *See* text.

[16] *Perez* v. *Brownell*, 356 U.S. 44 (1958). For the Court, Justice Frankfurter sustained expatriation as a necessary exercise of the congressional power to regulate the foreign relations of the United States to prevent the embarrassment and potential for trouble inherent in our nationals voting in foreign elections. Justice Whittaker dissented because he saw no problem of embarrassment or potential trouble if the foreign state permitted aliens or dual nationals to vote. Chief Justice Warren and Justices Black and Douglas denied that expatriation is within Congress' power to prescribe for an act, like voting, which is not necessarily a sign of intention to relinquish citizenship.

the same time, another five-to-four decision, in which a majority rationale was lacking, struck down punitive expatriation visited on persons convicted by court-martial of desertion from the armed forces in wartime.[17] In the next case, the Court struck down another punitive expatriation visited on persons who, in time of war or emergency, leave or remain outside the country in order to evade military service.[18] And in the following year, the Court held unconstitutional a section of the law which expatriated a naturalized citizen who returned to his native land and resided there continuously for a period of three years.[19]

The cases up to this point had lacked a common rationale and would have seemed to permit even punitive expatriation under the proper circumstances. But in *Afroyim* v. *Rusk*,[20] a five-to-four majority overruled the 1958 decision permitting expatriation for voting in a foreign election and announced a constitutional rule against all but purely voluntary renunciation of United States citizenship. The majority ruled that the first sentence of § 1 of the Fourteenth Amendment constitutionally vested citizenship in every person "born or naturalized in the United States" and that Congress was powerless to take that citizenship away.[21] The continuing vitality of this decision was called into question by another five-to-four decision in 1971 which technically distinguished *Afroyim* in upholding a congressionally-prescribed loss of citizenship visited upon a person who was statutorily naturalized "outside" the United States, and held not within the protection of the

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[17] *Trop* v. *Dulles*, 356 U.S. 86 (1958). Chief Justice Warren for himself and three Justices held that expatriation for desertion was a cruel and unusual punishment proscribed by the Eighth Amendment. Justice Brennan concurred on the ground of a lack of the requisite relationship between the statute and Congress' war powers. For the four dissenters, Justice Frankfurter argued that Congress had power to impose loss of citizenship for certain activity and that there was a rational nexus between refusal to perform a duty of citizenship and deprivation of citizenship. Justice Frankfurter denied that the penalty was cruel and unusual punishment and denied that it was punishment at all "in any valid constitutional sense." Id., 124.

[18] *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). For the Court Justice Goldberg held that penal expatriation effectuated solely by administrative determination violated due process because of the absence of procedural safeguards. Justices Black and Douglas continued to insist Congress could not deprive a citizen of his nationality at all. Justice Harlan for the dissenters thought the statute a valid exercise of Congress' war powers but the four dissenters divided two-to-two on the validity of a presumption spelled out in the statute.

[19] *Schneider* v. *Rusk*, 377 U.S. 163 (1964).

[20] 387 U.S. 253 (1967).

[21] Justice Harlan, for himself and Justices Clark, Stewart, and White, argued in dissent that there was no evidence that the drafters of the Fourteenth Amendment had at all the intention ascribed to them by the majority. He would have found in Afroyim's voluntary act of voting in a foreign election a voluntary renunciation of United States citizenship.

first sentence of § 1 of the Fourteenth Amendment.[22] Thus, while *Afroyim* was distinguished, the tenor of the majority opinion was hostile to its holding and it may be that in a future case it will be overruled.

The issue, then, of the constitutionality of congressionally-prescribed expatriation must be taken as unsettled.

## ALIENS

### The Power of Congress to Exclude Aliens

The power of Congress "to exclude aliens from the United States and to prescribe the terms and conditions on which they come in" is absolute, being an attribute of the United States as a sovereign nation. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power. . . . The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." [1]

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[22] *Rogers* v. *Bellei*, 401 U.S. 815 (1971). The three remaining *Afroyim* dissenters plus Chief Justice Burger and Justice Blackmun made up the majority, the three remaining Justices of the *Afroyim* majority plus Justice Marshall made up the dissenters. The continuing vitality of *Afroyim* was assumed in *Vance* v. *Terrazas*, 444 U. S. 252 (1980), in which a divided Court upheld a congressionally-imposed standard of proof, preponderance of evidence, by which to determine whether one had by his actions renounced his citizenship.

[1] *Chinese Exclusion Case (Chae Chan Ping* v. *United States)*, 130 U.S. 581, 603, 604 (1889); *see also Fung Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893); *The Japanese Immigrant Case (Yamataya* v. *Fisher)*, 189 U.S. 86 (1903); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279 (1904); *Bugajewitz* v. *Adams*, 228 U.S. 585 (1913); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Kleindeist* v. *Mandel*, 408 U. S. 753 (1972). In *Galvan* v. *Press*, 347 U.S. 522, 530–531 (1954), Justice Frankfurter for the Court wrote: "[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' . . . but a whole volume. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a "fundamental sovereign attribute" which is "of a political character and therefore subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong*, 426 U.S.

Except for the Alien Act of 1798,[2] Congress went almost a century without enacting laws regulating immigration into the United States. The first such statute, in 1875, barred convicts and prostitutes [3] and was followed by a series of exclusions based on health, criminal, moral, economic, and subversion considerations.[4] Another important phase was begun with passage of the Chinese Exclusion Act in 1882,[5] which was not repealed until 1943.[6] In 1924, Congress enacted into law a national origins quota formula which based the proportion of admittable aliens on the nationality breakdown of the 1920 census, which, of course, was heavily weighed in favor of English and northern European ancestry.[7] This national origins quota system was in effect until it was repealed in 1965.[8] The basic law remains the Immigration and Nationality Act of 1952,[9] which, with certain revisions in the 1965 law, regulates who may be admitted and under what conditions; the Act, it should be noted, contains a list of 31 excludable classes of aliens.[10]

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88, 101 n. 21 (1976); *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). Although aliens are "an identifiable class of persons," who aside from the classification at issue "are already subject to disadvantages not shared by the remainder of the community", *Hampton* v. *Mow Sun Wong*, *supra*, 102, Congress may treat them in ways that would violate the equal protection clause if a State should do it. *Diaz*, *supra* (residency requirement for welfare benefits); *Fiallo*, *supra* (sex and illegitimacy classifications). Nonetheless in *Mow Sun Wong*, *supra*, 103, the Court observed that when the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the equal protection clause if adopted by a State, due process requires that it be shown that the rule was actually intended to serve that interest. The case struck down a classification that the Court thought justified by the interest asserted but that had not been imposed by a body charged with effectuating that interest. *See Vergara* v. *Hampton*, 581 F.2d 1281 (C.A. 7, 1978).

[2] Act of June 25, 1798, 1 Stat. 570. The Act was part of the Alien and Sedition Laws and authorized the expulsion of any alien the President deemed dangerous.

[3] Act of March 3, 1875, 18 Stat. 477.

[4] 22 Stat. 214 (1882) (excluding idiots, lunatics, convicts, and persons likely to become public charges); 23 Stat. 332 (1885), and 24 Stat. 414 (1887) (regulating importing cheap foreign labor); 26 Stat. 1084 (1891) (persons suffering from certain diseases, those convicted of crimes involving moral turpitude, paupers, and polygamists); 32 Stat. 1213 (1903) (epileptics, insane persons, professional beggars, and anarchists); 34 Stat. 898 (1907) (feeble-minded, children unaccompanied by parents, persons suffering with tuberculosis, and women coming to the United States for prostitution or other immoral purposes).

[5] Act of May 6, 1882, 22 Stat. 58.

[6] Act of December 17, 1943, 57 Stat. 600.

[7] Act of May 26, 1924, 43 Stat. 153.

[8] Act of October 3, 1965, P.L. 89-236, 79 Stat. 911.

[9] Act of June 27, 1952, P.L. 82-414, 66 Stat. 163, 8 U.S.C. 1101 § 1101 *et seq.* as amended.

[10] The list of excludable aliens may be found at 8 U.S.C. § 1182.

Numerous cases underscore the sweeping nature of the powers of the Federal Government to exclude aliens and to deport by administrative process persons in excluded classes. For example, in *United States ex rel. Knauff* v. *Shaughnessy,*[11] an order of the Attorney General excluding, on the basis of confidential information he would not disclose, a wartime bride, who was *prima facie* entitled to enter the United States,[12] was held to be unreviewable by the courts. Nor were regulations on which the order was based invalid as an undue delegation of legislative power. "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interest of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent." [13] However, when Congress has spelled out the basis for exclusion or deportation, the Court remains free to interpret the statute and review the administration of it and to apply it, often in a manner to mitigate the effects of the law on aliens.[14]

Congress' power to admit aliens under whatever conditions it lays down is exclusive of state regulation. The States "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." [15] This principle, however, has not precluded all state regulations dealing with aliens.[16]

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[11] 338 U.S. 537 (1950). *See also Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953), in which the Court majority upheld the Government's power to exclude on the basis of information it would not disclose a permanent resident who had gone abroad for about nineteen months and was seeking to return on a new visa. But the Court will frequently read the applicable statutes and regulations strictly against the Government for the benefit of persons sought to be excluded. *Cf. Delgadillo* v. *Carmichael,* 332 U.S. 388 (1947); *Kwong Hai Chew* v. *Colding,* 344 U.S. 590 (1953); *Rosenburg* v. *Fleuti,* 374 U.S. 449 (1963).

[12] Under the War Brides Act of 1945, 59 Stat. 659.

[13] 338 U.S., 543.

[14] E.g., *Immigration and Naturalization Service* v. *Errico,* 385 U.S. 214 (1966).

[15] *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 419 (1948); *De Canas* v. *Bica,* 424 U.S. 351, 358 n. 6 (1976); *Toll* v. *Moreno,* 458 U.S. 1, 12–13 (1982). See also *Hines* v. *Davidowitz,* 312 U.S. 52, 66 (1941); *Graham* v. *Richardson,* 403 U.S. 365, 376–380 (1971).

[16] E.g., *Heim* v. *McCall,* 239 U.S. 175 (1915); *Ohio ex rel. Clarke* v. *Deckebach,* 274 U.S. 392 (1927); *Sugarman* v. *Dougall,* 413 U.S. 634, 646–649 (1973); *De Canas* v. *Bica,* 424 U.S. 351 (1976); *Cabell* v. *Chavez-Salido,* 454 U.S. 432 (1982).

The power of Congress to legislate with respect to the conduct of alien residents is a concomitant of its power to prescribe the terms and conditions on which they may enter the United States, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers. It is not a power to lay down a special code of conduct for alien residents or to govern their private relations.[17]

Yet Congress is empowered to assert a considerable degree of control over aliens after their admission to the country. By the Alien Registration Act of 1940 Congress provided that all aliens in the United States, fourteen years of age and over, should submit to registration and finger printing and willful failure to comply was made a criminal offense against the United States.[18] This Act, taken in conjunction with other laws regulating immigration and naturalization, has constituted a comprehensive and uniform system for the regulation of all aliens.[19]

An important benefit of this comprehensive regulation which accrues to the alien is that it precludes state regulation which may well be more severe and burdensome. For example, in *Hines* v. *Davidowitz*,[20] the Court voided a Pennsylvania law requiring the annual registration and fingerprinting of aliens but going beyond the subsequently-enacted federal law to require acquisition of an alien identification card which had to be carried at all times and to be exhibited to any police officer upon demand and to other licensing officers upon applications for such things as drivers' licenses. The Court did not squarely hold the State incapable of having such a law in the absence of federal law but appeared to lean in that direction.[21] A more recent decision voided a Pennsylvania law lim-

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[17] Purporting to enforce this distinction, the Court voided a statute which, in prohibiting the importation of "any alien woman or girl for the purpose of prostitution," provided that whoever should keep for the purpose of prostitution "any alien woman or girl within three years after she shall have entered the United States" should be deemed guilty of a felony. *Keller* v. *United States*, 213 U.S. 138 (1909).

[18] 54 Stat. 670, 8 U.S.C. §§ 1301–1306.

[19] *See Hines* v. *Davidowitz*, 312 U.S. 52, 69–70 (1941).

[20] 312 U.S. 52 (1941).

[21] Id., 68. But *see De Canas* v. *Bica*, 424 U.S. 351 (1976), in which the Court upheld a state law prohibiting an employer from hiring aliens not entitled to lawful residence in the United States. The Court wrote that States may enact legislation touching upon aliens coexistent with federal laws, under regular preemption standards, unless the nature of the regulated subject matter precludes the conclusion or unless Congress has unmistakably ordained the impermissibility of state law.

iting those eligible to welfare assistance to citizens and an Arizona law which prescribed a fifteen-year durational residency period before an alien could be eligible for welfare assistance.[22] Congress had provided, Justice Blackmun wrote for a unanimous Court, that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry.[23] Thus, in effect Congress had declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property and the States were disabled from denying aliens these benefits.[24]

**Deportation**

Unlike the exclusion proceedings,[1] deportation proceedings afford the alien a number of constitutional rights: a right against self-incrimination,[2] protection against unreasonable searches and seizures,[3] guarantees against *ex post facto* laws, bills of attainder, and cruel and unusual punishment,[4] a right to bail,[5] a right to procedural due process,[6] a right to counsel,[7] a right to notice of charges and hearing,[8] as well as a right to cross-examine.[9]

Notwithstanding these guarantees, the Supreme Court has upheld a number of statutory deportation measures as not unconstitutional. The Internal Security Act of 1950, in authorizing the Attorney General to hold in custody, without bail, aliens who are members of the Communist Party of the United States, pending determination as to their deportability, is not unconstitutional.[10] Nor

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[22] *Graham* v. *Richardson*, 403 U.S. 365 (1971). *See also Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Cabell* v. *Chavez-Salido*, 454 U.S. 432 (1982).

[23] 8 U.S.C. §§ 1182(a)(8), 1182(a)(15), 1251(a)(8).

[24] *See* 42 U.S.C. § 1981, applied in *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 419 n. 7 (1948).

[1] *See United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950), where the Court noted that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

[2] *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960).

[3] *Abel* v. *United States*, 362 U.S. 217, 229 (1960).

[4] *Marcello* v. *Bonds*, 349 U.S. 302 (1955).

[5] *Carlson* v. *Landon*, 342 U.S. 524, 540 (1952).

[6] *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49 (1950).

[7] 8 U.S.C. § 1252(b)(2).

[8] 8 U.S.C. § 1252(b)(1).

[9] 8 U.S.C. § 1252(b)(3).

[10] *Carlson* v. *Landon*, 342 U.S. 524 (1952).

was it unconstitutional to deport under the Alien Registration Act of 1940 [11] a legally resident alien because of membership in the Communist Party, although such membership ended before the enactment of the Act. Such application of the Act did not make it *ex post facto,* being but an exercise of the power of the United States to treminate its hospitality *ad libitum.*[12] And a statutory provision [13] which makes it a felony for an alien against whom a specified order of deportation is outstanding "to willfully fail or refuse to make timely application for travel or other documents necessary to his departure" is not on its face void for "vagueness." [14]

## BANKRUPTCY

### Persons Who May Be Released From Debt

In an early case on circuit Justice Livingston suggested that inasmuch as the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject." [1] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice to the extent of including bankers, brokers, factors and underwriters as well as traders.[2] Asserting that the narrow scope of the English statutes was a mere matter of policy, which by no means entered into the nature of such laws, Justice Story defined bankruptcy legislation in the sense of the Constitution as a law making provisions for cases of persons failing to pay their debts.[3]

This interpretation has been ratified by the Supreme Court. In *Hanover National Bank* v. *Moyses,*[4] it held valid the Bankruptcy Act of 1898 which provided that persons other than traders might become bankrupts and that this might be done on voluntary petition. The Court has given tacit approval to the extension of the bankruptcy laws to cover practically all classes of persons and cor-

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[11] 54 Stat. 670. For existing statutory provisions as to deportation, *see* 8 U.S.C. 1251 *et seq.*

[12] *Carlson* v. *Landon,* 342 U.S. 524 (1952).

[13] 8 U.S.C. § 1252(e).

[14] *United States* v. *Spector,* 343 U.S. 169 (1952).

[1] *Adams* v. *Storey,* 1 Fed. Cas. 141, 142 (No. 66) (C.C.D.N.Y. 1817).

[2] 2 Stat. 19 (1800).

[3] 2 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1113.

[4] 186 U.S. 181 (1902).

porations,[5] including even municipal corporations [6] and wage-earning individuals. The Bankruptcy Act has, in fact been amended to provide a wage-earners' extension plan to deal with the unique problems of debtors who derive their livelihood primarily from salaries or commissions. In furthering the implementation of this plan, the Supreme Court has held that a wage earner may make use of it, notwithstanding the fact he has been previously discharged in bankruptcy within the last six years.[7]

**Liberalization of Relief Granted and Expansion of the Rights of the Trustee**

As the coverage of the bankruptcy laws has been expanded, the scope of the relief afforded to debtors has been correspondingly enlarged. The act of 1800, like its English antecedents, was designed primarily for the benefit of creditors. Beginning with the act of 1841, which opened the door to voluntary petitions, rehabilitation of the debtor has become an object of increasing concern to Congress. An adjudication in bankruptcy is no longer requisite to the exercise of bankruptcy jurisdiction. In 1867 the debtor for the first time was permitted, either before or after adjudication of bankruptcy, to propose terms of composition which would become binding upon acceptance by a designated majority of his creditors and confirmation by a bankruptcy court. This measure was held constitutional,[1] as were later acts which provided for the reorganization of corporations which are insolvent or unable to meet their debts as they mature,[2] and for the composition and extension of debts in proceedings for the relief of individual farmer debtors.[3]

Nor is the power of Congress limited to adjustment of the rights of creditors. The Supreme Court has also ruled that the rights of a purchaser at a judicial sale of the debtor's property are within reach of the bankruptcy power, and may be modified by a reasonable extension of the period for redemption from such sale.[4]

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[5] *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 670 (1935).

[6] *United States* v. *Bekins*, 304 U.S. 27 (1938), distinguishing *Ashton* v. *Cameron County Dist.*, 298 U.S. 513 (1936).

[7] *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966).

[1] *In re Reiman*, 20 Fed. Cas. 490 (No. 11,673) (D.C.S.D.N.Y. 1874), cited with approval in *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 672 (1935).

[2] *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648 (1935).

[3] *Wright* v. *Vinton Branch*, 300 U.S. 440 (1937); *Adair* v. *Bank of America Assn.*, 303 U.S. 350 (1938).

[4] *Wright* v. *Union Central Ins. Co.*, 304 U.S. 502 (1938).

Moreover, the Court has recently expanded the bankruptcy court's power over the property of the estate by affording the trustee affirmative relief on counterclaim against a creditor filing a claim against the estate.[5]

Underlying most Court decisions and statutes in this area is the desire to achieve equity and fairness in the distribution of the bankrupt's funds.[6] *United States* v. *Speers*,[7] codified by an amendment to the Bankruptcy Act,[8] furthered this objective by strengthening the position of the trustee as regards the priority of a federal tax lien unrecorded at the time of bankruptcy.[9] The Supreme Court has held, in other cases dealing with the priority of various creditors' claims, that claims arising from the tort of the receiver is an "actual and necessary" cost of administration,[10] that benefits under a nonparticipating annuity plan are not wages and are therefore not given priority,[11] and that when taxes are allowed against a bankrupt's estate, penalties due because of the trustee's failure to pay the taxes incurred while operating a bankrupt business are also allowable.[12] The Court's attitude with regard to these and other developments is perhaps best summarized in the opinion in *Continental Bank* v. *Rock Island Ry.*,[13] where Justice Sutherland wrote, on behalf of a unanimous court: "[T]hese acts, far-reaching though they may be, have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." [14]

**Constitutional Limitations on the Bankruptcy Power**

In the exercise of its bankruptcy powers Congress must not transgress the Fifth and Tenth Amendments. The Bankruptcy Act provides that oral testimony cannot be used in violation of the bankrupt's right against self-incrimination.[1] Congress may not take from a creditor specific property previously acquired from a debtor, nor circumscribe the creditor's right to such an unreasonable extent as to deny him due process of law; [2] this principle, how-

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[5] *Katchen* v. *Landy*, 382 U.S. 323 (1966).
[6] *Bank of Marin* v. *England*, 385 U.S. 99, 103 (1966).
[7] 382 U.S. 266 (1965). *Cf. United States* v. *Vermont*, 337 U.S. 351 (1964).
[8] Act of July 5, 1966, 80 Stat. 269, 11 U.S.C. § 501, repealed.
[9] 382 U.S., 271-272.
[10] *Reading Co.* v. *Brown*, 391 U.S. 471 (1968).
[11] *Joint Industrial Board of the Election Industries* v. *United States*, 391 U.S. 224 (1968).
[12] *Nicholas* v. *United States*, 384 U.S. 678 (1966).
[13] 294 U.S. 648 (1935).
[14] Id., 671.
[1] 11 U.S.C. § 344.
[2] *Louisville Bank* v. *Radford*, 295 U.S. 555, 589, 602 (1935).

ever, is subject to the Supreme Court's finding that a bankruptcy court has summary jurisdiction for ordering the surrender of voidable preferences when the trustee successfully counterclaims to a claim filed by the creditor receiving such preferences.[3]

Since Congress may not supersede the power of a State to determine how a corporation shall be formed, supervised, and dissolved, a corporation which has been dissolved by a decree of a state court may not file a petition for reorganization under the Bankruptcy Act.[4] But Congress may impair the obligation of a contract and may extend the provisions of the bankruptcy laws to contracts already entered into at the time of their passage.[5] Although it may not subject the fiscal affairs of a political subdivision of a State to the control of a federal bankruptcy court,[6] congress may empower such courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness where the State has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners.[7] Congress may recognize the laws of the State relating to dower, exemption, the validity of mortgages, priorities of payment and similar matters, even though such recognition leads to different results from State to State; [8] for although bankruptcy legislation must be uniform, the uniformity required is geographic, not personal.

The power of Congress to vest the adjudication of bankruptcy claims in entitles not having the constitutional status of Article III federal courts is unsettled. At which, it may not give to non-Article III courts the authority to hear state law claims made subject to federal jurisdiction only because of their relevance to a bankruptcy proceeding.[9]

**Constitutional Status of State Insolvency Laws: Preemption**

Prior to 1898, Congress exercised the power to establish "uniform laws on the subject of bankruptcy" only intermittently. The first national bankruptcy law was not enacted until 1800 and was repealed in 1803; the second was passed in 1841 and was repealed

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[3] *Katchen* v. *Landy*, 382 U.S. 323, 327-340 (1966).

[4] *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U.S. 120 (1937).

[5] *In re Klein*, 1 How. (42 U.S.) 277 (1843); *Hanover National Bank* v. *Moyses*, 186 U.S. 181 (1902).

[6] *Ashton* v. *Cameron County Dist.*, 298 U.S. 513 (1936). *See also United States* v. *Bekins*, 304 U.S. 27 (1938).

[7] *United States* v. *Bekins*, 304 U.S. 27 (1938).

[8] *Stellwagon* v. *Clum*, 245 U.S. 605 (1918); *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 190 (1902).

[9] *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

two years later; a third was enacted in 1867 and repealed in 1878.[1] Thus, during the first eighty-nine years under the Constitution, a national bankruptcy law was in existence only sixteen years altogether. Consequently, the most important issue of interpretation which arose during that period concerned the effect of the clause on state law.

The Supreme Court ruled at an early date that in the absence of congressional action the States may enact insolvency laws, since it is not the mere existence of the power but rather its exercise which is incompatible with the exercise of the same power by the States.[2] Later cases settled further that the enactment of a national bankruptcy law does not invalidate state laws in conflict therewith but serves only to relegate them to a state of suspended animation with the result that upon repeal of the national statute they again come into operation without re-enactment.[3]

A State is, of course, without power to enforce any law governing bankruptcies which impairs the obligation of contracts,[4] extends to persons or property outside its jurisdiction,[5] or conflicts with the national bankruptcy laws.[6] Giving effect to the policy of the federal statute, the Court has held that a state statute regulating this distribution of property of an insolvent was suspended by that law,[7] and that a state court was without power to proceed with pending foreclosure proceedings after a farmer-debtor had filed a petition in federal bankruptcy court for a composition or extension of time to pay his debts.[8] A state law governing fraudulent transfers was found to be compatible with the federal law.[9]

Substantial disagreement has marked the actions of the Justices in one area, however, resulting in three five-to-four decisions first upholding and then voiding state laws which provided that a discharge in bankruptcy was not to relieve a judgment arising out of an automobile accident upon pain of suffering suspension of his driver's license.[10] The state statutes were all similar enactments of

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[1] *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 184 (1902).

[2] *Sturges* v. *Crowninshield*, 4 Wheat. (17 U.S.) 122, 199 (1819); *Ogden* v. *Saunders*, 12 Wheat. (25 U.S.) 213, 368 (1827).

[3] *Tua* v. *Carriere*, 117 U.S. 201 (1886); *Butler* v. *Goreley*, 146 U.S. 303, 314 (1892).

[4] *Sturges* v. *Crowninshield*, 4 Wheat. (17 U.S.) 122 (1819).

[5] *Ogden* v. *Saunders*, 12 Wheat. (25 U.S.) 213, 368 (1827); *Denny* v. *Bennett*, 128 U.S. 489, 498 (1888); *Brown* v. *Smart*, 145 U.S. 454 (1892).

[6] *In re Watts and Sachs*, 190 U.S. 1, 27 (1903); *International Shoe Co.* v. *Pinkus*, 278 U.S. 261, 264 (1929).

[7] *International Shoe Co.* v. *Pinkus*, 278 U.S. 261, 265 (1929).

[8] *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940).

[9] *Stellwagen* v. *Clum*, 245 U.S. 605, 615 (1918).

[10] *Reitz* v. *Mealey*, 314 U.S. 33 (1941); *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962); *Perez* v. *Campbell*, 402 U.S. 637 (1971).

the Uniform Motor Vehicle Safety Responsibility Act which authorizes the suspension of the license of any driver who fails to satisfy a judgment against himself growing out of a traffic accident; a section of the law specifically provides that a discharge in bankruptcy will not relieve the debtor of the obligation to pay and the consequence of license suspension for failure to pay. In the first two decisions, the Court majorities decided that the object of the state law was not to see that such judgments were paid but was rather a device to protect the public against irresponsible driving.[11] The last case rejected this view and held that the Act's sole emphasis was one of providing leverage for the collection of damages from drivers and as such was in fact intended to and did frustrate the purpose of the federal bankruptcy law, the giving of a fresh start unhampered by debt.[12]

If a State desires to participate in the assets of a bankruptcy, it must submit to the appropriate requirements of the bankruptcy court with respect to the filing of claims by a designated date. It cannot assert a claim for taxes by filing a demand at a later date.[13]

Clauses 5 and 6. *The Congress shall have Power * * * To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.*

* * * To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.

## FISCAL AND MONETARY POWERS OF CONGRESS

### Coinage, Weights, and Measures

The power "to coin money" and "regulate the value thereof" has been broadly construed to authorize regulation of every phase of the subject of currency. Congress may charter banks and endow them with the right to issue circulating notes.[1] and may restrain

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[11] *Reitz* v. *Mealey*, 314 U.S. 33, 37 (1941); *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 169–174 (1962).

[12] *Perez* v. *Campbell*, 402 U.S. 637, 644–648, 651–654 (1971). The dissenters, Justice Blackmun for himself and Chief Justice Burger and Justices Harlan and Stewart, argued, in line with the *Reitz* and *Kesler* majorities, that the provision at issue was merely an attempt to assure driving competence and care on the part of its citizens and had only tangential effect upon bankruptcy.

[13] *New York* v. *Irving Trust Co.*, 288 U.S. 329 (1933).

[1] *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819).

the circulation of notes not issued under its own authority.[2] To this end it may impose a prohibitive tax upon the circulation of the notes of state banks [3] or of municipal corporations.[4] It may require the surrender of gold coin and of gold certificates in exchange for other currency not redeemable in gold. A plaintiff who sought payment for the gold coin and certificates thus surrendered in an amount measured by the higher market value of gold was denied recovery on the ground that he had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency.[5] Inasmuch as "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power," [6] the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts,[7] and, many years later, to abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed.[8] The power to coin money also imports authority to maintain such coinage as a medium of exchange at home, and to forbid its diversion to other uses by defacement, melting or exportation.[9]

**Punishment of Counterfeiting**

In its affirmative aspect this clause has been given a narrow interpretation; it has been held not to cover the circulation of counterfeit coin or the possession of equipment susceptible of use for making counterfeit coin.[1] At the same time the Supreme Court has rebuffed attempts to read into this provision a limitation upon either the power of the States or upon the powers of Congress under the preceding clause. It has ruled that a State may punish the issuance of forged coins.[2] On the ground that the power of Con-

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[2] *Veazie Bank* v. *Fenno*, 8 Wall. (75 U.S.) 533 (1869).

[3] Id., 548.

[4] *National Bank* v. *United States*, 101 U.S. 1 (1880).

[5] *Nortz* v. *United States*, 249 U.S. 317 (1935).

[6] *Legal Tender Cases (Knox* v. *Lee)*, 12 Wall. (79 U.S.) 457, 549 (1871); *Legal Tender Cases (Juilliard* v. *Greenman)*, 110 U.S. 421, 449 (1884).

[7] *Legal Tender Cases (Knox* v. *Lee)*, 12 Wall. (79 U.S.) 457 (1871).

[8] *Norman* v. *Baltimore & O.R. Co.*, 294 U.S. 240 (1935).

[9] *Ling Su Fan* v. *United States*, 218 U.S. 302 (1910).

[1] *United States* v. *Marigold*, 9 How. (50 U.S.), 560, 568 (1850).

[2] *Fox* v. *Ohio*, 5 How. (46 U.S.) 410 (1847).

gress to coin money imports "the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation." [3] it has sustained federal statutes penalizing the importation or circulation of counterfeit coin,[4] or the willing and conscious possession of dies in the likeness of those used for making coins of the United States.[5] In short, the above clause is entirely superfluous. Congress would have had the power which it purports to confer under the necessary and proper clause; and the same is the case with the other enumerated crimes which it is authorized to punish. The enumeration was unnecessary and is not exclusive.[6]

**Borrowing Power Versus Fiscal Power**

Usually the aggregate of the fiscal and monetary powers of the National Government—to lay and collect taxes, to borrow money and to coin money and regulate the value thereof— have reinforced each other, and, cemented by the necessary and proper clause, have provided a secure foundation for acts of Congress chartering banks and other financial institutions,[7] or making its treasury notes legal tender in the payment of antecedent debts.[8] But in 1935 the opposite situation arose—one in which the power to regulate the value of money collided with the obligation incurred in the exercise of the power to borrow money. By a vote of eight-to-one the Supreme Court held that the obligation assumed by the exercise of the latter was paramount, and could not be repudiated to effectuate the monetary policies of Congress.[9] In a concurring opinion, Justice Stone declined to join with the majority in suggesting that "the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of

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[3] *United States* v. *Marigold*, 9 How. (50 U.S.) 560, 568 (1850).

[4] Ibid.

[5] *Baender* v. *Barnett*, 255 U.S. 224 (1921).

[6] *Legal Tender Cases (Knox* v. *Lee)*, 122 Wall. (79 U.S.) 457, 536 (1871).

[7] *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 407 (1819); *Osborn* v. *United States Bank*, 9 Wheat. (22 U.S.) 737, 861 (1824); *Farmers' & Mechanics' Nat. Bank* v. *Dearing*, 91 U.S. 29, 33 (1875); *Smith* v. *Kansas City Title Co.*, 255 U.S. 180, 208 (1921).

[8] *Legal Tender Cases (Knox* v. *Lee)*, 12 Wall. (79 U.S.) 457, 540–547 (1871).

[9] *Perry* v. *United States*, 294 U.S. 330, 353 (1935).

the bonds." [10] However, with a view to inducing purchase of savings bonds, the sale of which is essential to successful management of the national debt, Congress is competent to authorize issuance of regulations creating a right of survivorship in such bonds registered in co-ownership form, and such regulations preempt provisions of state law prohibiting married couples from utilizing the survivorship privilege whenever bonds are paid out of community property." [11]

Clause 7. *The Congress shall have Power* * * * To establish Post Offices and post roads.

## POSTAL POWER

### "Establish"

The great question raised in the early days with reference to the postal clause concerned the meaning to be given to the word "establish"—did it confer upon Congress the power to *construct* post offices and post roads, or only the power to *designate* from existing places and routes those that should serve as post offices and post roads? As late as 1855, Justice McLean stated that this power "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither under the commerce power nor the power to establish post roads could Congress construct a bridge over a navigable water.[1] A decade earlier, however, the Court, without passing upon the validity of the original construction of the Cumberland Road, held that being "charged . . . with the transportation of the mails," Congress could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the road lying in the State.[2] The debate on the question was terminated in 1876 by the decision in *Kohl* v. *United States* [3] sustaining a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

### Power To Protect the Mails

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the

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[10] Id., 361.

[11] *Free* v. *Bland*, 369 U.S. 663 (1962).

[1] *United States* v. *Railroad Bridge Co.*, 27 Fed. Cas. 686 (No. 16,114) (C.C.N.D. Ill. 1855).

[2] *Searight* v. *Stokes*, 3 How. (44 U.S.) 151, 166 (1845).

[3] 91 U.S. 367 (1876).

mails.[4] And not only are the mails under the protection of the National Government, they are in contemplation of law its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a state toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.[5] Half a century later it was availed of as one of the grounds on which the national executive was conceded the right to enter the national courts and demand an injunction against the authors of any wide-spread disorder interfering with interstate commerce and the transmission of the mails.[6]

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern States through the mails, President Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection." In the Senate, John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.[7] On this point his reasoning would appear to be vindicated by such decisions as those denying the right of the States to prevent the importation of alcoholic beverages from other States.[8]

**Power To Prevent Harmful Use of the Postal Facilities**

In 1872, Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of *Ex parte Jackson,*[1] the Court

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[4] *Ex parte Jackson,* 96 U.S. 727, 732 (1878). See *United States Postal Service* v. *Council of Greenburgh Civic Assns.,* 453 U.S. 114 (1981), in which the Court sustained the constitutionality of a law making it unlawful for persons to use, without payment of a fee (postage), a letterbox which has been designated an "authorized depository" of the mail by the Postal Service.

[5] *Searight* v. *Stokes,* 3 How. (44 U.S.) 151, 169 (1845).

[6] *In re Debs,* 158 U.S. 564, 599 (1895).

[7] *Cong. Globe,* 24th Cong., 1st Sess., 3, 10, 298 (1835).

[8] *Bowman* v. *Chicago & Nw. Railway Co.,* 125 U.S. 465 (1888); *Leisy* v. *Hardin,* 135 U.S. 100 (1890).

[1] 96 U.S. 727 (1878).

sustained the exclusion of circulars relating to lotteries on the general ground that "the right to designate what shall be carried necessarily involves the right to determine what shall be excluded." [2] The leading fraud order case, decided in 1904, held to the same effect.[3] Pointing out that it is "an indispensable adjunct to a civil government," to supply postal facilities, the Court restated its premise that the "legislative body in thus establishing a postal service may annex such conditions . . . as it chooses." [4]

Later cases first qualified these sweeping assertions and then overturned them, holding Government operation of the mails to be subject to constitutional limitations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness, and circulation and that all paid advertisements in the publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications.[5] Chief Justice White warned that the Court by no means intended to imply that it endorsed the Government's "broad contentions concerning . . . the classification of the mails, or by the way of condition . . ." [6] Again, when the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper he had found to have published material in contravention of the Espionage Act of 1917, the claim of absolute power in Congress to withhold the privilege was sedulously avoided.[7]

A unanimous Court transformed these reservations into a holding in *Lamont* v. *Postmaster General,*[8] in which it struck down a statute authorizing the Post Office to detain mail it determined to be "communist political propaganda" and to forward it to the addressee only if he notified the Post Office he wanted to see it. Noting that Congress was not bound to operate a postal service, the Court observed that while it did, it was bound to observe constitutional guarantees.[9] The statute violated the First Amendment be-

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[2] Id., 732.

[3] *Public Clearing House* v. *Coyne,* 194 U.S. 497 (1904), followed in *Donaldson* v. *Read Magazine,* 333 U.S. 178 (1948).

[4] 194 U.S., 506.

[5] *Lewis Publishing Co.* v. *Morgan,* 229 U.S. 288 (1913).

[6] Id., 316.

[7] *United States ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407 (1921). *See also Hannegan* v. *Esquire,* 327 U.S. 146 (1946), denying the Post Office the right to exclude *Esquire Magazine* from the mails on grounds of the poor taste and vulgarity of its contents.

[8] 381 U.S. 301 (1965).

[9] Id., 305, quoting Justice Holmes in *United States ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407, 437 (1921) (dissenting opinion): "The United States

cause it inhibited the right of persons to receive any information which they wished to receive.[10]

On the other hand, a statute which permits persons to place their names on a list in order to reject receipt of obscene or sexually suggestive materials is constitutional, because no sender has a right to foist his material on any unwilling receiver.[11] But, as in other areas, postal censorship systems must contain procedural guarantees sufficient to ensure prompt resolution of disputes about the character of allegedly objectionable material consistently with the First Amendment.[12]

**Exclusive Power as an Adjunct to Other Powers**

In the cases just reviewed, it was attempted to close the mails to communication which were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935.[1] To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies which failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treated this provision as a penalty. While it held this statute constitutional because the regulations whose infractions were thus penalized were themselves valid,[2] it declared that "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province. . . ."[3]

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may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . ." *And see Blount* v. *Rizzi*, 400 U.S. 410, 416 (1971) (quoting same language). But for a different perspective on the meaning and application of the Holmes language, *see United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U.S. 114, 127 n. 5 (1981), although there too the Court observes that the postal power may not be used in a manner that abridges freedom of speech or press. Id., 126. Notice, too, that first-class mail is protected against opening and inspection, except in accordance with the Fourth Amendment. *Ex parte Jackson*, 96 U.S. 727, 733 (1878); *United States* v. *van Leeuwen*, 397 U.S. 249 (1970). *But see United States* v. *Ramsey*, 431 U.S. 606 (1977) (border search).

[10] *Lamont* v. *Postmaster General*, 381 U.S. 301, 306–307 (1965). *And see* id., 308 (concurring opinion). Note that this was the first *congressional* statute ever voided as in conflict with the First Amendment.

[11] *Rowan* v. *Post Office Department*, 397 U.S. 728 (1970).

[12] *Blount* v. *Rizzi*, 400 U.S. 410 (1971).

[1] 49 Stat. 803, 812, 813, 15 U.S.C. §§ 79d, 79e.

[2] *Electric Bond Co.* v. *SEC*, 303 U.S. 419 (1938).

[3] Id., 442.

**State Regulations Affecting the Mails**

In determining the extent to which state laws may impinge upon persons or corporations whose services are utilized by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court has approved regulations which have a trivial or remote relation to the operation of the postal service, while disallowing those which constitute a serious impediment to it. Thus, a state statute which granted to one company an exclusive right to operate a telegraph business in the State was found to be incompatible with a federal law which, in granting to any telegraph company the right to construct its lines upon post roads, was interpreted as a prohibition of state monopolies in a field which Congress was entitled to regulate in the exercise of its combined power over commerce and post roads.[4]

An Illinois statute which, as construed by the state courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station, also was held to be an unconstitutional interference with the power of Congress under this clause.[5] But a Minnesota statute which required intrastate trains to stop at county seats was found to be unobjectionable.[6]

Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries,[7] or subjecting a union of railway mail clerks to a general law forbidding any "labor organization" to deny any person membership because of his race, color or creed,[8] have been held not to conflict with national legislation or policy in this field. Despite the interference *pro tanto* with the performance of a federal function, a State may arrest a postal employee charged with murder while he is engaged in carrying out his official duties,[9] but it cannot punish a person for operating a mail truck over its highways without procuring a driver's license from state authorities.[10]

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[4] *Pensacola Tel. Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1 (1878).

[5] *Illinois Central Railroad* v. *Illinois*, 163 U.S. 142 (1896).

[6] *Gladson* v. *Minnesota*, 166 U.S. 427 (1897).

[7] *Price* v. *Pennsylvania R. Co.*, 113 U.S. 218 (1895); *Martin* v. *Pittsburgh & Lake Erie R.R.*, 203 U.S. 284 (1906).

[8] *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88 (1945).

[9] *United States* v. *Kirby*, 7 Wall. (74 U.S.) 482 (1869).

[10] *Johnson* v. *Maryland*, 254 U.S. 51 (1920).

Clause 8. *The Congress shall have Power* * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

## COPYRIGHTS AND PATENTS

### Scope of the Power

This clause is the foundation upon which the national patent and copyright laws rest, although it uses neither of those terms. So far as patents are concerned, modern legislation harks back to the Statute of Monopolies of 1624, whereby Parliament endowed inventors with the sole right to their inventions for fourteen years.[1] Copyright law, in turn, traces back to the English Statute of 1710 which secured to authors of books the sole right of publishing them for designated periods.[2] Congress was not vested by this clause, however, with anything akin to the royal prerogative in the creation and bestowal of monopolistic privileges.[3] Its power is limited with regard both to subject matter and to the purpose and duration of the rights granted. Only the writings and discoveries of authors and inventors may be protected, and then only to the end of promoting science and the useful arts.[4] While Congress may grant exclusive rights only for a limited period, it may extend the term upon the expiration of the period originally specified, and in so doing may protect the rights of purchasers and assignees.[5] The copyright and patent laws do not have, of their own force, any extraterritorial operation.[6]

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[1] *Pennock* v. *Dialogue*, 2 Pet. (27 U.S.) 1, 17, 18 (1829).

[2] *Wheaton* v. *Peters*, 8 Pet. (33 U.S.) 591, 656, 658 (1834).

[3] *Cf. Graham* v. *John Deere Co.*, 383 U.S. 1, 5, 9 (1966).

[4] *Kendall* v. *Winsor*, 21 How. (62 U.S.) 322, 328 (1859); *A. & P. Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950).

[5] *Evans* v. *Jordan*, 9 Cr. (13 U.S.) 199 (1815); *Bloomer* v. *McQuewan*, 14 How. (55 U.S.) 539, 548 (1852); *Bloomer* v. *Millinger*, 1 Wall. (68 U.S.) 340, 350 (1864); *Eunson* v. *Dodge*, 18 Wall. (85 U.S.) 414, 416 (1873).

[6] *Brown* v. *Duchesne*, 19 How. (60 U.S.) 183, 195 (1857). It is, however, the ultimate objective of many nations, including the United States, to develop a system of patent issuance and enforcement which transcends national boundaries; it has been recommended, therefore, that United States policy should be to harmonize its patent system with that of foreign countries so long as such measures do not diminish the quality of the United States patent standards. President's Commission on the Patent System, *To Promote the Progress of Useful Arts*, Report to the Senate Judiciary Committee, S. Doc. No. 5, 90th Cong., 1st sess. (1967), recommendation XXXV.

### Patentable Discoveries

The protection traditionally afforded by acts of Congress under this clause has been limited to new and useful inventions,[1] and while a patentable invention is a mental achievement,[2] for an idea to be patentable it must have first taken physical form.[3] Despite the fact that the Constitution uses the term "discovery" rather than "invention", a patent may not be issued for the discovery of a hitherto unknown phenomenon of nature. "If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end." [4] As for the mental processes which have been traditionally required, the Court has held in the past that an invention must display "more ingenuity . . . than the work of a mechanic skilled in the art"; [5] and while combination patents have been at times sustained,[6] the accumulation of old devices is patentable "only when the whole in some way exceeds the sum of its parts." [7]

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[1] *Seymour* v. *Osborne*, 11 Wall. (78 U.S.) 516, 549 (1871). *Cf. Collar Company* v. *Van Dusen*, 23 Wall. (90 U.S.) 530, 563 (1875); *Reckendorfer* v. *Faber*, 92 U.S. 347, 356 (1876).

[2] *Smith* v. *Nichols*, 21 Wall. (89 U.S.) 112, 118 (1875).

[3] *Rubber-Tip Pencil Company* v. *Howard*, 20 Wall. (87 U.S.) 498, 507 (1874); *Clark Thread Co.* v. *Willimantic Linen Co.*, 140 U.S. 481, 489 (1891).

[4] *Funk Bros. Seed Co.* v. *Kalo Co.*, 333 U.S. 127, 130 (1948). *Cf. Dow Co.* v. *Halliburton Co.*, 324 U.S. 320 (1945); *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84, 89 (1941).

[5] *Sinclair Co.* v. *Interchemical Corp.*, 325 U.S. 327, 330 (1945); *Marconi Wireless Co.* v. *United States*, 320 U.S. 1 (1943).

[6] *Keystone Manufacturing Co.* v. *Adams*, 151 U.S. 139 (1894); *Diamond Rubber Co.* v. *Consol. Tire Co.*, 220 U.S. 428 (1911).

[7] *A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950). An interesting concurring opinion was filed by Justice Douglas for himself and Justice Black: "It is not enough," says Justice Douglas, "that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." Id., 154–155. He then quotes the following from an opinion of Justice Bradley's given 70 years ago:

"It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith. (*Atlantic Works* v. *Brady*, 107 U.S. 192, 200 (1882)." Id., 155.

Though "inventive genius" and slightly varying language have been appearing in judicial decisions for almost a century,[8] "novelty" and "utility" have been the primary statutory test since the Patent Act of 1793.[9] With Congress' enactment of the Patent Act of 1952, however, § 103 of the Act required that an innovation be of a "nonobvious" nature, that is, it must not be an improvement that would be obvious to a person having ordinary skill in the pertinent art.[10] This alteration of the standard of patentability was perceived by some as overruling previous Supreme Court cases which required perhaps a higher standard for obtaining a patent,[11] but the Court itself interpreted the provision as codifying its earlier holding in *Hotchkiss* v. *Greenwood*,[12] in *Graham* v. *John Deere Co.*[13] The Court in this case said: "Innovation, *advancement*, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored." [14] Congressional requirements on patentability, then, are conditions and tests which must fall within the constitutional standard. Underlying the constitutional tests and congressional conditions for patentability is the balancing of two interests—the interest of the public in being protected against monopolies and in having ready access and use of new items versus the interest of the country, as a whole, in encour-

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The opinion concludes: "The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices: [listing instances]. Id., 156–158.

[8] "Inventive genius"—Justice Hunt in *Reckendorfer* v. *Faber*, 92 U.S. 347, 357 (1875); "Genius or invention"—Chief Justice Fuller in *Smith* v. *Whitman Saddle Co.*, 148 U.S. 674, 681 (1893); "Intuitive genius"—Justice Brown in *Potts* v. *Creager*, 155 U.S. 597, 607 (1895); "Inventive genius"—Justice Stone in *Concrete Appliances Co.* v. *Gomery*, 269 U.S. 177, 185 (1925); "Inventive genius"—Justice Roberts in *Mantle Lamp Co.* v. *Aluminum Co.*, 301 U.S. 544, 546 (1937); "the flash of creative genius, not merely the skill of the calling", Justice Douglas in *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84, 91 (1941).

[9] Act of February 21, 1793, c. 11, 1 Stat. 318. *See Graham* v. *John Deere Co.*, 383 U.S. 1, 3–4, 10 (1966).

[10] 35 U.S.C. § 103.

[11] E.g., *A. & P. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U.S. 147 (1950); *Jungerson* v. *Ostby & Barton Co.*, 335 U.S. 560 (1949); and *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84 (1941).

[12] 11 How. (52 U.S.) 248 (1850).

[13] 383 U.S. 1 (1966).

[14] Id., 6. (First emphasis added.) *See also Calmar, Inc.* v. *Cook Chem. Co.*, 383 U.S. 1 (1966); *United States* v. *Adams*, 383 U.S. 39 (1966).

aging invention by rewarding creative persons for their innovations. By declaring a constitutional standard of patentability, however, the Court, rather than Congress, will be doing the ultimate weighing. As for the clarity of the patentability standard, the three-fold test of utility, novelty and advancement seems to have been made less clear by the Supreme Court's recent rejuvenation of "invention" as a standard of patentability.[15]

**Procedure in Issuing Patents**

The standard of patentability is a constitutional standard, and the question of the validity of a patent is a question of law.[1] Congress may authorize the issuance of a patent for an invention by a special, as well as by general law, provided the question as to whether the patentees device is in truth an invention is left open to investigation under the general law.[2] The function of the Commissioner of Patents in issuing letters patent is deemed to be quasi-judicial in character. Hence an act granting a right of appeal from the Commission to the Court of Appeals for the District of Columbia is not unconstitutional as conferring executive power upon a judicial body.[3] The primary responsibility, however, for weeding out unpatentable devices rests in the Patent Office.[4] The present system of "de novo" hearings before the Court of Appeals allows the applicant to present new evidence which the Patent Office has not heard,[5] thus making somewhat amorphous the central responsibility.

**Nature and Scope of the Right Secured**

The leading case bearing on the nature of the rights which Congress is authorized to *secure* is that of *Wheaton* v. *Peters*. Wheaton charged Peters with having infringed his copyright on the

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[15] *Anderson's-Black Rock, Inc.* v. *Pavement Salvage Co.*, 396 U.S. 57 (1969). "The question of invention must turn on whether the combination supplied the key requirement." Id., 60. But the Court also appeared to apply the test of nonobviousness in the same decision: "We conclude that the combination was reasonably obvious to one with ordinary skill in the art." Ibid. *See also McClain* v. *Ortmayer*, 141 U.S. 419, 427 (1891), where, speaking of the use of "invention" as a standard of patentability the Court said: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not."

[1] *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U.S. 147 (1950); *Mahn* v. *Harwood*, 112 U.S. 354, 358 (1884).

[2] *Evans* v. *Eaton*, 3 Wheat. (16 U.S.) 454, 512 (1818).

[3] *United States* v. *Duell*, 172 U.S. 576, 586–589 (1899). *See also Butterworth* v. *United States ex rel. Hoe*, 112 U.S. 50 (1884).

[4] *Graham* v. *John Deere Co.*, 383 U.S. 1, 18 (1966).

[5] In *Jennings* v. *Brenner*, 225 F. Supp. 410, 412 (D.C.D.C. 1966), District Judge Holtzoff suggested that a system of remand be adopted.

twelve volumes of "Wheaton's Reports" wherein are reported the decisions of the United States Supreme Court for the years from 1816 to 1827 inclusive. Peters' defense turned on the proposition that inasmuch as Wheaton had not complied with all of the requirements of the act of Congress, his alleged copyright was void. Wheaton, while denying this assertion of fact, further contended that the statute was only intended to *secure* him in his pre-existent rights at common law. These at least, he claimed, the Court should protect. A divided Court held in favor of Peters on the legal question. It denied, in the first place, that there was any principle of the common law which protected an author in the sole right to continue to publish a work once published. It denied, in the second place, that there is any principle of law, common or otherwise, which pervades the Union except such as are embodied in the Constitution and the acts of Congress. Nor, in the third place, it held, did the word "securing" in the Constitution recognize the alleged common law principle which Wheaton invoked. The exclusive right which Congress is authorized to *secure* to authors and inventors owes its existence solely to the acts of Congress securing it,[1] from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress, in its unhampered consultation of the public interest, sees fit to impose.[2]

In giving to authors the exclusive right to dramatize any of their works, Congress did not exceed its powers under this clause. Even as applied to pantomine dramatization by means of silent motion pictures, the act was sustained against the objection that it extended the copyright to ideas rather than to the words in which they were clothed.[3] But the copyright of the description of an art in a book was held not to lay a foundation for an exclusive claim to the art itself. The latter can be protected, if at all, only by letters patent.[4] Since copyright is a species of property distinct from the ownership of the equipment used in making copies of the matter copyrighted, the sale of a copperplate under execution did not pass any right to print and publish the map which the copperplate was

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[1] *Wheaton* v. *Peters*, 8 Pet. (33 U.S.) 591, 660 (1834); *Holmes* v. *Hurst*, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[2] *Wheaton* v. *Peters*, 8 Pet. (33 U.S.) 591, 662 (1834); *Evans* v. *Jordan*, 9 Cr. (13 U.S.) 199 (1815).

[3] *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911). For other problems arising because of technological and electronic advancement *see*, e.g., *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968).

[4] *Baker* v. *Selden*, 101 U.S. 99, 105 (1880).

designed to produce.[5] A patent right may, however, be subjected, by bill in equity, to payment of a judgment debt of the patentee.[6]

### Power of Congress Over Patent Rights

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government without just compensation.[7] Congress may, however, modify rights under an existing patent, provided vested property rights are not thereby impaired,[8] but it does not follow that it may authorize an inventor to recall rights which he has granted to others or reinvest in him rights of property which he had previously conveyed for a valuable and fair consideration.[9] Furthermore, the rights which the present statutes confer are subject to the antitrust laws, though it can be hardly said that the cases in which the Court has endeavored to draw the line between the rights claimable by patentees and the kind of monopolistic privileges which are forbidden by those acts exhibit entire consistency in their holdings.[10]

### State Power Affecting Patents and Copyrights

Displacement of state police or taxing powers by federal patent or copyright has been a source of considerable dispute. Ordinarily, rights secured to inventors must be enjoyed in subordination to the general authority of the States over all property within their limits. A state statute requiring the condemnation of illuminating oils which were inflammable at less than 130 degrees Fahrenheit was held not to interfere with any right secured by the patent laws, although the oil for which the patent was issued could not be made to comply with state specifications.[1] In the absence of federal legislation, a State may prescribe reasonable regulations for the transfer of patent rights, so as to protect its citizens from fraud. Hence, a requirement of state law that the words "given for a

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[5] *Stevens* v. *Gladding*, 17 How. (58 U.S.) 447 (1855).

[6] *Ager* v. *Murray*, 105 U.S. 126 (1882).

[7] *James* v. *Campbell*, 104 U.S. 356, 358 (1882). *See also United States* v. *Burns* 12 Wall. (79 U.S.) 246, 252 (1871); *Cammeyer* v. *Newton*, 94 U.S. 225, 234 (1877); *Hollister* v. *Benedict Manufacturing Co.*, 113 U.S. 59, 67 (1885); *United States* v. *Palmer*, 128 U.S. 262, 271 (1888); *Belknap* v. *Schild*, 161 U.S. 10, 16 (1896).

[8] *McClurg* v. *Kingsland*, 1 How. (42 U.S.) 202, 206 (1843).

[9] *Bloomer* v. *McQuewan*, 14 How. (55 U.S.) 539, 553 (1852).

[10] *See Motion Picture Co.* v. *Universal Film Co.*, 243 U.S. 502 (1917); *Morton Salt Co.* v. *Suppiger Co.*, 314 U.S. 488 (1942); *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942); *United States* v. *New Wrinkle, Inc.*, 342 U.S. 371 (1952), where the Justices divided 6 to 3 as to the significance for the case of certain leading precedents; and *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

[1] *Patterson* v. *Kentucky*, 97 U.S. 501 (1879).

patent right" appear on the face of notes given in payment for such right is not unconstitutional.[2] Royalties received from patents or copyrights are subject to a nondiscriminatory state income tax, a holding to the contrary being overruled.[3]

State power to protect things not patented or copyrighted under federal law was buffeted under changing Court doctrinal views. In two major cases, the Court held that a State could not utilize unfair competition laws to prevent or punish the copying of products which were not entitled to a patent. Emphasizing the necessity for a uniform national policy and adverting to the monopolistic effects of the state protection, the Court inferred that because Congress had not extended the patent laws to the material at issue, federal policy was to promote free access when the materials were thus in the public domain.[4] But, in *Goldstein* v. *California*,[5] the Court distinguished the two prior cases and held that the determination whether a state "tape piracy" statute conflicted with the federal copyright statute depended upon the existence of a specific congressional intent to forbid state protection of the "writing" there involved. Its consideration of the statute and of its legislative history convinced the Court that Congress in protecting certain "writings" and in not protecting others bespoke no intention that federally unprotected materials should enjoy no state protection, only that Congress "has left the area unattended." [6] Similar analysis was used to sustain the application of a state trade secret law to protect a chemical process, that was patentable but not patented, from utilization by a commercial rival, which had obtained the process from former employees of the company, all of whom had

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[2] *Allen* v. *Riley*, 203 U.S. 347 (1906); *John Woods & Sons* v. *Carl*, 203 U.S. 358 (1906); *Ozan Lumber Co.* v. *Union County Bank*, 207 U.S. 251 (1907).

[3] *Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932), overruling *Long* v. *Rockwood*, 277 U.S. 142 (1928).

[4] *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

[5] 412 U.S. 546 (1973). Informing the decisions were different judicial attitudes with respect to the preclusion of the States from acting in fields covered by the patent and copyright clauses, whether Congress had or had not acted. The latter case recognized permissible state interests, id., 552–560, whereas the former intimated that congressional power was exclusive. *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 228–231 (1964).

[6] In the 1976 revision of the copyright law, Congress broadly preempted, with narrow exceptions, all state laws bearing on material subject to copyright. 17 U.S.C. § 301. The legislative history makes clear Congress' intention to overturn *Goldstein* and "to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law." H. Rept. No. 94-1476, 94th Congress, 2d sess. (1976), 130. The statute preserves state tape piracy and similar laws as to sound recordings fixed before February 15, 1972, until February 15, 2047.

signed agreements not to reveal the process. The Court determined that protection of the process by state law was not incompatible with the federal patent policy of encouraging invention and public use of patented inventions, inasmuch as the trade secret law serves other interests not similarly served by the patent law and where it protects matter clearly patentable it is not likely to deter applications for patents.[7]

**Trade-Marks and Advertisements**

In the famous *Trade-Mark Cases*,[8] decided in 1879, the Supreme Court held void acts of Congress which, in apparent reliance upon this clause, extended the protection of the law to trade-marks registered in the Patent Office. "The ordinary trade mark" said Justice Miller for the Court, "has no necessary relation to invention or discovery"; nor is it to be classified "under the head of writings of authors." It does not "depend upon novelty, invention, discovery, or any work of the brain."[9] Not many years later the Court, again speaking through Justice Miller, ruled that a photograph may be constitutionally copyrighted,[10] while still more recently a circus poster was held to be entitled to the same protection. In answer to the objection of the circuit court that a lithograph which "has no other use than that of a mere advertisement . . . (would not be within) the meaning of the Constitution," Justice Holmes summoned forth the shades of Velasquez, Whistler, Rembrandt, Ruskin, Degas, and others in support of the proposition that it is not for the courts to attempt to judge the worth of pictorial illustrations outside the narrowest and most obvious limits.[11]

Clause 9. *The Congress shall have Power* * * * To constitute Tribunals inferior to the supreme Court; (*see* Article III, *pp.* 615–616).

Clause 10. *The Congress shall have Power* * * * To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

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[7] *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974). See also *Aronson* v. *Quick Point Pencil Co.*, 440 U.S. 257 (1979).

[8] 100 U.S. 82 (1879).

[9] Id., 94.

[10] *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53 (1884).

[11] *Bleisten* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

## PIRACIES, FELONIES, AND OFFENSES AGAINST THE LAW OF NATIONS

### Origin of the Clause

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ." [1] These words of the Chancellor Kent expressed the view of the binding character of international law which was generally accepted at the time the Constitution was adopted. During the Revolutionary War, Congress took cognizance of all matters arising under the law of nations and professed obedience to that law.[2] Under the Articles of Confederation, it was given exclusive power to appoint courts for the trial of piracies and felonies committed on the high seas, but no provision was made for dealing with offenses against the law of nations.[3] The draft of the Constitution submitted to the Convention of 1787 by its Committee of Detail empowered Congress "to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations." [4] In the debate on the floor of the Convention the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies and offenses against the law of nations.[5]

### Definition of Offenses

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case Congress must undertake to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations" was held to be an

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[1] 1 J. Kent, *Commentaries on American Law* (New York: 1826), 1.

[2] 19 *Journals of the Continental Congress*, 315, 361 (1912); 20 id. 762; 21 id. 1136–1137, 1158.

[3] Article IX.

[4] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: Rev. ed. 1937), 168, 182.

[5] Id., 316.

appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law.[6] Similarly, in *Ex parte Quirin*,[7] the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions . . . ," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." [8] Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus, the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds and other securities of foreign governments.[9]

**Extraterritorial Reach of the Power**

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932 [1] that the general grant of admiralty and maritime jurisdiction by Article III, § 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision "cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the National Government. It would be a surprising result, and one plainly not anticipat-

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[6] *United States* v. *Smith*, 5 Wheat. (18 U.S.) 153, 160, 162 (1820). *See also The Marianna Flora*, 11 Wheat. (24 U.S.) 1, 40–41 (1826); *United States* v. *Brig Malek Abhel*, 2 How. (43 U.S.) 210, 232 (1844).

[7] 317 U.S. 1, 27 (1942).

[8] Id., 28.

[9] *United States* v. *Arjona*, 120 U.S. 479 487, 488 (1887).

[1] *United States* v. *Flores*, 3 F. Supp. 134 (D.C.E.D. Pa. 1932).

ed by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the States and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters." [2] Within the meaning of this section an offense is committed on the high seas even where the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.[3]

Clauses 11, 12, 13, and 14. *The Congress shall have power* * * *;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

To provide and maintain a Navy.

To make Rules for the Government and Regulation of the land and naval Forces.

## THE WAR POWER

### Source and Scope

***Three Theories.***—Three different views regarding the source of the war power found expression in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. Writing in *The Federalist,*[1] Hamilton elaborated the theory that the war power is an aggregate of the particular powers granted by Article I, § 8. Not many years later, in 1795, the argument was advanced that the war power of the National Government is

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[2] *United States* v. *Flores*, 289 U.S. 137, 149–150 (1933).

[3] *United States* v. *Furlong*, 5 Wheat. (18 U.S.) 184, 200 (1820).

[1] *The Federalist* No. 23 (Modern Library Ed.: 1937), 141–146.

an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.[2] Chief Justice Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it. In *McCulloch* v. *Maryland*,[3] he listed the power "to declare *and conduct* a war" [4] as one of the "enumerated powers" from which the authority to charter the Bank of the United States was deduced. During the era of the Civil War the two latter theories were both given countenance by the Supreme Court. Speaking for four Justices in *Ex parte Milligan*, Chief Justice Chase described the power to declare war as "necessarily" extending "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns." [5] In another case, adopting the terminology used by Lincoln in his Message to Congress on July 4, 1861,[6] the Court referred to "the war power" as a single unified power.[7]

***An Inherent Power.***—Thereafter we find the phrase, "the war power," being used by both Chief Justice White [8] and Chief Justice Hughes,[9] the former declaring the power to be "complete and undivided." [10] Not until 1936, however, did the Court explain the logical basis for imputing such an inherent power to the Federal Government. In *United States* v. *Curtis-Wright Corp.*,[11] the reasons for this conclusion were stated by Justice Sutherland as follows: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. . . . It results that the investment of the Federal Government with

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[2] *Penhallow* v. *Doane*, 3 Dall. (3 U.S.) 53 (1795).
[3] 4 Wheat. (17 U.S.) 316 (1819).
[4] Id., 407. (Emphasis supplied.)
[5] *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 139 (1866) (dissenting opinion); *see also Miller* v. *United States*, 11 Wall. (78 U.S.) 268, 305 (1871); and *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931).
[6] *Cong. Globe*, 37th Congress, 1st Sess., App. 1 (1861).
[7] *Hamilton* v. *Dillin*, 21 Wall. (88 U.S.) 73, 86 (1875).
[8] *Northern Pac. Ry. Co.* v. *North Dakota, ex rel. Langer*, 250 U.S. 135, 149 (1919).
[9] *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U.S. 398 (1934).
[10] *Northern Pac. Ry. Co.* v. *North Dakota, ex rel. Langer*, 250 U.S. 135, 149 (1919).
[11] 299 U.S. 304 (1936).

the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality." [12]

***A Complexus of Granted Powers.***—In the more recent case of *Lichter* v. *United States*,[13] on the other hand, the Court speaks of the "war powers" of Congress. Upholding the Renegotiation Act, it declared that: "In view of this power 'To raise and support Armies, . . . and the power granted in the same Article of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, . . . the only question remaining is whether the Renegotiation Act was a law 'necessary and proper for carrying into Execution' the war powers of Congress and especially its power to support armies." [14] In a footnote it listed the Preamble, the necessary and proper clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander-in-Chief of the Army and Navy, as being "among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war. . . ." [15]

### Declaration of War

In the early draft of the Constitution presented to the Convention by its Committee of Detail, Congress was empowered "to make war." [1] Although there were solitary suggestions that the power should better be vested in the President alone,[2] in the Senate alone,[3] or in the President and the Senate,[4] the sentiment of the

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[12] Id., 316, 318, *But see infra pp.* 448-450.

[13] 334 U.S. 742 (1948).

[14] Id., 757-758.

[15] Id., 755 n. 3.

[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 313.

[2] Mr. Butler favored "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Id., 318.

[3] Mr. Pinkney thought the House was too numerous for such deliberations but that the Senate would be more capable of a proper resolution and more acquainted with foreign affairs. Additionally, with the States equally represented in the Senate, the interests of all would be safeguarded. Ibid.

[4] Hamilton's plan provided that the President was "to make war or peace, with the advice of the senate . . ." 1 id., 300.

Convention, as best we can determine from the limited notes of the proceedings, was that the potentially momentous consequences of initiating armed hostilities should only be called up by the concurrence of the President and both Houses of Congress.[5] In contrast to the English system, the Framers did not want the wealth and blood of the Nation committed by the decision of a single individual; [6] in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of executive efficiency nor to entrust the matter solely to a branch so close to popular passions.[7]

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to "declare war." [8] Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to insure that the President was empowered to repel sudden attacks [9] without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President.[10]

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[5] 2 id., 318–319. In *The Federalist* No. 69 (Modern Library ed. 1937), 448, Hamilton notes "The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature." (Emphasis in original). And *see* id., No. 26, 159–166. *Cf.* C. Berdahl, *War Powers of the Executive in the United States* (Urbana, Ill.: 1921), ch. V.

[6] *The Federalist* No. 69 (Modern Library ed. 1937), 448, 453. During the Convention, Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 318.

[7] The Articles of Confederation vested powers with regard to foreign relations in the Congress.

[8] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 318–319.

[9] Jointly introducing the amendment to substitute "declare" for "make", Madison and Gerry noted the change would "leav[e] to the Executive the power to repel sudden attacks." Id., 318.

[10] Connecticut originally voted against the amendment to substitute "declare" for "make" but "on the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed. . . ." Id., 319. The contemporary and subsequent judicial interpretation was to the understanding set out in the text. *Cf. Talbot* v. *Seeman*, 1 Cr. (5 U.S.), 1, 28 (1801) (Chief Justice Marshall: "The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry."); *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 139 (1866).

An early controversy revolved about the issue of the President's powers and the necessity of congressional action when hostilities are initiated against us rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Jefferson sent a squadron of frigates to the Mediterranean to protect our ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war.[11] Hamilton espoused a different interpretation, contending that the Constitution vested in Congress the power to initiate war but that when another nation made war upon the United States we were already in a state of war and no declaration by Congress was needed.[12] Congress thereafter enacted a statute authorizing the President to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli "and also to cause to be done all such other acts of precaution or hostility as *the state of war will* justify . . ." [13] But no formal declaration of war was passed, Congress apparently accepting Hamilton's view.[14]

Sixty years later the Supreme Court sustained the blockade of the Southern ports instituted by Lincoln in April 1861 at a time when Congress was not in session.[15] Congress had subsequently ratified Lincoln's action,[16] so that it was unnecessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization, but the Court nonetheless approved, five-to-four, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact. "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." [17] The

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[11] *Messages and Papers of the President*, J. Richardson ed. (Washington: 1896), 326, 327.

[12] 7 *Works of Alexander Hamilton*, J. Hamilton ed. (New York: 1851), 746-747.

[13] 2 Stat. 129, 130 (1802) (emphasis supplied).

[14] Of course, Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. *Cf. Bas* v. *Tingy*, 4 Dall. (4 U.S.) 37 (1800).

[15] *The Prize Cases*, 2 Bl. (67 U.S.) 635 (1863).

[16] 12 Stat. 326 (1861).

[17] *The Prize Cases*, 2 Bl. (67 U.S.) 635, 669 (1863).

minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the enforcement of order against insurgency, Congress alone could stamp an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.[18]

The view of the majority was proclaimed by a unanimous Court a few years later when it became necessary to ascertain the exact dates on which the war began and ended. The Court, the Chief Justice said, must "refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second." [19]

These cases settled the issue whether a state of war could exist without formal declaration by Congress. When hostile action is taken against the Nation, or against its citizens or commerce, the appropriate response by order of the President may be resort to force. But the issue so much a source of controversy in the era of the Cold War and so divisive politically in the context of United States involvement in the Vietnamese War has been whether the President is empowered to commit troops abroad to further national interests in the absence of a declaration of war or specific congressional authorization short of such a declaration.[20] The Supreme Court has studiously refused to consider the issue in any of the forms in which it has been presented [21] and the lower courts

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[18] Id., 682.

[19] *The Protector*, 12 Wall. (79 U.S.) 700, 702 (1872).

[20] The controversy, not susceptible of definitive resolution in any event, was stilled for the present, when in 1973 Congress set a cut-off date for United States military activities in Indochina, P.L. 93-52, § 108, 87 Stat. 134, and subsequently, over the President's veto, Congress enacted the War Powers Resolution, providing a framework for the assertion of congressional and presidential powers in the use of military force, P.L. 93-148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541-1548.

[21] In *Atlee* v. *Richardson*, 411 U.S. 911 (1973), *aff'g.* 347 F. Supp. 689 (D.C.E.D.Pa., 1982), the Court summarily affirmed a three-judge court's dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted approval on the merits of the dismissal, but it did not necessarily approve the lower court's grounds. *See also Massachusetts* v. *Laird*, 400 U.S. 886 (1970); *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court simply denied *certiorari* in all cases on its discretionary docket.

have generally refused, on "political question" grounds to adjudicate the matter.[22] In the absence of judicial elucidation, the Congress and the President have been required to accommodate themselves in the controversy to accept from each other less than each has been willing to accept but more than either has been willing to grant.

## THE POWER TO RAISE AND MAINTAIN ARMED FORCES

### Purpose of Specific Grants

The clauses of the Constitution which give Congress authority to raise and support armies, and so forth, were not inserted to endow the national government rather than the States with the power to do these things but to designate the department of the Federal Government which would exercise the powers. As we have noted above, the English king was endowed with the power not only to initiate war but the power to raise and maintain armies and navies.[1] Aware historically that these powers had been utilized to the detriment of the liberties and well-being of Englishmen and aware that in the English Declaration of Rights of 1688 it was insisted that standing armies could not be maintained without the consent of Parliament, the Framers vested these basic powers in Congress.[2]

### Time Limit on Appropriations for the Army

Prompted by the fear of standing armies to which Story alluded, the framers inserted the limitation that "no appropriation of money to that use shall be for a longer term than two years." In 1904 the question arose whether this provision would be violated if the Government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments are likely to continue for more than two years. Solicitor-General Hoyt ruled that such a contract would be lawful; that the appropriations limited by the Constitution "are those only which are to raise and

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[22] E.g., *Velvel* v. *Johnson*, 287 F. Supp. 846 (D.C.D.Kan. 1968), *aff'd sub nom Velvel* v. *Nixon*, 415 F.2d 236 (C.A. 10, 1969), *cert. den.*, 396 U.S. 1042 (1970); *Luftig* v. *McNamara*, 252 F. Supp. 819 (D.C.D.C. 1966), *aff'd* 373 F.2d 664 (C.A.D.C. 1967), *cert. den.*, 389 U.S. 945 (1968); *Mora* v. *McNamara*, 387 F.2d 862 (C.A.D.C., 1967), *cert. den.*, 389 U.S. 934 (1968); *Orlando* v. *Laird*, 317 F. Supp. 1013 (D.C.E.D.N.Y. 1970), and *Berk* v. *Laird*, 317 F. Supp. 715 (D.C.E.D.N.Y. 1970), *consolidated and Aff'd*, 443 F.2d 1039 (C.A.2, 1971), *cert. den.*, 404 U.S. 869 (1971); *Massachusetts* v. *Laird*, 451 F.2d 26 (C.A. 1, 1971); *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (C.A. 2, 1973) *cert. den.*, 416 U.S. 936 (1974); *Mitchell* v. *Laird*, 488 F.2d 611 (C.A.D.C. 1973).

[1] W. Blackstone, *Commentaries*, St. G. Tucker ed. (Philadelphia: 1803), 263.

[2] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1187.

support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense. . . ." [3] Relying on this earlier opinion, Attorney General Clark ruled in 1948 that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended." [4]

**Conscription**

The constitutions adopted during the Revolutionary War by at least nine of the States sanctioned compulsory military service.[5] Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be enacted.[6] In 1863, a compulsory draft law was adopted and put into operation without being challenged in the federal courts.[7] Not so the Selective Service Act of 1917.[8] This measure was attacked on the grounds that it tended to deprive the States of the right to "a well-regulated militia," that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby.[9]

Before the United States entered the first World War, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the following words: "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was

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[3] 25 *Ops. Atty. Gen.* 105, 108 (1904).
[4] 40 *Ops. Atty. Gen.* 555 (1948).
[5] *Selective Draft Law Cases*, 245 U.S. 366, 380 (1918); *Cox* v. *Wood*, 247 U.S. 3 (1918).
[6] 245 U.S., 385.
[7] Id., 386–388. The measure was upheld by a state court. *Kneedler* v. *Lane*, 45 Pa. St. 238 (1863).
[8] Act of May 18, 1917, 40 Stat. 76.
[9] *Selective Draft Law Cases*, 245 U.S. 366, 381, 382 (1918).

not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." [10] Accordingly, in the *Selective Draft Law Cases*,[11] it dismissed the objection under that amendment as a contention that was "refuted by its mere statement." [12]

Although the Supreme Court has so far formally declined to pass on the question of the "peacetime" draft,[13] its opinions leave no doubt of the constitutional validity of the act. In *United States* v. *O'Brien*,[14] upholding a statute prohibiting the destruction of selective service registrants' certificate of registration, the Court, speaking through Chief Justice Warren, thought "[t]he power of Congress to classify and conscript manpower for military service is 'beyond question.'" [15] In noting Congress' "broad constitutional power" to raise and regulate armies and navies,[16] the Court has specifically observed that the conscription act was passed "pursuant to" the grant of authority to Congress in clauses 12-14.[17]

**Care of the Armed Forces**

Scope of the congressional and executive authority to prescribe the rules for the governance of the military is broad and subject to great deference by the judiciary. The Court recognizes "that the military is, by necessity, a specialized society separate from civilian society," that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than it is when prescribing rules for [civilian society]." [1] Denying that Congress or military au-

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[10] *Butler* v. *Perry*, 240 U.S. 328, 333 (1916).

[11] 245 U.S. 366 (1918).

[12] Id., 390.

[13] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451-473. Actual conscription has been precluded as of July 1, 1973, P.L. 92-129, 85 Stat. 353, 50 U.S.C. App. § 467(c), and registration was discontinued in 1975. Pres. Proc. No. 4360, 3 C.F.R. 462, 50 U.S.C. App. § 453 note. Registration, but not conscription, was reactivated in the wake of the invasion of Afghanistan. P.L. 96-282, 94 Stat. 552 (1980).

[14] 391 U.S. 367 (1968).

[15] Id., 377, quoting *Lichter* v. *United States*, 334 U.S. 742, 756 (1948).

[16] *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975).

[17] *Rostker* v. *Goldberg*, 453 U.S. 57, 59 (1981). *See* id., 64-65.

[1] *Parker* v. *Levy*, 417 U.S. 733, 743-752 (1974). *See also Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953); *Schlesinger* v. *Councilman*, 420 U.S. 738, 746-748 (1975); *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976); *Middendorf* v. *Henry*, 425 U.S. 25, 45-46 (1976); *Brown* v. *Glines*, 444 U.S. 348, 353-358 (1980); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-68 (1981).

thorities are free to disregard the Constitution when acting in this area,[2] the Court nonetheless operates with "a healthy deference to legislative and executive judgments" with respect to military affairs,[3] so that, while constitutional guarantees apply, "the different character of the military community and of the military mission requires a different application of those protections." [4]

In reliance upon this deference to congressional judgment with respect to the roles of the sexes in combat and the necessities of military mobilization, coupled with express congressional consideration of the precise questions, the Court sustained as constitutional the legislative judgment to provide only for registration of males for possible future conscription.[5] Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court upheld the validity of military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature and the distribution of literature without prior approval of post headquarters, with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base.[6] On the same basis, the Court rejected challenges on constitutional and statutory grounds to military regulations requiring servicemen to obtain approval from their commanders before circulating petitions on base, in the context of circulations of petitions for presentation to Congress.[7] And the statements of a military officer urging disobedience to certain orders could be punished under provisions that would have been of questionable validity in a civilian context.[8]

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall be received, the compensation he shall be allowed and the service to which he shall be as-

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[2] *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981).

[3] Id., 66. "[P]erhaps in no other area has the Court accorded Congress greater deference." Id., 64–65. *See also Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973

[4] *Parker* v. *Levy*, 417 U.S. 733, 758 (1974). "[T]he tests and limitations [of the Constitution] to be applied may differ because of the military context." *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981).

[5] *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). *Compare Frontiero* v. *Richardson*, 411 U.S. 677 (1973), *with Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

[6] *Greer* v. *Spock*, 424 U.S. 828 (1976), limiting *Flower* v. *United States*, 407 U.S. 197 (1972).

[7] *Brown* v. *Glines*, 444 U.S. 348 (1980); *Secretary of the Navy* v. *Huff*, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034, which protects a serviceman's right to communicate with a Member of Congress, but which the Court interpreted narrowly.

[8] *Parker* v. *Levy*, 417 U.S. 733 (1974).

signed. This power may be exerted to supersede parents' control of minor sons who are needed for military service. Where the statute which required the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of his mother was not binding on the Government.[9] Since the possession of government insurance payable to the person of his choice is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of state law, and may exempt the proceeds from the claims of creditors.[10] Likewise, Congress may bar a State from taxing the tangible, personal property of a soldier, assigned for duty therein, but domiciled elsewhere.[11] To safeguard the health and welfare of the armed forces, Congress may authorize the suppression of bordellos in the vicinity of the places where forces are stationed.[12]

### Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents

Under its power to make rules for the government and regulation of the armed forces, Congress has set up a system of criminal law binding on all servicemen, with its own substantive laws, its own courts and procedures, and its own appeals procedure.[1] The drafters of these congressional enactments conceived of a military justice system with application to all servicemen wherever they are, to reservists while on inactive duty training, and to certain civilians in special relationships to the military. In recent years, all these conceptions have been restricted.

***Servicemen.***—Although there is extensive disagreement about the practice of court-martial trial of servicemen for nonmilitary offenses in the past,[2] the matter never really was raised in substan-

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[9] *United States* v. *Williams*, 302 U.S. 46 (1937). *See also In re Grimley*, 137 U.S. 147, 153 (1890); *In re Morrissey*, 137 U.S. 157 (1890).

[10] *Wissner* v. *Wissner*, 338 U.S. 655 (1950); *Ridgway* v. *Ridgway*, 454 U.S. 46 (1981). In the absence of express congressional language, like that found in *Wissner*, the Court nonetheless held that a state court division under its community property system of an officer's military retirement benefits conflicted with the federal program and could not stand. *McCarty* v. *McCarty*, 453 U.S. 210 (1981). *See also Porter* v. *Aetna Casualty Co.*, 370 U.S. 159 (1962) (exemption from creditors' claims of disability benefits deposited by a veteran's guardian in a savings and loan association).

[11] *Dameron* v. *Brodhead*, 345 U.S. 322 (1953). *See also California* v. *Buzard*, 382 U.S. 386 (1966); *Sullivan* v. *United States*, 395 U.S. 169 (1969).

[12] *McKinley* v. *United States*, 249 U.S. 397 (1919).

[1] The Uniform Code of Military Justice of 1950, 64 Stat. 107, as amended by the Military Justice Act of 1968, 82 Stat. 1335, 10 U.S.C. § 801 *et seq.* For prior acts, *see* 12 Stat. 736 (1863); 39 Stat. 650 (1916).

[2] *Compare O'Callahan* v. *Parker*, 395 U.S. 258, 268-272 (1969) (majority opinion), *with* id., 276-280 (Justice Harlan dissenting). *See* Duke & Vogel, "The Constitution

tial degree until the Cold War period when the United States found it essential to maintain both at home and abroad a large standing army in which great numbers of servicemen were draftees. In *O'Callahan* v. *Parker*,[3] the Court held that court-martial jurisdiction was lacking to try servicemen charged with a crime which was not "service connected." The Court attempted to assay no definition of "service connection" but among the factors it noted were that the crime in question was committed against a civilian in peacetime in the United States off-base while lawfully off duty.[4] In a more recent decision, the Court unanimously extrapolated a list of factors relating to "service connection" and held court-martial jurisdiction existed with regard to crimes committed on-base against civilian dependents and employees of the military.[5]

With regard to trials before court-martials, it is not clear what provisions of the Bill of Rights and other constitutional guarantees do apply. The Fifth Amendment expressly excepts "[c]ases arising in the land and naval forces" from its grand jury provision and there is an implication that these cases are also excepted from the Sixth Amendment.[6] The double jeopardy provision of the Fifth Amendment appears to be applicable.[7] The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those expressly or by implication inapplicable to the military.[8] The Uniform Code of Military Justice, supplemented by

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and the Standing Army: Another Problem of Court-Martial Jurisdiction," 13 Vand. L. Rev. 435 (1960).

[3] 395 U.S. 258 (1969).

[4] Id., 273–274.

[5] *Relford* v. *Commandant*, 401 U.S. 355 (1971). In *Gosa* v. *Mayden*, 413 U.S. 665 (1973), in which a fractionated Court denied retroactive application to *O'Callahan*, two Justices urged the overruling of that case, id., 692, 693 (Justices Rehnquist and Stewart), and these two plus Justice Douglas indicated their view that any offense committed during wartime is service connected. Id., 686, 692, 693. The Court of Military Appeals has construed "service connection" quite broadly to reach much off-base activity. E.g., *United States* v. *Trottier*, 9 M. J. 337 (C.M.A. 1980); *Murray* v. *Haldeman*, 16 M. J. 74 (C.M.A. 1983); *United States* v. *Lockwood*, 15 M. J. 1 (C.M.A. 1983).

[6] *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 123, 138–139 (1866); *Ex parte Quirin*, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in *Middendorf* v. *Henry*, 425 U.S. 25 (1976).

[7] *See Wade* v. *Hunter*, 336 U.S. 684 (1949). *Cf. Grafton* v. *United States*, 206 U.S. 333 (1907).

[8] *United States* v. *Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *United States* v. *Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This conclusion by the Court of Military Appeals is at least questioned and perhaps disapproved in *Middendorf* v. *Henry*, 425 U.S. 25, 43–48 (1976), in the course of overturning a CMA rule that counsel was required in summary court-martial. For the CMA's response to the holding *see United States* v. *Booker*, 5 M. J. 238 (C.M.A. 1977), *rev'd in part on reh.*, 5 M. J. 246 (C.M.A. 1978).

the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures, so that many such issues are unlikely to arise absolutely necessitating constitutional analysis.[9] However, the Code leaves intact much of the criticized traditional structure of courts-martial, including the pervasive possibilities of command influence,[10] and the Court of Military Appeals is limited on the scope of its review,[11] thus creating areas in which constitutional challenges are likely.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society.[12] This difference has resulted in a military Code that regulates aspects of the conduct of members of the military which in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards.[13] Neither did application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, inasmuch as the speech was unprotected and even while it might reach protected speech the officer here was unable to raise that issue.[14]

Military courts are not Article III courts but agencies established pursuant to Article I.[15] It was established in the last century that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review.[16] The Supreme Court also held it had no jurisdiction to

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[9] The UCMJ guarantees counsel, protection from self-incrimination and double jeopardy, and warnings of rights prior to interrogation, to name a few.

[10] Cf. *O'Callahan* v. *Parker*, 395 U.S. 258, 263–264 (1969).

[11] 10 U.S.C. § 867.

[12] *Parker* v. *Levy*, 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman," and Article 134 punishes any person subject to the Code for "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

[13] Id., 756.

[14] Id., 757–761.

[15] *Kurtz* v. *Moffitt*, 115 U.S. 487 (1885); *Dynes* v. *Hoover*, 20 How. (61 U.S.) 65 (1858).

[16] *Dynes* v. *Hoover*, 20 How. (61 U.S.) 65 (1858).

review by writ of certiorari the proceedings of a military commission.[17] However, civil court review of court-martial decisions is possible through *habeas corpus* jurisdiction.[18] The Court severely limited the scope of such review, restricting it to the issue whether the court-martial has jurisdiction over the person tried and the offense charged.[19] But, in *Burns* v. *Wilson*,[20] at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on *habeas corpus* could review claims of denials of due process rights to which the military had not given full and fair consideration. Since *Burns*, the Court has thrown little light on the range of issues cognizable by a federal court in such litigation [21] and the lower federal courts have divided several possible ways.[22]

***Civilians and Dependents.***—In recent years, the Court has rejected the view of the drafters of the Code of Military Justice with regard to the persons which Congress may constitutionally reach under its clause 14 powers. Thus, it held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but must be charged in federal court, if at all.[23] After first leaning the other way,[24] the Court on rehearing found lacking court-martial jurisdiction, at least in peacetime, to try civilian dependents of servicemen for capital crimes committed outside the United States.[25] Subsequently, the Court extended its ruling to ci-

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[17] *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243 (1864).

[18] Cf. *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866); *Ex parte Yerger*, 8 Wall. (75 U.S.) 85 (1869); *Ex parte Reed*, 100 U.S. 13 (1879). While federal courts have jurisdiction to intervene in military court proceedings prior to judgment, as a matter of equity, following the standards applicable to federal court intervention in state criminal proceedings, they should act when the petitioner has not exhausted his military remedies only in extraordinary circumstances. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975).

[19] *Ex parte Reed*, 100 U.S. 13 (1879); *Swaim* v. *United States*, 165 U.S. 553 (1897); *Carter* v. *Roberts*, 177 U.S. 496 (1900); *Hiatt* v. *Brown*, 339 U.S. 103 (1950).

[20] 346 U.S. 137 (1953).

[21] *Cf. Fowler* v. *Wilkinson*, 353 U.S. 583 (1957); *United States* v. *Augenblick*, 393 U.S. 348, 350 n. 3, 351 (1969); *Parker* v. *Levy*, 417 U.S. 733 (1974); *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).

[22] E.g., *Calley* v. *Callaway*, 519 F. 2d 184, 194–203 (C.A.5, 1975) *(en banc)*, *cert. den.*, 425 U.S. 911 (1976).

[23] *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955). *See also Lee* v. *Madigan*, 385 U.S. 228 (1959).

[24] *Kinsella* v. *Krueger*, 351 U.S. 470 (1956); *Reid* v. *Covert*, 351 U.S. 487 (1956

[25] *Reid* v. *Covert*, 354 U.S. 1 (1957) (voiding court-martial convictions of two women for murdering their soldier husbands stationed in Japan). Chief Justice Warren and Justices Black, Douglas, and Brennan were of the opinion Congress' power under clause 14 could not reach civilians. Justices Frankfurter and Harlan concurred, limited to capital cases. Justices Clark and Burton dissented.

vilian dependents overseas charged with noncapital crimes [26] and to civilian employees of the military charged with either capital or noncapital crimes.[27]

## WAR LEGISLATION

### Revolutionary War Legislation

The American Revolution affords many precedents for extensive and detailed regulation of the nation's economy in time of war. But since the resolves of Congress under the Articles of Confederation were in practical effect mere recommendations to the state legislatures, it was the action of the latter which made these policies effective. On November 22, 1777, for example, Congress recommended to the States that they take steps "to regulate and ascertain the price of labour, manufactures, [and] internal produce." [1] A month later the same body further recommended "to the respective legislatures of the United States, forthwith to enact laws, appointing suitable persons to seize and take, for the use of the continental army of the said States, all woolen cloths, blankets, linens, shoes, stockings, hats, and other necessary articles of clothing. . . ." [2] Responding to such appeals, or acting on their own initiative, the state legislatures enacted measure after measure which entrenched upon the normal life of the community very drastically. Laws were passed forbidding the distillation of whiskey and other spirits in order to conserve grain supplies; [3] fixing prices of labor and commodities, sometimes in greatest detail; [4] levying requisitions upon the inhabitants for supplies needed by the army; [5] and so on. In one instance a statute authorized the erection of an arms manufactory for the United States; [6] in another, Negro slaves were im-

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[26] *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960) (voiding court-martial conviction for noncapital crime of wife of soldier husband overseas). The majority could see no reason for distinguishing between capital and noncapital crimes. Justices Harlan and Frankfurter dissented on the ground that in capital cases greater constitutional protection, available in civil courts, was required.

[27] *Grisham* v. *Hagan*, 361 U.S. 278 (1960); *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

[1] J. Clark, *Emergency Legislation Passed Prior to December 1917* (Washington: 1918), 211.

[2] Id., 214.

[3] Id., 250, 332, 380, 438, 497.

[4] Id., 420, 466, 535, 595, 636, 823. Many of these were soon suspended or repealed. Id., 458, 553, 601, 733.

[5] Id., 482, 543, 963, 969.

[6] Id., 916.

pressed for labor on fortifications.[7] The fact that all this legislation came from the state legislatures whereas the war power was attributed to the "United States in Congress assembled" served to obscure the fact that the former was really an outgrowth of the latter.

### Civil War Legislation

The most pressing economic problem of the Civil War was that of finance. When Congress found itself unable to raise money to pay the soldiers in the field, it authorized the issuance of Treasury notes which, although not redeemable in species, were made legal tender in payment of private debts. Upon its first consideration of this measure, the Supreme Court held it unconstitutional. It concluded that even if the circulation of such notes was facilitated by giving them the quality of legal tender, that result did not suffice to make the expedient an appropriate and plainly adapted means for the execution of the power to declare and carry on war.[8] Three of the seven Justices then constituting the Court dissented from this decision,[9] and it was reversed within a little more than a year, after two vacancies in the membership of the Court had been filled. One of the grounds relied upon by the new majority to sustain the statute was that the exigencies of war justified its enactment under the necessary and proper clause.[10]

### World War I Legislation

In meeting the strain which World War I put on our national resources of men and material, the economic activities of the people were directed or restricted by the Government on a scale previously unparalleled. The most sweeping measure of control was the Lever Food and Fuel Control Act,[11] which authorized the President to regulate by license the importation, manufacture, storage, mining or distribution of necessaries; to requisition foods, feeds, and fuels; to take over and operate factories, packinghouses, pipelines, mines or other plants; to fix a minimum price for wheat; to limit, regulate or prohibit the use of food materials in the production of alcoholic beverages; and to fix the price of coal and coke and to regulate the production, sale and distribution thereof. Other statutes clothed him with power to determine priority in car serv-

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[7] Id., 280.
[8] *Hepburn* v. *Griswold*, 8 Wall. (75 U.S.) 603, 617 (1870).
[9] Id., 626.
[10] *Legal Tender Cases (Knox* v. *Lee)*, 12 Wall. (79 U.S.) 457, 540 (1871).
[11] 40 Stat. 276 (1917).

ice,[12] to license trade with the enemy and his allies,[13] and to take over and operate the rail and water transportation system,[14] and the telephonic and telegraphic communication systems,[15] of the country.

**World War II Legislation**

Several of these World War I measures were still on the statute books when World War II broke out. Moreover, in the period of preparation preceding the latter, Congress had enacted the Priorities Act of May 31, 1941,[16] which gave the President the power to allocate any material where necessary to facilitate the defense effort. By the Second War Powers Act,[17] passed early in 1942, the authority to allocate materials was extended to facilities. These two acts furnished the statutory foundation for the extensive system of consumer rationing administered by the Office of Price Administration, as well as for the comprehensive control of industrial materials and output which was exercised by the War Production Board. Under the Emergency Price Control Act [18] the Office of Price Administration regulated the price of almost all commodities, as well as the rentals for housing accommodations in scores of defense rental areas. The War Labor Disputes Act [19] permitted the President to commandeer plants which were closed by strikes.

While the validity of several of the measures just reviewed was assailed on one constitutional ground or another, the general power of Congress to regulate their subject matter in time of war was not disputed. Not until the Government sought to recover excessive profits realized on war contracts did the Supreme Court have occasion to affirm the broad authority of the National Government to mobilize the industrial resources of the nation in time of war. Using the power of Congress to conscript men for the armed forces as a measure of its power to regulate industry, the Court sustained the legislation, saying: "The Renegotiation Act was developed as a major wartime policy of Congress comparable to that of the Selective Service Act. The authority of Congress to authorize each of them sprang from its war powers. . . . Both Acts were a form of mobilization. The language of the Constitution au-

[12] Id., 272.
[13] Id., 411.
[14] Id., 451 (1918).
[15] Id., 904.
[16] 55 Stat. 236 (1941).
[17] 56 Stat. 176 (1942).
[18] 56 Stat. 23 (1942).
[19] 57 Stat. 163 (1943).

thorizing such measures is broad rather than restrictive. . . . [It] places emphasis upon the supporting as well as upon the raising of armies. The power of Congress as to both is inescapably express, not merely implied." [20]

**War Powers in Peacetime**

To some indeterminate extent, the power to wage war embraces the power to prepare for it and the power to deal with the problems of adjustment following its cessation. Justice Story emphasized that "[i]t is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. . . . How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? . . . It will be in vain to oppose constitutional barriers to the impulse of self-preservation." [1] Authoritative judicial recognition of the power is found in *Ashwander* v. *Tennessee Valley Authority*,[2] in which the power of the Federal Government to construct and operate a dam and power plant, pursuant to the National Defense Act of June 3, 1916,[3] was sustained. The Court noted that the assurance of an abundant supply of electrical energy and of nitrates which would be produced at the site "constitute national defense assets" and the project was justifiable under the war powers.[4]

Perhaps the most significant example of legislation adopted pursuant to the war powers when no actual "shooting war" was in progress, with the object of strengthening national defense, was the Atomic Energy Act of 1946, establishing a body to oversee and further the research into and development of atomic energy for both military and civil purposes.[5] Congress has also authorized a vast amount of highway construction, pursuant to its conception of their "primary importance to the national defense," [6] and the first extensive program of federal financial assistance in the field of education was the National Defense Education Act.[7]

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[20] *Lichter* v. *United States*, 334 U.S. 742, 754–756 (1948). *See also United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 305 (1942); *Clallam County* v. *United States*, 263 U.S. 341 (1923); *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U.S. 549 (1922).

[1] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1180.

[2] 297 U.S. 288 (1936).

[3] 39 Stat. 166 (1916).

[4] 297 U.S., 327–328.

[5] 60 Stat. 755 (1946), 42 U.S.C. § 1801 *et seq.*

[6] § 108(a), 70 Stat. 374, 378 (1956), 23 U.S.C. § 101(b), naming the Interstate System the "National System of Interstate and Defense Highways."

[7] 72 Stat. 1580 (1958), as amended, codified to various sections of Titles 20 and 42.

The post-World War II years, though nominally peacetime, have constituted the era of the Cold War and the occasions for several armed conflicts, notably in Korea and Indochina, in which the Congress has enacted much legislation designed to strengthen national security, including an apparently permanent draft,[8] authorization of extensive space exploration,[9] authorization for wage and price controls,[10] and continued extension of the Renegotiation Act to recapture excess profits on defense contracts.[11] Additionally, the period saw extensive regulation of matter affecting individual rights, such as loyalty-security programs,[12] passport controls,[13] and limitations on members of the Communist Party and associated organizations,[14] all of which are dealt with in other sections.

A particular province of such legislation is that designed to effect a transition from war to peace. The war power "is not limited to victories in the field. . . . It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." [15] This principle was given a much broader application after the First World War in *Hamilton* v. *Kentucky Distilleries Co.*,[16] where the War Time Prohibition Act [17] adopted after the signing of the Armistice was upheld as an appropriate measure for increasing war efficiency. The Court was unable to conclude that the war emergency had passed with the cessation of hostilities.[18]

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[8] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451-473. Actual conscription has been precluded as of July 1, 1973, P. L. 92-129, 85 Stat. 353, 50 U. S. C. App. § 467(c), although registration for possible conscription is in effect. P. L. 96-282, 94 Stat. 552 (1980).

[9] National Aeronautics and Space Act of 1958, 72 Stat. 426, as amended, codified in various sections of Titles 5, 18, and 50.

[10] Title II of the Defense Production Act Amendments of 1970, 84 Stat. 799, as amended, provided temporary authority for wage and price controls, a power which the President subsequently exercised. E.O. 11615, 36 *Fed Reg.* 15727 (August 16, 1971). Subsequent legislation expanded the President's authority. 85 Stat. 743, 12 U.S.C. § 1904 note.

[11] Renegotiation Act of 1951, 65 Stat. 7, as amended, 50 U.S.C. App. § 1211 *et seq.*

[12] E.g., *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961); *Peters* v. *Hobby*, 349 U.S. 331 (1955).

[13] *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *United States* v. *Laub*, 385 U.S. 475 (1967).

[14] *United States* v. *Robel*, 389 U.S. 258 (1967); *United States* v. *Brown*, 381 U.S. 437 (1965).

[15] *Stewart* v. *Kahn*, 11 Wall. (78 U.S.) 493, 507 (1871) (sustaining a congressional deduction from a statute of limitations the period during which the Civil War prevented the bringing of an action). *See also Mayfield* v. *Richards*, 115 U.S. 137 (1885).

[16] 251 U.S. 146 (1919). *See also Ruppert* v. *Caffey*, 251 U.S. 264 (1920).

[17] Act of November 21, 1918, 40 Stat. 1046.

[18] 251 U.S., 163.

But in 1924, it held that a rent control law for the District of Columbia, which had been previously upheld,[19] had ceased to operate because the emergency which justified it had come to an end.[20]

A similar issue was presented after World War II in which the Court held that the authority of Congress to regulate rents by virtue of the war power did not end with the presidential proclamation terminating hostilities on December 31, 1946.[21] However, the Court cautioned that "[w]e recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision." [22]

In the same year, the Court sustained by only a five-to-four vote the Government's contention that the power which Congress had conferred upon the President to deport enemy aliens in times of a declared war was not exhausted when the shooting stopped.[23] "It is not for us to question," said Justice Frankfurter for the Court, "a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilites [sic] do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come." [24]

**Delegation of Legislative Power in Wartime**

The Court has insisted that in times of war as in times of peace "the respective branches of the Government keep within the power assigned to each," [1] thus raising the issue of permissible delegation, inasmuch as during a war Congress has been prone to delegate many more powers to the President than at other times.[2] But

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[19] *Block* v. *Hirsh*, 256 U.S. 135 (1921).

[20] *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924).

[21] *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948). *See also Fleming Mohawk Wrecking Co.*, 331 U.S. 111 (1947).

[22] 333 U.S., 143–144.

[23] *Ludecke* v. *Watkins*, 335 U.S. 160 (1948).

[24] Id., 170.

[1] *Lichter* v. *United States*, 334 U.S. 742, 779 (1948).

[2] For an extensive consideration of this subject in the context of the President's redelegation of it, *see* N. Grundstein, *Presidential Delegation of Authority in Wartime* (Pittsburgh: 1961).

the number of cases actually discussing the matter is few.[3] Two theories have been advanced at times when the delegation doctrine carried more of a force than it has in recent years. First, it is suggested that inasmuch as the war power is inherent in the Federal Government, and one shared by the legislative and executive branches, Congress does not really delegate *legislative* power when it authorizes the President to exercise the war power in a prescribed manner, a view which entirely overlooks the fact that the Constitution expressly vests the war power as a legislative power in Congress. Second, it is suggested that Congress' power to delegate in wartime is limited as in other situations but that the existence of a state of war is a factor weighing in favor of the validity of the delegation.

The first theory was fully stated by Justice Bradley in *Hamilton* v. *Dillin*,[4] upholding a levy imposed by the Secretary of the Treasury pursuant to an act of Congress. To the argument that the levy was a tax the fixing of which Congress could not delegate, Justice Bradley noted that the power exercised "does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government. . . ." [5]

Both theories found expression in different passages of Chief Justice Stone's opinion in *Hirabayashi* v. *United States*,[6] upholding executive imposition of a curfew on Japanese-Americans pursuant to legislative delegation. On the one hand, he spoke to Congress and the Executive, "acting in cooperation," to impose the curfew,[7] while on the other hand, he noted that a delegation in which Congress has determined the policy and the rule of conduct, leaving to the Executive the carry-out of the matter, is permissible delegation.[8]

A similar ambiguity is found in *Lichter* v. *United States*,[9] upholding the Renegotiation Act, but taken as a whole the Court there espoused the second theory. "The power [of delegation] is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to method to be employed may be essential to an effective use of its war powers by

[3] In the *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918), the objection was dismissed without discussion. The issue was decided by reference to peacetime precedents in *Yakus* v. *United States*, 321 U.S. 414, 424 (1944).

[4] 21 Wall. (88 U.S.) 73 (1875).

[5] Id., 96–97. *Cf. United States* v. *Chemical Foundation*, 272 U.S. 1 (1926).

[6] 320 U.S. 81 (1943).

[7] Id., 91–92, 104.

[8] Id., 104.

[9] 334 U.S. 742 (1948).

Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. . . . Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind." [10] The Court then examined the exigencies of war and concluded that the delegation was valid.[11]

## CONSTITUTIONAL RIGHTS IN WARTIME

### Constitution and the Advance of the Flag

***Theater of Military Operations.***—Military law to the exclusion of constitutional limitations otherwise applicable is the rule in the areas in which military operations are taking place. This view was assumed by all members of the Court in *Ex parte Milligan*,[1] in which the trial by a military commission of a civilian charged with disloyalty in a part of the country remote from the theater of military operations was held invalid. Although unanimous in the result, the Court divided five-to-four on the ground of decision. The point of disagreement was over which department of the Government had authority to say with finality what regions lie within the theater of military operations. The majority claimed this function for the courts and asserted that an area in which the civil courts were open and functioning does not; [2] the minority argued that the question was for Congress' determination.[3] The entire Court rejected the Government's contention that the President's determination was conclusive in the absence of restraining legislation.[4]

Similarly, in *Duncan* v. *Kahanamoku*,[5] the Court declared that the authority granted by Congress to the territorial governor of Hawaii to declare marital law under certain circumstances, which he exercised in the aftermath of the attack on Pearl Harbor, did not warrant the supplanting of civil courts with military tribunals and the trial of civilians for civilian crimes in these military tribunals at a time when no obstacle stood in the way of the operation of the civil courts, except, of course, the governor's order.

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[10] Id., 778–779, 782.
[11] Id., 778–783.
[1] 4 Wall. (71 U.S.) 2 (1866).
[2] Id., 127.
[3] Id., 132, 138.
[4] Id., 121, 139–142.
[5] 327 U.S. 304 (1946).

***Enemy Country.***—It has seemed reasonably clear that the Constitution does not follow the advancing troops into conquered territory. Persons in such territory have been held entirely beyond the reach of constitutional limitations and subject to the laws of war as interpreted and applied by the Congress and the President.[6] "What is the law which governs an army invading an enemy's country?" the Court asked in *Dow* v. *Johnson.*[7] "It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

These conclusions follow not only from the usual necessities of war but as well from the Court's doctrine that the Constitution is not automatically applicable in all territories acquired by the United States, the question turning upon whether Congress has made the area "incorporated" or "unincorporated" territory,[8] but in *Reid* v. *Covert,*[9] Justice Black in a plurality opinion of the Court asserted that wherever the United States acts it must do so only "in accordance with all the limitation imposed by the Constitution. . . . [C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as at home." [10] The case, however, involved the trial of a United States citizen abroad and the language quoted was not subscribed to by a majority of the Court; thus, it must be regarded as a questionable rejection of the previous line of cases.[11]

***Enemy Property.***—In *Brown* v. *United States,*[12] Chief Justice Marshall dealt definitively with the legal position of enemy property during wartime. He held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the United States, but the right of Congress by further action to subject such property to con-

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[6] *New Orleans* v. *The Steamship Co.*, 20 Wall. (87 U.S.) 387 (1874); *Santiago* v. *Nogueras*, 214 U.S. 260 (1909); *Madsen* v. *Kinsella*, 343 U.S. 341 (1952).

[7] 100 U.S. 158, 170 (1880).

[8] *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Dorr* v. *United States*, 195 U.S. 138 (1904).

[9] 354 U.S. 1 (1957).

[10] Id., 6, 7.

[11] For a comprehensive treatment, preceding *Reid* v. *Covert*, of the matter in the context of the post-War war crimes trials, *see* Fairman, "Some New Problems of the Constitution Following the Flag," 1 Stan. L. Rev. 587 (1949).

[12] 8 Cr. (12 U.S.) 110 (1814). *See also Conrad* v. *Waples*, 96 U.S. 279 (1878).

fiscation was asserted in the most positive terms. As an exercise of the war power, such confiscation was held not subject to the restrictions of the Fifth and Sixth Amendment. Since such confiscation is unrelated to the personal guilt of the owner, it is immaterial whether the property belongs to an alien, a neutral, or even to a citizen. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within the reach of his power, whether within his territory or outside it, impairs his ability to resist the confiscating government while at the same time it furnishes to that government means for carrying on the war.[13]

***Prizes of War.***—The power of Congress with respect to prizes is plenary; no one can have any interest in prizes captured except by permission of Congress.[14] Nevertheless, since international law is a part of our law, the Court will administer it so long as it has not been modified by treaty or by legislative or executive action. Thus, during the Civil War, the Court found that the Confiscation Act of 1861, and the Supplementary Act of 1863, which, in authorizing the condemnation of vessels, made provision for the protection of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize. It decided, therefore, that when a vessel was liable to condemnation under either law, the Government was at liberty to proceed under the most stringent rules of international law, with the result that the citizen would be deprived of the benefit of the protective provisions of the statute.[15] Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held, over the vigorous dissent of three of its members, that the rule of international law exempting unarmed fishing vessels from capture was applicable in the absence of any treaty provision, or other public act of the Government in relation to the subject.[16]

### The Constitution at Home in Wartime

***Personal Liberty.***—"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and

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[13] *Miller* v. *United States*, 11 Wall. (78 U.S.) 268 (1871); *Steehr* v. *Wallace*, 255 U.S. 239 (1921); *Central Trust Co.* v. *Garvan*, 254 U.S. 554 (1921); *United States* v. *Chemical Foundation*, 272 U.S. 1 (1926); *Silesian-American Corp.* v. *Clark*, 332 U.S. 469 (1947); *Cities Service Co.* v. *McGrath*, 342 U.S. 330 (1952); *Handelsbureau La Mola* v. *Kennedy*, 370 U.S. 940 (1962); *cf. Honda* v. *Clark*, 386 U.S. 484 (1967).

[14] *The Siren*, 13 Wall. (80 U.S.) 389 (1871).

[15] *The Hampton*, 5 Wall. (72 U.S.) 372, 376 (1867).

[16] *The Paquete Habana*, 175 U.S. 677, 700, 711 (1900).

under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." [1]

*Ex parte Milligan*, from which these words are quoted, is justly deemed one of the great cases undergirding civil liberty in this country in times of war or other great crisis, holding that except in areas in which armed hostilities have made enforcement of civil law impossible constitutional rights may not be suspended and civilians subjected to the vagaries of military justice. Yet, the words were uttered after the cessation of hostilities and the Justices themselves recognized that with the end of the shooting there arose the greater likelihood that constitutional rights could be and would be observed and that the Court would require the observance.[2] This pattern recurs with each critical period.

That the power of Congress to punish seditious utterances in wartime is limited by the First Amendment was assumed by the Court in a series of cases [3] in which it nonetheless affirmed conviction for violations of the Espionage Act of 1917.[4] The Court also upheld a state law making it an offense for persons to advocate that citizens of the State should refuse to assist in prosecuting war against enemies of the United States.[5] Justice Holmes matter-of-factly stated the essence of the pattern which we have mentioned. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." [6]

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[1] *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 120–121 (1866).

[2] "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which were happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment." Id., 109 (emphasis by Court).

[3] *Schneck* v. *United States*, 249 U.S. 47 (1919); *Debs* v. *United States*, 249 U.S. 211 (1919); *Surgarman* v. *United States*, 249 U.S. 182 (1919); *Frohwerk* v. *United States*, 249 U.S. 204 (1919); *Abrams* v. *United States*, 250 U.S. 616 (1919).

[4] 40 Stat. 217 (1917), as amended by 40 Stat. 553 (1918).

[5] *Gilbert* v. *Minnesota*, 254 U.S. 325 (1920).

[6] *Schenck* v. *United States*, 249 U.S. 47, 52 (1919).

By far, the most dramatic restraint of personal liberty imposed during World War II was the detention and relocation of the Japanese residents of the Western States, including those who were native-born citizens of the United States. When various phases of this program were challenged, the Court held that in order to prevent espionage and sabotage, the authorities could restrict the movement of these persons by a curfew order,[7] even by a regulation excluding them from defined areas,[8] but that a citizen of Japanese ancestry whose loyalty was conceded could not be detained in a relocation camp.[9]

A mixed pattern emerges from an examination of the Cold War period. Legislation designed to regulate and punish the organizational activities of the Communist Party and its adherents was at first upheld [10] and then in a series of cases was practically vitiated.[11] Against a contention that Congress' war powers had been utilized to achieve the result, the Court struck down for the second time in history a congressional statute as an infringement of the First Amendment.[12] It voided a law making it illegal for any member of a "communist-action organization" to work in a defense facility.[13] The majority reasoned that the law overbroadly required a person to choose between his First Amendment-protected right of association and his right to hold a job, without attempting to distinguish between those persons who constituted a threat and those who did not.[14]

On the other hand, in *New York Times Co.* v. *United States*,[15] a majority of the Court agreed that in appropriate circumstances the First Amendment would not preclude a prior restraint of publication of information which might result in a sufficient degree of harm to the national interest, although a different majority con-

[7] *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

[8] *Korematsu* v. *United States*, 323 U.S. 214 (1944).

[9] *Ex parte Endo*, 323 U.S. 283 (1944).

[10] E.g., *Dennis* v. *United States*, 341 U.S. 494 (1951); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961); *American Communications Association* v. *Douds*, 339 U.S. 382 (1950).

[11] E.g., *Yates* v. *United States*, 354 U.S. 298 (1957); *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965); *United States* v. *Brown*, 381 U.S. 437 (1965).

[12] *United States* v. *Robel*, 389 U.S. 258 (1967); *cf. Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). *And see Schneider* v. *Smith*, 390 U.S. 17 (1968).

[13] § 5(a)(1)(D) of the Subversive Control Act of 1950, 64 Stat 992, 50 U.S.C. § 784(a)(1)(D).

[14] 389 U.S., 264–266. Justices Harlan and White dissented, contending that the right of association should have been balanced against the public interest and finding the weight of the latter the greater. Id., 282.

[15] 403 U.S. 713 (1971).

curred in denying the Government's request for an injunction in that case.[16]

***Enemy Aliens.***—The Alien Enemy Act of 1798 authorized the President to deport any alien or to license him to reside within the United States at any place to be designated by the President.[17] Though critical of the measure, many persons conceded its constitutionality on the theory that Congress' power to declare war carried with it the power to treat the citizens of a foreign power against which war has been declared as enemies entitled to summary justice.[18] A similar statute was enacted during World War I[19] and was held valid in *Ludecke* v. *Watkins.*[20]

During World War II, the Court unanimously upheld the power of the President to order to trial before a military tribunal German saboteurs captured within this Country.[21] Enemy combatants, said Chief Justice Stone, who without uniforms come secretly through the lines during time of war, for the purpose of committing hostile acts, are not entitled to the status of prisoners of war but are unlawful combatants punishable by military tribunals.

***Eminent Domain.***—An often-cited dictum uttered shortly after the Mexican War asserted the right of an owner to compensation for property destroyed to prevent its falling into the hands of the enemy, or for that taken for public use.[22] In *United States* v. *Russell,*[23] decided following the Civil War, a similar conclusion was based squarely on the Fifth Amendment, although the case did not necessarily involve the point. Finally, in *United States* v. *Pacific Railroad,*[24] also a Civil War case, the Court held that the United States was not responsible for the injury or destruction of private property by military operations, but added that it did not have in mind claims for property of loyal citizens which was taken for the use of the national forces. "In such cases," the Court said, "it has been the practice of the government to make compensation for the property taken. . . . although the seizure and appropriation of pri-

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[16] The result in the case was reached by a six-to-three majority. The three dissenters, Chief Justice Burger, id., 748, Justice Harlan, id., 752, and Justice Blackmun, id., 759, would have granted an injunction in the case; Justices Stewart and White, id., 727, 730, would not in that case but could conceive of cases in which they would.

[17] 1 Stat. 577 (1798).

[18] 6 *Writing of James Madison,* G. Hunt ed. (New York: 1904), 360–361.

[19] 40 Stat. 531 (1918), 50 U.S.C. § 21.

[20] 335 U.S. 160 (1948).

[21] *Ex parte Quirin,* 317 U.S. 1 (1942).

[22] *Mitchell* v. *Harmony,* 13 How. (54 U.S.) 115, 134 (1852).

[23] 13 Wall. (80 U.S.) 623, 627 (1871).

[24] 120 U.S. 227 (1887).

vate property under such circumstances by the military authorities may not be within the terms of the constitutional clauses." [25]

Meantime, however, in 1874, a committee of the House of Representatives, in an elaborate report on war claims growing out of the Civil War, had voiced the opinion that the Fifth Amendment embodies the distinction between a taking of property in the course of military operations or other urgent military necessity, and other takings for war purposes, and required compensation of owners in the latter class of cases.[1] In determining what constitutes just compensation for property requisitioned for war purposes during World War II, the Court has assumed that the Fifth Amendment is applicable to such takings.[2] But as to property seized and destroyed to prevent its use by the enemy, it has relied on the principle enunciated in *United States* v. *Pacific Railroad* as justification for the conclusion that owners thereof are not entitled to compensation.[3]

***Rent and Price Controls.***—Even at a time when the Court was utilizing substantive due process to void economic regulations, it generally sustained such regulations in wartime. Thus, shortly following the end of World War I, it sustained, by a narrow margin, a rent control law for the District of Columbia, which not only limited permissible rent increases but also permitted existing tenants to continue in occupancy provided they paid rent and observed other stipulated conditions.[4] Justice Holmes for the majority conceded in effect that in the absence of a war emergency the legislation might transcend constitutional limitations [5] but noted that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation." [6]

During World War II and thereafter, economic controls were uniformly sustained.[7] An apartment house owner who complained

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[25] Id., 239.

[1] H.R. Rept. No. 262, 43d Cong., 1st Sess. (1874), 39–40.

[2] *United States* v. *Commodities Trading Corp.*, 339 U.S. 121 (1950); *United States* v. *Toronto Nav. Co.*, 338 U.S. 396 (1949); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *Cors*, 337 U.S. 325 (1949); *United States v. Felin & Co.*, 334 U.S. 624 (1948); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945).

[3] *United States* v. *Caltex, Inc.*, 344 U.S. 149, 154 (1952). Justices Douglas and Black dissented.

[4] *Block* v. *Hirsh*, 256 U.S. 135 (1921).

[5] But *quaere* in the light of *Nebbia* v. *New York*, 291 U.S. 502 (1934), *Olsen* v. *Nebraska ex rel. Western Reference and Bond Association*, 313 U.S. 236 (1941), and their progeny.

[6] *Block* v. *Hirsh*, 256 U.S. 135, 156 (1921).

[7] *Yakus* v. *United States*, 321 U.S. 414 (1944); *Bowles* v. *Willingham*, 321 U.S. 503 (1944); *Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947); *Lichter* v. *United States*, 334 U.S. 742 (1948).

that he was not allowed a "fair return" on the property was dismissed with the observation that "a nation which can demand the lives of its men and women in the waging of . . . war is under no constitutional necessity of providing a system of price control . . . which will assure each landlord a 'fair return' on his property." [8] The Court also held that rental ceilings could be established without a prior hearing when the exigencies of national security precluded the delay which would ensue.[9]

But in another World War I case, the Court struck down a statute which penalized the making of "any unjust or unreasonable rate or charge in handling . . . any necessaries" [10] as repugnant to the Fifth and Sixth Amendments in that it was so vague and indefinite that it denied due process and failed to give adequate notice of what acts would violate it.[11]

Clause 15. *The Congress shall have Power* * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Clause 16. *The Congress shall have Power* * * * To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militi according to the discipline prescribed by Congress.

## THE MILITIA CLAUSE

### Calling Out the Militia

The States as well as Congress may prescribe penalties for failure to obey the President's call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1] The Federal Government may call out the mi-

[8] *Bowles* v. *Willingham*, 321 U.S. 503, 519 (1944).

[9] Id., 521. The Court stressed, however, that Congress had provided for judicial review after the regulations and orders were made effective.

[10] Act of October 22, 1919, § 2, 41 Stat. 297.

[11] *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

[1] *Moore* v. *Houston*, 3 S. & R. (Pa.) 169 (1817), *affirmed*, *Houston* v. *Moore*, 5 Wheat. (18 U.S.) 1 (1820).

litia in case of civil war; its authority to suppress rebellion is found in the power to suppress insurrection and to carry on war.[2] The act of February 28, 1795,[3] which delegated to the President the power to call out the militia, was held constitutional.[4] A militiaman who refused to obey such a call was not "employed in the service of the United States so as to be subject to the article of war," but was liable to be tried for disobedience of the act of 1795.[5]

**Regulation of the Militia**

The power of Congress over the militia "being unlimited, except in the two particulars of officering and training them . . . it may be exercised to any extent that may be deemed necessary by Congress. . . . The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government . . ." [1] Under the National Defense Act of 1916,[2] the militia, which hitherto had been an almost purely state institution, was brought under the control of the National Government. The term "militia of the United States" was defined to comprehend "all able-bodied male citizens of the United States and all other able-bodied males who have . . . declared their intention to become citizens of the United States," between the ages of eighteen and forty-five. The act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," limited the appointment of officers to those who "shall have successfully passed such tests as to . . . physical, moral and professional fitness as the President shall prescribe," and authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, and all mem-

[2] *Texas* v. *White*, 7 Wall. (74 U.S.) 700 (1869); *Tyler* v. *Defrees*, 11 Wall. (78 U.S.) 331 (1871).

[3] 1 Stat. 424 (1795), 10 U.S.C. § 332.

[4] *Martin* v. *Mott*, 12 Wheat. (25 U.S.) 19, 32 (1827).

[5] *Houston* v. *Moore*, 5 Wheat. (18 U.S.) 1 (1820); *Martin* v. *Mott*, 12 Wheat. (25 U.S.) 19 (1827).

[1] *Houston* v. *Moore*, 5 Wheat. (18 U.S.) 1, 16 (1820). Organizing and providing for the militia being constitutionally committed to Congress and statutorily shared with the Executive, the judiciary is precluded from exercising oversight over the process, *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages. *Scheuer* v. *Rhodes*, 416 U.S. 233 (1974).

[2] 39 Stat. 166, 197, 198, 200, 202, 211 (1916), codified in sections of Titles 10 & 32. *See* Wiener, "The Militia Clause of the Constitution," 54 Harv. L. Rev. 181 (1940).

bers of the National Guard and National Guard Reserve," who thereupon should "stand discharged from the militia." [3]

Clause 17. *Congress shall have power* * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

### SEAT OF THE GOVERNMENT

The Convention was moved to provide for the creation of a site in which to locate the Capital of the Nation, completely removed from the control of any State, because of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, physically threatened and verbally abused the members, and caused the Congress to flee the City when neither municipal nor state authorities would take action to protect the members.[1] Thus, Madison noted that "[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it. . . . Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." [2]

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[3] Military and civilian personnel of the National Guard are state, rather than federal, employees and the Federal Government is thus not liable under the Tort Claims Act for their negligence. *Maryland* v. *United States*, 381 U.S. 41 (1965).

[1] J. Fiske, *The Critical Period of American History*, 1783–1789 (Boston: 1888), 112–113; W. Tindall, *The Origin and Government of the District of Columbia* (Washington: 1903), 31–36.

[2] *The Federalist* No. 43 (Modern Library ed. 1937), 279. *See also* 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 1213, 1214.

The actual site was selected by compromise, Northerners accepting the Southern-favored site on the Potomac in return for Southern support for a Northern aspiration, assumption of Revolutionary War debts by the National Government.[3] Maryland and Virginia both authorized the cession of territory [4] and Congress accepted.[5] Congress divided the District into two counties, Washington and Alexandria, and provided that the local laws of the two States should continue in effect.[6] It also established a circuit court and provided for the appointment of judicial and law enforcement officials.[7]

There seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District.[8] Madison in *The Federalist* did assume that the inhabitants "will have had their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed them. . . ." [9] Although there was some dispute about the constitutional propriety of permitting local residents a measure of "home rule," to use the recent term,[10] almost from the first there

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[3] W. Tindall, *The Origin and Government of the District of Columbia* (Washington: 1903), 5–30.

[4] Maryland Laws 1798, ch. 2, p. 46; 13 Laws of Virginia 43 (Hening 1789).

[5] Act of July 16, 1790, 1 Stat. 130. In 1846, Congress authorized a referendum in Alexandria County on the question of retroceding that portion to Virginia. The voters approved and the area again became part of Virginia. Laws of Virginia 1845–46, c. 64, p. 50; Act of July 9, 1846, 9 Stat. 35; Proclamation of September 7, 1846; 9 Stat. 1000. Constitutional questions were raised about the retrocession but suit did not reach the Supreme Court until some 40 years later and the Court held that the passage of time precluded the raising of the question. *Phillips* v. *Payne*, 92 U.S. 130 (1875).

[6] Act of February 27, 1801, § 2, 2 Stat. 103. The declaration of the continuing effect of state law meant that law in the District was frozen as of the date of cession, unless Congress should change it, which it seldom did. For some of the problems, *see Tayloe* v. *Thompson*, 5 Pet. (30 U.S.) 358 (1831); *Ex parte Watkins*, 7 Pet. (32 U.S.) 568 (1833); *Stelle* v. *Carroll*, 12 Pet. (37 U.S.) 201 (1838); *Van Ness* v. *United States Bank*, 13 Pet. (38 U.S.) 17 (1839); *United States* v. *Eliason*, 16 Pet. (41 U.S.) 291 (1842).

[7] Act of March 3, 1801, § 1, 2 Stat. 115.

[8] The objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place. 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 1215, 1216.

[9] *The Federalist* No. 43 (Modern Library ed. 1937), 280.

[10] Such a contention was cited and rebutted in 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1218.

were local elections provided for. In 1802, the District was divided into five divisions, in some of which the governing officials were elected; an elected mayor was provided in 1820. District residents elected some of those who governed them until this form of government was swept away in the aftermath of financial scandals in 1874 [11] and replaced with presidentially appointed Commission in 1878.[12] The Commission lasted until 1967 when it was replaced by an appointed Mayor-Commissioner and an appointed city council.[13] In recent years, Congress provided for a limited form of self-government in the District, with the major offices filled by election.[14] District residents vote for President and Vice President,[15] elect a nonvoting delegate to Congress,[16] and may receive voting representation in the House and Senate.[17]

Constitutionally, it appears that Congress is neither required to provide for a locally elected government [18] nor precluded from delegating its powers over the District to an elective local government.[19] The Court has indicated that the "exclusive" jurisdiction granted was meant to exclude any question of state power over the area and was not intended to require Congress to exercise all powers itself.[20]

Chief Justice Marshall for the Court held in *Hepburn* v. *Ellzey* [21] that the District of Columbia was not a State within the

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[11] Act of May 3, 1802, 2 Stat. 195; Act of May 15, 1820, 3 Stat. 583; Act of February 21, 1871, 16 Stat. 419; Act of June 20, 1874, 18 Stat. 116. The engrossing story of the postwar changes in the government is related in W. Whyte, *The Uncivil War: Washington During the Reconstruction* (Washington: 1958).

[12] Act of June 11, 1878, 20 Stat. 103.

[13] Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11699, reprinted as appendix to District of Columbia Code, Title I.

[14] District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 774.

[15] Twenty-third Amendment.

[16] P.L. 91-405, 84 Stat. 848, D.C. Code, § 1-291.

[17] H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978.

[18] *Loughborough* v. *Blake*, 5 Wheat. (18 U.S.) 317 (1820); *Heald* v. *District of Columbia*, 259 U.S. 114 (1922).

[19] *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953). The case upheld the validity of ordinances enacted by the District governing bodies in 1872 and 1873 prohibiting racial discrimination in places of public accommodations.

[20] Id., 109-110. *See also Thompson* v. *Lessee of Carroll*, 22 How. (63 U.S.) 422 (1860); *Stoutenburgh* v. *Hennick*, 129 U.S. 141 (1889).

[21] 2 Cr. (6 U.S.) 445 (1805); *see also Sere* v. *Pitot*, 6 Cf. (10 U.S.) 332 (1810); *New Orleans* v. *Winter*, 1 Wheat. (14 U.S.) 91 (1816). The District was held to be a State within the terms of a treaty. *Geofroy* v. *Riggs*, 133 U.S. 258 (1890).

meaning of the diversity jurisdiction clause of Article III. This view, adhered to for nearly a century and a half,[22] was overturned by the Court in 1949 upholding the constitutionality of a 1940 statute authorizing federal courts to take jurisdiction of nonfederal controversies between residents of the District of Columbia and the citizens of a State.[23] The decision was by a five to four division but the five in the majority disagreed among themselves on the reasons. Three thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia pursuant to this clause without regard to Article III.[24] Two others thought that *Hepburn* v. *Ellzey* had been erroneously decided and would have overruled it.[25] But six Justices rejected the former rationale and seven Justices rejected the latter one; since five Justices agreed, however, that the statute was constitutional, it was sustained.

It is not disputed that the District is a part of the United States and that its residents are entitled to all the guarantees of the United States Constitution including the privilege of trial by jury [1] and of presentment by a grand jury.[2] Legislation which is restrictive of liberty and property in the District must find justification in facts adequate to support like legislation by a State in the exercise of its police power.[3]

Congress possesses over the District of Columbia the blended powers of a local and national legislature.[4] This fact means that in some respects ordinary constitutional restrictions do not operate; thus, for example, in creating local courts of local jurisdiction in the District Congress acts pursuant to its legislative powers under clause 17 and need not create courts which comply with Article III court requirements.[5] And when legislating for the District Con-

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[22] *Barney* v. *City of Baltimore*, 6 Wall. (73 U.S.) 280 (1868); *Hooe* v. *Jamieson*, 166 U.S. 395 (1897); *Hooe* v. *Werner*, 166 U.S. 399 (1897).

[23] *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949).

[24] Id., 588–600 (Justices Jackson, Black and Burton).

[25] Id., 604 (Justices Rutledge and Murphy). The dissents were by Chief Justice Vinson, id., 626, joined by Justice Douglas, and by Justice Frankfurter, id., 646, joined by Justice Reed.

[1] *Callan* v. *Wilson*, 127 U.S. 540 (1888); *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899).

[2] *United States* v. *Moreland*, 258 U.S. 433 (1922).

[3] *Wright* v. *Davidson*, 181 U.S. 371, 384 (1901); cf. *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), overruled in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

[4] *Kendall* v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 619 (1838); *Shoemaker* v. *United States*, 147 U.S. 282, 300 (1893); *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435 (1932); *O'Donoghue* v. *United States*, 289 U.S. 516, 518 (1983).

[5] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91-358, § 111, 84 Stat. 475, D.C. Code, § 11-101, Congress specifically declared it

gress remains the legislature of the Union, so that it may give its enactments nationwide operation to the extent necessary to make them locally effective.[6]

## AUTHORITY OVER PLACES PURCHASED

### "Places"

This clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government.[1] It includes post offices,[2] a hospital and a hotel located in a national park,[3] and locks and dams for the improvement of navigation.[4] But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control.[5] Nevertheless, the Supreme Court has held that a State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a State, for purposes other than those enumerated in clause 17.[6]

After exclusive jurisdiction over lands within a State has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory.[7] Private property located thereon is not subject to taxation by the State,[8] nor can state statutes enacted subsequent to the transfer have any operation therein.[9] But the local laws in force at the date of cession which

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was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The Article I courts were sustained in *Palmore* v. *United States*, 411 U.S. 389 (1973). *See also Swain* v. *Pressley*, 430 U.S. 372 (1977). The latter, federal courts, while Article III courts, traditionally have had some non-Article III functions imposed on them, under the "hybrid" theory announced in *O'Donoghue* v. *United States*, 289 U.S. 516 (1933). E.g., *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.C.D.C. 1967), *app. dismd.*, 393 U.S. 801 (1968) (power then vested in District Court to appoint school board members). *See also Keller* v. *Potomac Electric Co.*, 261 U.S. 428 (1923); *Embry* v. *Palmer*, 107 U.S. 3 (1883).

[6] *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 428 (1821).

[1] *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 143 (1937).

[2] *Battle* v. *United States*, 209 U.S. 36 (1908).

[3] *Arlington Hotel* v. *Fant*, 278 U.S. 439 (1929).

[4] *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 143 (1937).

[5] *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 530 (1938).

[6] Id., 528.

[7] *Battle* v. *United States*, 209 U.S. 36 (1908); *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383 (1944); *Bowen* v. *Johnston*, 306 U.S. 19 (1939).

[8] *Surplus Trading Co.* v. *Cook*, 281 U.S. 647 (1930).

[9] *Western Union Telegraph Co.* v. *Chiles*, 214 U.S. 274 (1909); *Arlington Hotel* v. *Fant*, 278 U.S. 439 (1929); *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285 (1943). The Assimilative Crimes Act of 1948, 18 U.S.C. § 13, making applicable to a federal enclave a subsequently enacted criminal law of the State in which the enclave is situated entails no invalid delegation of legislative power to the State. *United States* v. *Sharpnack*, 355 U.S. 286, 294, 296–297 (1958).

are protective of private rights continue in force until abrogated by Congress.[10] Moreover, as long as there is no interference with the exclusive jurisdiction of the United States, an area subject thereto may be annexed by a municipality.[11]

**Duration of Federal Jurisdiction**

A State may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes.[1] Such a provision operates prospectively and does not except from the grant that portion of a described tract which is then used as a railroad right of way.[2] In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the State had ceded jurisdiction only over such portions of the area as were used for military purposes and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the Court to inquire into the actual uses to which any portion of the area was temporarily put.[3] A few years later, however, it ruled that the lease to a city, for use as a market, of a portion of an area which had been ceded to the United States for a particular purpose, suspended the exclusive jurisdiction of the United States.[4]

The question arose whether the United States retains jurisdiction over a place which was ceded to it unconditionally after it has abandoned the use of the property for governmental purposes and entered into a contract for the sale thereof to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in such land, and the Supreme Court upheld its right to do so. The majority assumed that "the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power." [5] In separate concurring opinions

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[10] *Chicago, R. I. & P. Ry. Co.* v. *McGlinn*, 114 U.S. 542, 545 (1885); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940).

[11] *Howard* v. *Commissioners*, 344 U.S. 624 (1953). As *Howard* recognized, such areas of federal property do not cease to be part of the State in which they are located and the residents of the areas are for most purposes residents of the State. Thus, a State may not constitutionally exclude such residents from the privileges of suffrage if they are otherwise qualified. *Evans* v. *Cornman*, 398 U.S. 419 (1970).

[1] *Palmer* v. *Barrett*, 162 U.S. 399 (1896).

[2] *United States* v. *Unzeuta*, 281 U.S. 138 (1930).

[3] *Benson* v. *United States*, 146 U.S. 325, 331 (1892).

[4] *Palmer* v. *Barrett*, 162 U.S. 399 (1896).

[5] *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 564 (1946).

Chief Justice Stone and Justice Frankfurter reserved judgment on the question of territorial jurisdiction.[6]

**Reservation of Jurisdiction by States**

For more than a century the Supreme Court kept alive, by repeated dicta,[1] the doubt expressed by Justice Story "whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void." [2] But when the issue was squarely presented in 1937, the Court ruled that where the United States purchases property within a State with the consent of the latter, it is valid for the State to convey, and for the United States to accept, "concurrent jurisdiction" over such land, the State reserving to itself the right to execute process "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States." [3] The holding logically renders the second half of clause 17 superfluous. In a companion case, the Court ruled further that even if a general state statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.[4]

Clause 18. *The Congress shall have Power* * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

## COEFFICIENT OR ELASTIC CLAUSE

**Scope of Incidental Powers**

That this clause is an enlargement, not a constriction, of the powers expressly granted to Congress, that it enables the lawmak-

[6] Id., 570, 571.

[1] *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 532 (1885); *United States* v. *Unzeuta*, 281 U.S. 138, 142 (1930); *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652 (1930).

[2] *United States* v. *Cornell*, 25 Fed. Cas. 646, 649 (No. 14,867) (C.C.D.R.I. 1819).

[3] *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 145 (1937).

[4] *Mason Co.* v. *Tax Comm.* 302 U.S. 186 (1937). *See also Atkinson* v. *Tax Comm.*, 303 U.S. 20 (1938).

ers to select any means reasonably adapted to effectuate those powers, was established by Marshall's classic opinion in *McCulloch* v. *Maryland*.[1] "Let the end be legitimate," he wrote, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." [2] Moreover, the provision gives Congress a share in the responsibilities lodged in other departments, by virtue of its right to enact legislation necessary to carry into execution all powers vested in the National Government. Conversely, where necessary for the efficient execution of its own powers, Congress may delegate some measure of legislative power to other departments.[3]

**Operation of Coefficient Clause**

Practically every power of the National Government has been expanded in some degree by the coefficient clause. Under its authority Congress has adopted measures requisite to discharge the treaty obligations of the nation;[4] it has organized the federal judicial system and has enacted a large body of law defining and punishing crimes. Effective control of the national economy has been made possible by the authority to regulate the internal commerce of a State to the extent necessary to protect and promote interstate commerce.[5] The right of Congress to utilize all known and appropriate means for collecting the revenue, including the distraint of property for federal taxes,[6] and its power to acquire property needed for the operation of the Government by the exercise of the power of eminent domain,[7] have greatly extended the range of national power. But the widest application of the necessary and proper clause has occurred in the field of monetary and fiscal controls. Inasmuch as the various specific powers granted by Article I, section 8, do not add up to a general legislative power over such

[1] 4 Wheat. (17 U.S.) 316 (1819).

[2] Id., 420. This decision had been clearly foreshadowed fourteen years earlier by Marshall's opinion in *United States* v. *Fisher*, 2 Cr. (6 U.S.) 358, 396 (1805). Upholding an act which gave priority to claims of the United States against the estate of a bankrupt he wrote: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittance, by bills or otherwise, and to take those precautions which will render the transaction safe."

[3] *Supra*, pp. 69–85.

[4] *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901). *See also Missouri* v. *Holland*, 252 U.S. 416 (1920).

[5] *Supra*, pp. 158–159, 197–200.

[6] *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U.S. 272, 281 (1856).

[7] *Kohl* v. *United States*, 91 U.S. 367, 373 (1876); *United States* v. *Fox*, 94 U.S. 315, 320 (1877).

matters, the Court has relied heavily upon this clause in sustaining the comprehensive control which Congress has asserted over this subject.[8]

**Definition of Punishment and Crimes**

Although the only crimes which Congress is expressly authorized to punish are piracies, felonies on the high seas, offenses against the law of nations, treason and counterfeiting of the securities and current coin of the United States, its power to create, define and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded.[9] Illustrative of the offenses which have been punished under this power are the alteration of registered bonds,[10] the bringing of counterfeit bonds into the country,[11] conspiracy to injure prisoners in custody of a United States marshal,[12] impersonation of a federal officer with intent to defraud,[13] conspiracy to injure a citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States,[14] the receipt by Government officials of contributions from Government employees for political purposes,[15] advocating the overthrow of the Government by force.[16] Part I of Title 18 of the United States Code comprises more than 500 sections defining penal offenses against the United States.[17]

**Chartering of Banks**

As an appropriate means for executing "the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies . . . ",

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[8] *Supra., pp.* 139-152.

[9] *United States* v. *Fox*, 95 U.S. 670, 672 (1878); *United States* v. *Hall*, 98 U.S. 343, 357 (1879); *United States* v. *Worrall*, 2 *Dall.* (2 U.S.) 384, 394 (1798); *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819). That this power has been freely exercised is attested by the pages of the United States Code devoted to Title 18, entitled "Criminal Code and Criminal Procedure". In addition numerous regulatory measures prescribe criminal penalties for infractions thereof.

[10] *Ex parte Carll*, 106 U.S. 521 (1883).

[11] *United States* v. *Marigold*, 9 How. (50 U.S.) 560, 567 (1850).

[12] *Logan* v. *United States*, 144 U.S. 263 (1892).

[13] *United States* v. *Barnow*, 239 U.S. 74 (1915).

[14] *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States* v. *Waddell*, 112 U.S. 76 (1884); *In re Quarles and Butler*, 158 U.S. 532, 537 (1895); *Motes* v. *United States*, 178 U.S. 458, (1900); *United States* v. *Mosley*, 238 U.S. 383 (1915). *See also Rakes* v. *United States*, 212 U.S. 55 (1909)

[15] *Ex parte Curtis*, 106 U.S. 371 (1882).

[16] 18 U.S.C. § 2385.

[17] *See* National Commission on Reform of Federal Criminal Laws, *Final Report* (Washington: 1970); National Commission on Reform of Federal Criminal Laws, *Working Papers* (Washington: 1970), 2 vols.

Congress may incorporate banks and kindred institutions.[18] Moreover, it may confer upon them private powers which, standing alone, have no relation to the functions of the Federal Government, if those privileges are essential to the effective operation of such corporations.[19] Where necessary to meet the competition of state banks, Congress may authorize national banks to perform fiduciary functions, even though, apart from the competitive situation, federal instrumentalities might not be permitted to engage in such business.[20] The Court will not undertake to assess the relative importance of the public and private functions of a financial institution which Congress has seen fit to create. It sustained the act setting up the Federal Farm Loan Banks to provide funds for mortgage loans on agricultural land against the contention that the right of the Secretary of the Treasury, which he had not exercised, to use these banks as depositories of public funds, was merely a pretext for chartering those banks for private purposes.[21]

**Currency Regulations**

Reinforced by the necessary and proper clause, the powers " 'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States and to coin money and regulate the value thereom . . .' ",[22] have been held to give Congress virtually complete control over money and currency. A prohibitive tax on the notes of state banks,[23] the issuance of treasury notes impressed with the quality of legal tender in payment of private debts[24] and the abrogation of clauses in private contracts which called for payment in gold coin,[25] were sustained as appropriate measures for carrying into effect some or all of the foregoing powers.

**Power to Charter Corporations**

In addition to the creation of banks, Congress has been held to have authority to charter a railroad corporation,[1] or a corporation

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[18] *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 407 (1819).

[19] *Osborn* v. *United States Bank*, 9 Wheat. (22 U.S.) 738, 862 (1824). *See also Pittman* v. *Home Owners' Corp.*, 308 U.S. 21 (1939).

[20] *First National Bank* v. *Follows ex rel. Union Trust Co.*, 244 U.S. 416 (1917); *Missouri ex rel. Burnes National Bank* v. *Duncan*, 265 U.S. 17 (1924).

[21] *Smith* v. *Kansas City Title Co.*, 255 U.S. 180 (1921).

[22] *Legal Tender Cases (Julliard* v. *Greenman)*, 110 U.S. 421, 449 (1884).

[23] *Veazie Bank* v. *Fenno*, 8 Wall. (75 U.S.) 533 (1869).

[24] *Legal Tender Cases (Julliard* v. *Greenman)*, 110 U.S. 421 (1884). *See also Legal Tender Cases (Knox* v. *Lee)*, 12 Wall. (79 U.S.) 457 (1871).

[25] *Norman* v. *B. & O. R. Co.*, 294 U.S. 240, 303 (1935).

[1] *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885); *California* v. *Pacific Railroad Company*, 127 U.S. 1, 39 (1888).

to construct an interstate bridge,[2] as instrumentalities for promoting commerce among the States, and to create corporations to manufacture aircraft [3] or merchant vessels [4] as incidental to the war power.

**Courts and Judicial Proceedings**

Inasmuch as the Constitution "delineated only the great outlines of the judicial power . . . , leaving the details to Congress, . . . [t]he distribution and appropriate exercise of the judicial power must . . . be made by laws passed by Congress. . . ." [5] As a necessary and proper provision for the exercise of the jurisdiction conferred by Article III, § 2, Congress may direct the removal from a State to a federal court of a criminal prosecution against a federal officer for acts done under color of federal law,[6] and may authorize the removal before trial of civil cases arising under the laws of the United States.[7] It may prescribe the effect to be given to judicial proceedings of the federal courts [8] and may make all laws necessary for carrying into execution the judgments of federal courts.[9] When a territory is admitted as a State, Congress may designate the court to which the records of the territorial courts shall be transferred and may prescribe the mode for enforcement and review of judgments rendered by those courts.[10] In the exercise of other powers conferred by the Constitution, apart from Article III, Congress may create legislative courts and "clothe them with functions deemed essential or helpful in carrying those powers into execution." [11]

**Special Acts Concerning Claims**

This clause enables Congress to pass special laws to require other departments of the Government to prosecute or adjudicate particular claims, whether asserted by the Government itself or by private persons. In 1924,[12] Congress adopted a Joint Resolution di-

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[2] *Luxton* v. *North River Bridge Co.*, 153 U.S. 525 (1894).
[3] *Clallam County* v. *United States*, 263 U.S. 341 (1923).
[4] *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U.S. 549 (1922).
[5] *Rhode Island* v. *Massachusetts*, 12 Pet. (37 U.S.) 657, 721 (1838).
[6] *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880).
[7] *Railway Company* v. *Whitton*, 13 Wall. (80 U.S.) 270, 287 (1872).
[8] *Embry* v. *Palmer*, 107 U.S. 3 (1883).
[9] *Bank of the United States* v. *Halstead*, 10 Wheat. (23 U.S.) 51, 53 (1825).
[10] *Express Company* v. *Kountze Brothers*, 8 Wall. (75 U.S.) 342, 350 (1869).
[11] *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929). But see *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
[12] 43 Stat. 5 (1924). *See Sinclair* v. *United States*, 279 U.S. 263 (1929).

recting the President to cause suit to be instituted for the cancellation of certain oil leases alleged to have been obtained from the Government by fraud and to prosecute such other actions and proceedings, civil and criminal, as were warranted by the facts. This resolution also authorized the appointment of special counsel to have charge of such litigation. Private acts providing for a review of an order for compensation under the Longshoreman's and Harbor Workers' Compensation Act,[13] or conferring jurisdiction upon the Court of Claims, after it had denied recovery, to hear and determine certain claims of a contractor against the Government, have been held constitutional.[14]

**Maritime Law**

Congress may implement the admiralty and maritime jurisdiction conferred upon the federal courts by revising and amending the maritime law which existed at the time the Constitution was adopted, but in so doing, it cannot go beyond the reach of that jurisdiction.[15] This power cannot be delegated to the States; hence, acts of Congress which purported to make state Workmen's Compensation laws applicable to maritime cases were held unconstitutional.[16]

SECTION 9. Clause 1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

## POWERS DENIED TO CONGRESS

**General Purpose of Section 9**

This section of the Constitution (containing eight clauses restricting or prohibiting legislation affecting the importation of slaves, the suspension of the writ of *habeas corpus,* the enactment of bills of attainder or *ex post facto* laws, the levying of taxes on exports, the granting of preference to ports of one State over an-

[13] *Paramino Co.* v. *Marshall,* 309 U.S. 370 (1940).
[14] *Pope* v. *United States,* 323 U.S. 1 (1944).
[15] *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U.S. 21 (1934).
[16] *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920); *Washington* v. *Dawson & Co.,* 264 U.S. 219 (1924).

other, the granting of titles of nobility, et cetera) is devoted to restraints upon the power of Congress and of the National Government,[17] and in no respect affects the States in the regulation of their domestic affairs.[18]

The above clause, which sanctioned the importation of slaves by the States for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters, Art. IV, § 1, cl. 3, was held by Chief Justice Taney in *Scott* v. *Sandford*,[19] to show conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution. Today this ruling is interesting only as an historical curiosity.

Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

This clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the Constitution was written [1] and stranger in the context of the role the right has come to play in the Supreme Court's efforts to constitutionalize federal and state criminal procedure.[2]

Only the Federal Government and not the States, it has been held obliquely, is limited by the clause.[3] The issue that has always excited critical attention is the authority in which the clause places the power to determine whether the circumstances warrant suspension of the privilege of the Writ.[4] The clause itself does not

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[17] *Barron* v. *Baltimore*, 7 Pet. (32 U.S.) 243 (1833); *Morgan* v. *Louisiana*, 118 U.S. 455, 467 (1886).

[18] *Munn* v. *Illinois*, 94 U.S. 113, 135 (1877); *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U.S. 388, 400 (1886).

[19] 19 How. (60 U.S.) 393, 411 (1857).

[1] R. Walker, *The American Reception of the Writ of Liberty* (Norman, Okla.: 1961).

[2] *Infra*, *pp.* 649–659, 816–822.

[3] *Gasquet* v. *Lapeyre*, 242 U.S. 367, 369 (1917).

[4] In form, of course, clause 2 is a limitation of power, not a grant of power, and is in addition placed in a section of limitations. It might be argued, therefore, that the power to suspend lies elsewhere and that this clause limits that authority. This argument is opposed by the little authority there is on the subject. 3 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: 1937), 213 (Luther Martin); *Ex parte Merryman*, 17 Fed. Cas. 144, 148 (No. 9487), (C.C.D. Md. 1861); *but cf.* 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington: 2d ed. 1836), 464 (Edmund Randolph). At the Convention, Gouverneur Morris proposed the language of the present clause: the first

specify and while most of the clauses of § 9 are directed at Congress not all of them are.[5] At the Convention the first proposal of a suspending authority expressly vested "in the legislature" the suspending power,[6] but the author of this proposal did not retain this language when the matter was taken up,[7] the present language then being adopted.[8] Nevertheless, Congress' power to suspend was assumed in early commentary[9] and stated in dictum by the Court.[10] President Lincoln suspended the privilege on his own motion in the early Civil War period[11] but this met with such opposition[12] that he sought and received congressional authorization.[13] Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.[14]

When suspension operates, what is suspended? In *Ex parte Milligan*,[15] the Court asserted that the Writ is not suspended but only the privilege, so that the Writ would issue and the issuing court on its return would determine whether the person applying can proceed, thereby passing on the constitutionality of the suspension and whether the petitioner is within the terms of the suspension.

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section of the clause, down to "unless" was adopted unanimously, but the second part, qualifying the prohibition on suspension was adopted over the opposition of three States. 2 M. Farrand, *op. cit.*, 438. It would hardly have been meaningful for those States which opposed any power to suspend to vote against this language if the power to suspend were conferred elsewhere.

[5] *Cf.* Clauses 7, 8.

[6] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 341.

[7] Id., 438.

[8] Ibid.

[9] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1336.

[10] *Ex parte Bollman*, 4 Cr. (8 U.S.) 75, 101 (1807).

[11] *Cf.* J. Randall, *Constitutional Problems Under Lincoln* (Urbana: rev. ed. 1951), 118–139.

[12] Including a finding by Chief Justice Taney on circuit that the President's action was invalid. *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

[13] Act of March 3, 1863, § 1, 12 Stat. 755. *See* Sellery, "Lincoln's Suspension of *Habeas Corpus* as Viewed by Congress," 1 U. Wis. History Bull. 213 (1907).

[14] The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, § 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, § 5, 32 Stat. 692. *Cf. Fisher* v. *Baker*, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, § 67, 31 Stat. 153 (1900). *Cf. Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). For the problem of *de facto* suspension through manipulation of the jurisdiction of the federal courts, *see infra*, *pp.* 791–803.

[15] 4 Wall. (71 U.S.) 2, 130–131 (1866).

Clause 3. No Bill of Attainder or ex post facto Law shall be passed.

**Bills of Attainder**

"Bills of attainder . . . are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. . . . In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions." [1] The phrase "bill of attainder," as used in this clause and in clause 1 of § 10, applies to bills of pains and penalties as well as to the traditional bills of attainder.[2]

The prohibition embodied in this clause is not to be strictly and narrowly construed in the context of traditional forms but is to be interpreted in accordance with the designs of the framers so as to preclude trial by legislature, a violation of the separation of powers concept.[3] The clause thus prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." [4] That the Court has applied the clause dynamically is revealed by a consideration of the three cases in which acts of Congress have been struck down as violating it.[5]

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[1] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1338.

[2] *Cummings* v. *Missouri*, 4 Wall. (71 U.S.) 277, 323 (1867); *cf. United States* v. *Brown*, 381 U.S. 437, 441-442, (1965).

[3] *United States* v. *Brown*, 381 U.S. 437, 442-446 (1965). Four dissenting Justices, however, denied that any separation of powers concept underlay the clause. Id., 472-473.

[4] *United States* v. *Lovett*, 328 U.S. 303, 315 (1946).

[5] For a rejection of the Court's approach and a plea to adhere to the traditional concept, *see* id., 318 (Justice Frankfurter concurring).

In *Ex parte Garland,*[6] the Court struck down a statute which required attorneys to take an oath that they had taken no part in the Confederate rebellion against the United States before they could practice in federal courts. The statute, and a state constitutional amendment requiring a similar oath of persons before they could practice certain professions,[7] were struck down as legislative acts inflicting punishment on a specific group the members of which had taken part in the rebellion and therefore could not truthfully take the oath. The clause then lay unused until 1946 when the Court utilized it to strike down a rider to an appropriations bill forbidding the use of money appropriated therein to pay the salaries of three named persons whom the House of Representatives wished discharged because they were deemed to be "subversive." [8]

Then, in *United States* v. *Brown,*[9] a sharply divided Court held void as a bill of attainder a statute which made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. Congress could, Chief Justice Warren wrote for the majority, under its commerce power, protect the economy from harm by enacting a prohibition generally applicable to any person who commits certain acts or possesses certain characteristics which make him likely in Congress' view to initiate political strikes or other harmful deeds and leaving it to the courts to determine whether a particular person committed the specified acts or possessed the specified characteristics; it was impermissible, however, for Congress to designate a class of persons—members of the Communist Party—as being forbidden to hold union office.[10] The dissenters viewed the statute as merely expressing in shorthand the characteristics of those persons who were likely to utilize union responsibilities to accomplish harmful acts; Congress could validly conclude that all members of the Communist Party possessed those characteristics.[11]

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[6] 4 Wall. (71 U.S.) 333 (1867).

[7] *Cummings* v. *Missouri,* 4 Wall. (71 U.S.) 277 (1867).

[8] *United States* v. *Lovett,* 328 U.S. 303 (1946).

[9] 381 U.S. 437 (1965).

[10] The Court of Appeals had voided the statute as an infringement of First Amendment expression and association rights, but the Court majority did not choose to utilize this ground. 334 F. 2d 488 (C.A. 9, 1964). But in *United States* v. *Robel,* 389 U.S. 258 (1967), a very similar statute making it unlawful for any member of a "Communist-action organization" to be employed in a defense facility was struck down on First Amendment grounds and the bill of attainder argument was ignored.

[11] *United States* v. *Brown,* 381 U.S. 437, 462 (1965) (Justices White, Clark, Harlan, and Stewart dissenting).

The majority's decision in *Brown* cast in doubt certain statutes and certain statutory formulations which had been held not to constitute bills of attainder. For example, a predecessor of the statute struck down in *Brown* which had conditioned a union's access to the NLRB upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party had been upheld,[12] and although Chief Justice Warren distinguished the previous case from *Brown* on the basis that the Court in the previous decision had found the statute to be preventive rather than punitive,[13] he then proceeded to reject the contention that the punishment necessary for a bill of attainder had to be punitive or retributive rather than preventive,[14] thus undermining the prior decision. Of much greater significance was the effect of the *Brown* decision on "conflict-of-interest" legislation typified by that upheld in *Board of Governors* v. *Agnew.*[15] The statute there forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank.[16] Chief Justice Warren distinguished the prior decision and the statute on three grounds from the statute then under consideration. First, the union statute inflicted its deprivation upon the members of a suspect political group in typical bill-of-attainder fashion, unlike the statute in *Agnew.* Second, in the *Agnew* statute, Congress did not express a judgment upon certain men or members of a particular group; it rather concluded that any man placed in the two positions would suffer a temptation which any man might yield to. Third, Congress established in the *Agnew* statute an objective standard of conduct expressed in shorthand which precluded persons from holding the two positions.

Apparently withdrawing from the *Brown* analysis in upholding a statute providing for governmental custody of documents and recordings accumulated during the tenure of former President Nixon,[17] the Court set out a rather different formula for deciding bill of attainder cases.[18] The law specifically applied only to Presi-

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[12] *American Communications Assn.* v. *Douds,* 339 U.S. 382 (1950).

[13] Id., 413, 414, cited in *United States* v. *Brown,* 381 U.S. 437, 457–458 (1965).

[14] Id., 458–461.

[15] 329 U.S. 441 (1947).

[16] 12 U.S.C. § 78.

[17] The Presidential Recordings and Materials Preservation Act, P.L. 93–526, 88 Stat. 1695 (1974), note following 44 U.S.C. 2107. For an application of this statute, see *Nixon* v. *Warner Communications,* 435 U.S. 589 (1978).

[18] *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 468–484 (1977). Justice Stevens' concurrence is more specifically directed to the facts behind the statute than is the opinion of the Court, id., 484, and Justice White, author of the dissent in *Brown,* merely noted he found the act nonpunitive. Id., 487. Chief Justice Burger and Justice Rehnquist dissented. Id., 504, 536–545, 545. Adding to the impression of

dent Nixon and directed an executive agency to assume control over the materials and prepare regulations providing for ultimate public dissemination of at least some of them; the act assumed that it did not deprive the former President of property rights but authorized the award of just compensation if it should be judicially determined that there was a taking. First, the Court denied that the clause denies the power to Congress to burden some persons or groups while not so treating all other plausible individuals or groups; even the present law's specificity in referring to the former President by name and applying only to him did not condemn the act because he "constituted a legitimate class of one" on whom Congress could "fairly and rationally" focus.[19] Second, even if the statute's specificity did bring it within the prohibition of the clause, the lodging of Mr. Nixon's materials with the GSA did not inflict punishment within the meaning of the clause. This analysis was a three-pronged one: 1) the law imposed no punishment traditionally judged to be prohibited by the clause; 2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and 3) the law had no legislative record evincing a congressional intent to punish.[20] That is, the Court, looking "to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect", concluded that the statute served to further legitimate policies of preserving the availability of evidence for criminal trials and the functioning of the adversary legal system and in promoting the preservation of records of historical value, all in a way that did not and was not intended to punish the former President.

The clause protects individual persons and groups who are vulnerable to nonjudicial determinations of guilt and does not apply to a State; neither does a State have standing to invoke the clause for its citizens against the Federal Government.[21]

### Ex Post Facto Laws

***Definition.***—At the time the Constitution was adopted, many persons understood the terms *ex post facto* laws to "embrace all retrospective laws, or laws governing or controlling past transac-

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a departure from *Brown* is the quotation in the opinion of the Court at several points of the *Brown* dissent, id., 470 n. 31, 471 n. 34, while the dissent quoted and relied on the opinion of the Court in *Brown*. Id., 538, 542.

[19] Id., 472. Justice Stevens carried the thought further, although in the process he severely limited the precedential value of the decision. Id., 484.

[20] Id., 473–484.

[21] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966).

tions, whether . . . of a civil or a criminal nature." [1] But in the early case of *Calder* v. *Bull,*[2] the Supreme Court decided that the phrase, as used in the Constitution, applied only to penal and criminal statutes. But although it is inapplicable to retroactive legislation of any other kind,[3] the constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal.[4] Every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution.[5] A prosecution under a temporary statute which was extended before the date originally set for its expiration does not offend this provision even though it is instituted subsequent to the extension of the statute's duration for a violation committed prior thereto.[6] Since this provision has no application to crimes committed outside the jurisdiction of the United States against the laws of a foreign country, it is immaterial in extradition proceedings whether the foreign law is *ex post facto* or not.[7]

***What Constitutes Punishment.***—An act of Congress which prescribed as a qualification for practice before the federal courts an oath that the attorney had not participated in the Rebellion was found unconstitutional since it operated as a punishment for past acts.[8] But a statute which denied to polygamists the right to vote in a territorial election was upheld even as applied to one who had not contracted a polygamous marriage and had not cohabited with more than one woman since the act was passed, because the law did not operate as an additional penalty for the offense of polygamy but merely defined it as a disqualification of a voter.[9] A deportation law authorizing the Secretary of Labor to expel aliens for criminal acts committed before its passage is not *ex post facto* since deportation is not a punishment.[10] For this reason a statutory pro-

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[1] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1339.

[2] 3 Dall. (3 U.S.) 386, 393 (1798).

[3] *Bankers Trust Co.* v. *Blodgett,* 260 U.S. 647, 652 (1923).

[4] *Burgess* v. *Salmon,* 97 U.S. 381 (1878).

[5] *Calder* v. *Bull,* 3 Dall. (3 U.S.) 386, 390 (1798); *Ex parte Garland,* 4 Wall. (71 U.S.) 333, 377 (1867); *Burgess* v. *Salmon,* 97 U.S. 381, 384 (1878).

[6] *United States* v. *Powers,* 307 U.S. 214 (1939).

[7] *Neely* v. *Henkel,* 180 U.S. 109, 123 (1901). *Cf. In re Yamashita,* 327 U.S. 1, 26 (1946) (dissenting opinion of Justice Murphy); *Hirota* v. *MacArthur,* 338 U.S. 197, 199 (1948) (concurring opinion of Justice Douglas).

[8] *Ex parte Garland,* 4 Wall. (71 U.S.) 333 (1867).

[9] *Murphy* v. *Ramsey,* 114 U.S. 15 (1885).

[10] *Mahler* v. *Eby,* 264 U.S. 32 (1924); *Bugajewitz* v. *Adams,* 228 U.S. 585 (1913); *Marcello* v. *Bonds,* 349 U.S. 302 (1955). Justices Black and Douglas, reiterating in

vision terminating payment of old-age benefits to an alien deported for Communist affiliation also is not *ex post facto*, for the denial of a non-contractual benefit to a deported alien is not a penalty but a regulation designed to relieve the Social Security System of administrative problems of supervision and enforcement likely to arise from disbursements to beneficiaries residing abroad.[11] Likewise an act permitting the cancellation of naturalization certificates obtained by fraud prior to the passage of the law was held not to impose a punishment, but simply to deprive the alien of his illgotten privileges.[12]

***Change in Place or Mode of Trial.***—A change of the place of trial of an alleged offense after its commission is not an *ex post facto* law. If no place of trial was provided when the offense was committed, Congress may designate the place of trial thereafter.[13] A law which alters the rule of evidence to permit a person to be convicted upon less or different evidence than was required when the offense was committed is invalid,[14] but a statute which simply enlarges the class of persons who may be competent to testify in criminal cases is not *ex post facto* as applied to a prosecution for a crime committed prior to its passage.[15]

Clause 4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

**Direct Taxes**

***The Hylton Case.***—The crucial problem under this section is to distinguish "direct" from other taxes. In its opinion in *Pollock* v. *Farmers' Loan & Trust Co.*, the Court declared: "It is apparent . . . that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopt-

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*Lehman* v. *United States ex rel. Carson*, 353 U.S. 685, 690–691 (1957), their dissent from the premise that the *ex post facto* clause is directed solely to penal legislation, disapproved a holding that an immigration law, enacted in 1952, 8 U.S.C. § 1251, which authorized deportation of an alien who, in 1945, had acquired a status of nondeportability under pre-existing law is valid. In their opinion, to banish, in 1957, an alien who had lived in the United States for almost 40 years, for an offense committed in 1936, and for which he already had served a term in prison, was to subject him to new punishment retrospectively imposed.

[11] *Fleming* v. *Nestor*, 363 U.S. 603 (1960).

[12] *Johannessen* v. *United States*, 225 U.S. 227 (1912).

[13] *Cook* v. *United States*, 138 U.S. 157, 183 (1891).

[14] *Calder* v. *Bull*, 3 Dall. (3 U.S.) 386, 390 (1798).

[15] *Hopt* v. *Utah*, 110 U.S. 574, 589 (1884).

ed it." [1] Against this confident dictum may be set the following brief excerpt from Madison's *Notes on the Convention:* "Mr. King asked what was the precise meaning of *direct* taxation? No one answered." [2] The first case to come before the Court on this issue was *Hylton* v. *United States,*[3] which was decided early in 1796. Congress has levied, according to the rule of uniformity, a specific tax upon all carriages, for the conveyance of persons, which were to be kept by, or for any person, for his own use, or to be let out for hire, or for the conveying of passengers. In a fictitious statement of facts, it was stipulated that the carriages involved in the case were kept exclusively for the personal use of the owner and not for hire. The principal argument for the constitutionality of the measure was made by Hamilton, who treated it as an "excise tax," [4] while Madison both on the floor of Congress and in correspondence attacked it as "direct" and so void, inasmuch as it was levied without apportionment.[5] The Court, taking the position that the direct tax clause constituted in practical operation an exception to the general taxing powers of Congress, held that no tax ought to be classified as "direct" which could not be conveniently apportioned, and on this basis sustained the tax on carriages as one on their "use" and therefore an "excise." Moreover, each of the judges advanced the opinion that the direct tax clause should be restricted to capitation taxes and taxes on land, or that at most, it might cover a general tax on the aggregate or mass of things which generally pervade all the States, especially if an assessment should intervene, while Justice Paterson, who had been a member of the Federal Convention, testified to his recollection that the principal purpose of the provision had been to allay the fear of the Southern States lest their Negroes and land should be subjected to a specific tax.[6]

***From the Hylton to the Pollock Case.***—The result of the *Hylton* case was not challenged until after the Civil War. A number of the taxes imposed to meet the demands of that war were assailed during the postwar period as direct taxes but without result. The

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[1] 157 U.S. 429, 573 (1895).

[2] J. Madison, *The Debates in the Federal Convention of 1787* (G. Hunt & J. Scott eds.) (Greenwood Press ed. 1970), 435.

[3] 3 Dall. (3 U.S.) 171 (1796).

[4] *The Works of Alexander Hamilton,* J. Hamilton ed. (New York: 1851), 845. "If the meaning of the word *excise* is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an *excise,* and then must necessarily be uniform and liable to apportionment; consequently, not a direct tax."

[5] 4 *Annals of Congress* 730 (1794); 2 *Letters and Other Writings of James Madison* (Philadelphia: 1865), 14.

[6] 3 Dall. (3 U.S.) 171, 177 (1796).

Court sustained successively, as "excises" or "duties," a tax on an insurance company's receipts for premiums and assessments; [7] a tax on the circulating notes of state banks,[8] an inheritance tax on real estate,[9] and finally a general tax on incomes.[10] In the last case, the Court took pains to state that it regarded the term "direct taxes" as having acquired a definite and fixed meaning, to wit, capitation taxes, and taxes on land.[11] Then, almost one hundred years after the *Hylton* case, the famous case of *Pollock* v. *Farmers' Loan & Trust Co.*[12] arose under the Income Tax Act of 1894.[13] Undertaking to correct "a century of error" the Court held, by a vote of five-to-four, that a tax on income from property was a direct tax within the meaning of the Constitution and hence void because not apportioned according to the census.

***Restriction of the Pollock Decision.***—The *Pollock* decision encouraged taxpayers to challenge the right of Congress to levy by the rule of uniformity numerous taxes which had always been reckoned to be excises. But the Court evinced a strong reluctance to extend the doctrine to such exactions. Purporting to distinguish taxes levied "because of ownership" or "upon property as such" from those laid upon "privileges," [14] it sustained as "excises" a tax on sales on business exchanges,[15] a succession tax which was construed to fall on the recipients of the property transmitted rather than on the estate of the decedent,[16] and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer.[17] Again, in *Thomas* v. *United States,*[18] the validity of a stamp tax on sales of stock certificates was sustained on the basis of a definition of "duties, imposts and excises." These terms, according to the Chief Justice, "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." [19] On the same day it ruled, in *Spreckels Sugar Refining Co.*

[7] *Pacific Insurance Company* v. *Soule,* 7 Wall. (74 U.S.) 433 (1869).
[8] *Veazie Bank* v. *Fenno,* 8 Wall. (75 U.S.) 533 (1869).
[9] *Scholey* v. *Rew,* 23 Wall. (90 U.S.) 331 (1875).
[10] *Springer* v. *United States,* 102 U.S. 586 (1881).
[11] Id., 602.
[12] 157 U.S. 429 (1895); 158 U.S. 601 (1895).
[13] 28 Stat. 509, 553 (1894).
[14] *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103 (1916); *Knowlton* v. *Moore,* 178 U.S. 41, 80 (1900).
[15] *Nicol* v. *Ames,* 173 U.S. 509 (1899).
[16] *Knowlton* v. *Moore,* 178 U.S. 41 (1900).
[17] *Patton* v. *Brady,* 184 U.S. 608 (1902).
[18] 192 U.S. 363 (1904).
[19] Id., 370.

v. *McClain*,[20] that an exaction, denominated a special excise tax, imposed on the business of refining sugar and measured by the gross receipts thereof, was in truth an excise and hence properly levied by the rule of uniformity. The lesson of *Flint* v. *Stone Tracy Co.*[21] was the same. In the *Flint* case what was in form an income tax was sustained as a tax on the privilege of doing business as a corporation, the value of the privilege being measured by the income, including income from investments. Similarly, in *Stanton* v. *Baltic Mining Co.*,[22] a tax on the annual production of mines was held to be "independently of the effect of the operation of the Sixteenth Amendment . . . not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations." [23]

A convincing demonstration of the extent to which the *Pollock* decision had been whittled down by the time the Sixteenth Amendment was adopted is found in *Billings* v. *United States*.[24] In challenging an annual tax assessed for the year 1909 on the use of foreign built yachts—a levy not distinguishable in substance from the carriage tax involved in the *Hylton* case as construed by the Supreme Court—counsel did not even suggest that the tax should be classed as a direct tax. Instead, he based his argument that the exaction constituted a taking of property without due process of law upon the premise that it was an excise, and the Supreme Court disposed of the case upon the same assumption.

In 1921 the Court cast aside the distinction drawn in *Knowlton* v. *Moore* between the right to transmit property on the one hand and the privilege of receiving it on the other, and sustained an estate tax as an excise. "Upon this point," wrote Justice Holmes for a unanimous Court, "a page of history is worth a volume of logic." [25] This proposition being established, the Court has had no difficulty in deciding that the inclusion in the computation of the estate tax of property held as joint tenants,[1] or as tenants by the entirety,[2] or the entire value of community property owned by husband and wife,[3] or the proceeds of insurance upon the life of the

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[20] 192 U.S. 397 (1904).
[21] 220 U.S. 107 (1911).
[22] 240 U.S. 103 (1916).
[23] Id., 114.
[24] 232 U.S. 261 (1914).
[25] *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).
[1] *Phillips* v. *Dime Trust & S.D. Co.*, 284 U.S. 160 (1931).
[2] *Tyler* v. *United States*, 281 U.S. 497 (1930).
[3] *Fernandez* v. *Wiener*, 326 U.S. 340 (1945).

decedent,[4] did not amount to direct taxation of such property. Similarly it upheld a graduated tax on gifts as an excise, saying that it was "a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another." [5] Justice Sutherland, speaking for himself and two associates, urged that "the right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it." [6]

***Miscellaneous.***—The power of Congress to levy direct taxes is not confined to the States which are represented in that body. Such a tax may be levied in proportion to population in the District of Columbia.[7] A penalty imposed for nonpayment of a direct tax is not a part of the tax itself and hence is not subject to the rule of apportionment. Accordingly, the Supreme Court sustained the penalty of fifty percent which Congress exacted for default in the payment of the direct tax on land in the aggregate amount of twenty million dollars which was levied and apportioned among the States during the Civil War.[8]

## Clause 5. No Tax or Duty shall be laid on Articles exported from any State.

### Taxes on Exports

This prohibition applies only to the imposition of duties on goods by reason of exportation.[1] The word "export" signifies goods exported to a foreign country, not to an unincorporated territory of the United States.[2] A general tax laid on all property alike, including that intended for export, is not within the prohibition, if it is not levied on goods in course of exportation nor because of their intended exportation.[3] Where the sale to a commission merchant for a foreign consignee was consummated by delivery of the goods to an exporting carrier, the sale was held to be a step in the exportation and hence exempt from a general tax on sales of such commodity.[4] The giving of a bond for exportation of distilled liquor was

[4] *Chase Nat. Bank* v. *United States*, 278 U.S. 327 (1929); *United States* v. *Manufacturers Nat. Bank*, 363 U.S. 194, 198–201 (1960).

[5] *Bromley* v. *McCaughn*, 280 U.S. 124, 136 (1929). *See also Helvering* v. *Bullard*, 303 U.S. 297 (1938).

[6] *Bromley* v. *McCaughn*, 280 U.S. 124, 140 (1929).

[7] *Loughborough* v. *Blake*, 5 Wheat. (18 U.S.) 317 (1820).

[8] *De Treville* v. *Smalls*, 98 U.S. 517, 527 (1879).

[1] *Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886). *Cf. Almy* v. *California*, 24 How. (65 U.S.) 169, 174 (1861).

[2] *Dooley* v. *United States*, 183 U.S. 151, 154 (1901).

[3] *Cornell* v. *Coyne*, 192 U.S. 418, 428 (1904); *Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886).

[4] *Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923).

not the commencement of exportation so as to exempt from an excise tax spirits which were not exported pursuant to such bond.[5] A tax on the income of a corporation derived from its export trade was not a tax on "articles exported" within the meaning of the Constitution.[6]

***Stamp Taxes.***—A stamp tax imposed on foreign bills of lading,[7] charter parties,[8] or marine insurance policies,[9] was in effect a tax or duty upon exports, and so void; but an act requiring the stamping of all packages of tobacco intended for export in order to prevent fraud was held not to be forbidden as a tax on exports.[10]

Clause 6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

**The "No Preference" Clause**

The limitations imposed by this section were designed to prevent preferences as between ports because of their location in different States. They do not forbid such discriminations as between individual ports. Acting under the commerce clause, Congress may do many things which benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic.[1] A rate order of the Interstate Commerce Commission which allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas.[2] Al-

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[5] *Thompson* v. *United States*, 142 U.S. 471 (1892).

[6] *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918); *National Paper Co.* v. *Bowers*, 266 U.S. 373 (1924).

[7] *Fairbank* v. *United States*, 181 U.S. 283 (1901).

[8] *United States* v. *Hvoslef*, 237 U.S. 1 (1915).

[9] *Thames & Mersey Inc. Co.* v. *United States*, 237 U.S. 19 (1915).

[10] *Pace* v. *Burgess*, 92 U.S. 372 (1876); *Turpin* v. *Burgess*, 117 U.S. 504, 505 (1886).

[1] *Louisiana Pub. Serv. Comm.* v. *Texas & N.O.R. Co.*, 284 U.S. 125, 131 (1931); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. (59 U.S.) 421, 433 (1856); *South Carolina* v. *Georgia*, 93 U.S. 4 (1876). In *Williams* v. *United States*, 255 U.S. 336 (1921) the argument that an act of Congress which prohibited interstate transportation of liquor into States whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this clause was rejected.

[2] *Louisiana PSC* v. *Texas & N.O.R. Co.*, 284 U.S. 125, 132 (1931).

though there were a few early intimations that this clause was applicable to the States as well as to Congress,[3] the Supreme Court declared emphatically in 1886 that state legislation was unaffected by it.[4] After more than a century the Court confirmed, over the objection that this clause was offended, the power which the First Congress had exercised [5] in sanctioning the continued supervision and regulation of pilots by the States.[6]

Clause 7. No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

**Appropriations**

This clause is a limitation upon the power of the Executive Department and does not restrict Congress in appropriating moneys in the Treasury.[7] That body may recognize and pay a claim of an equitable, moral, or honorary nature. When it directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.[8] In making appropriations to pay claims arising out of the Civil War, the Court held that it was lawful to provide that certain persons, i.e., those who had aided the Rebellion, should not be paid out of the funds made available by the general appropriation, but that such persons should seek relief from Congress.[9] The Court has also recognized that Congress has a wide discretion with regard to the extent to which it shall prescribe details of expenditures for which it appropriates funds and has approved the frequent practice of making general appropriations of large amounts to be allotted and expended as directed by designated government agencies. Citing as an example that act of June 17, 1902,[10] where all moneys received from the sale and disposal of

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[3] *Passenger Cases (Smith* v. *Turner)*, 7 How. (48 U.S.) 282, 414 (1849) (opinion of Justice Wayne); *cf. Cooley* v. *Port Wardens*, 12 How. (53 U.S.) 299, 314 (1851).

[4] *Morgan* v. *Louisiana*, 118 U.S. 455, 467 (1886). *See also Munn* v. *Illinois*, 94 U.S. 113, 135 (1877); *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U.S. 388, 400 (1886).

[5] 1 Stat. 53, 54, § 4 (1789).

[6] *Thompson* v. *Darden*, 198 U.S. 310 (1905).

[7] *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937); *Knote* v. *United States*, 95 U.S. 149, 154 (1877).

[8] *United States* v. *Price*, 116 U.S. 43 (1885); *United States* v. *Realty Company*, 163 U.S. 427, 439 (1896); *Allen* v. *Smith*, 173 U.S. 389, 393 (1899).

[9] *Hart* v. *United States*, 118 U.S. 62, 67 (1886).

[10] 32 Stat. 388 (1902).

public lands in a large number of States and territories were set aside as a special fund to be expended under the direction of the Secretary of the Interior upon such projects as he determined to be practicable and advisable for the reclamation of arid and semi-arid lands within those States and territories, the Court declared: "The constitutionality of this delegation of authority has never been seriously questioned." [11]

**Payment of Claims**

No officer of the Federal Government is authorized to pay a debt due from the United States, whether reduced to judgment or not, without an appropriation for that purpose.[12] After the Civil War, a number of controversies arose out of attempts by Congress to restrict the payment of the claims of persons who had aided the Rebellion, but had thereafter received a pardon from the President. The Supreme Court held that Congress could not prescribe the evidentiary effect of a pardon in a proceeding in the Court of Claims for property confiscated during the Civil War,[13] but that where the confiscated property had been sold and the proceeds paid into the Treasury, a pardon did not of its own force authorize the restoration of such proceeds.[14] It was within the competence of Congress to declare that the amount due to persons thus pardoned should not be paid out of the Treasury and that no general appropriation should extend to their claims.[15]

Clause 8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

In 1871 the Attorney General of the United States ruled that: "A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power . . . but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation

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[11] *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937).

[12] *Reeside* v. *Walker*, 11 How. (52 U.S.) 272 (1851).

[13] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128 (1872).

[14] *Knote* v. *United States*, 95 U.S. 149, 154 (1877); *Austin* v. *United States*, 155 U.S. 417, 427 (1894).

[15] *Hart* v. *United States*, 118 U.S. 62, 67 (1886).

between the individual thus commissioned and the government which in this way accredits him as its representative," which is prohibited by this clause of the Constitution.[10]

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

## POWERS DENIED TO THE STATES

### Treaties, Alliances, or Confederations

At the time of the Civil War, this clause was one of the provisions upon which the Court relied in holding that the Confederation formed by the seceding States could not be recognized as having any legal existence.[1] Today, its practical significance lies in the limitations which it implies upon the power of the States to deal with matters having a bearing upon international relations. In the early case of *Holmes* v. *Jennison*,[2] Chief Justice Taney invoked it as a reason for holding that a State had no power to deliver up a fugitive from justice to a foreign State. Recently, the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, since the oil under the three mile marginal belt along the California coast might well become the subject of international dispute and since the ocean, including this three mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area.[3] In *Skiriotes* v. *Florida*,[4] the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Hughes declared;

[10] 13 *Ops. Atty. Gen.* 538 (1871).
[1] *Williams* v. *Bruffy*, 96 U.S. 176, 183 (1878).
[2] 14 Pet. (39 U.S.) 540 (1840).
[3] *United States* v. *California*, 332 U.S. 19 (1947).
[4] 313 U.S. 69 (1941).

"When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances." [5]

**Bills of Credit**

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals, and between the Government and individuals, for the ordinary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest bearing certificates, in denominations not exceeding ten dollars, which were issued by loan offices established by the State of Missouri and made receivable in payment of taxes or other moneys due to the State, and in payment of the fees and salaries of state officers, were held to be bills of credit whose issuance was banned by this section.[6] The States are not forbidden, however, to issue coupons receivable for taxes,[7] nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.[8] Bills issued by state banks are not bills of credit; [9] it is immaterial that the State is the sole stockholder of the bank,[10] that the officers of the bank were elected by the state legislature,[11] or that the capital of the bank was raised by the sale of state bonds.[12]

**Legal Tender**

Relying on this clause, which applies only to the States and not to the Federal Government,[1] the Supreme Court has held that where the marshal of a state court received state bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.[2] Since, however, there is noth-

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[5] Id., 78-79.

[6] *Craig* v. *Missouri*, 4 Pet. (29 U.S.) 410, 425 (1830); *Byrne* v. *Missouri*, 8 Pet. (33 U.S.) 40 (1834).

[7] *Virginia Coupon Cases (Poindexter* v. *Greenhow)*, 114 U.S. 269 (1885); *Chaffin* v. *Taylor*, 116 U.S. 567 (1886).

[8] *Houston & Texas Central Rd.* v. *Texas*, 177 U.S. 66 (1900).

[9] *Briscoe* v. *Bank of Kentucky*, 11 Pet. (36 U.S.) 257 (1837).

[10] *Darrington* v. *Bank of Alabama*, 13 How. (54 U.S.) 12, 15 (1851); *Curran* v. *Arkansas*, 15 How. (56 U.S.) 304, 317 (1854).

[11] *Briscoe* v. *Bank of Kentucky*, 11 Pet. (36 U.S.) 257 (1837).

[12] *Woodruff* v. *Trapnall*, 10 How. (51 U.S.) 190, 205 (1851).

[1] *Legal Tender Cases (Juilliard* v. *Greenman)*, 110 U.S. 421, 446 (1884).

[2] *Gwin* v. *Breedlove*, 2 How. (43 U.S.) 29, 38 (1844). *See also Griffin* v. *Thompson*, 2 How. (43 U.S.) 244 (1844).

ing in the Constitution which prohibits a bank depositor from consenting when he draws a check that payment may be made by draft, a state law which provided that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts was held valid.[3]

### Bills of Attainder

Statutes passed after the Civil War with the intent and result of excluding persons who had aided the Confederacy from following certain callings, by the device of requiring them to take an oath that they had never given such aid, were held invalid as being bills of attainder, as well as *ex post facto* laws.[4]

Other attempts to raise bill-of-attainder claims have been unsuccessful. A Court majority denied that a municipal ordinance which required all employees to execute oaths that they had never been affiliated with Communist or similar organizations on the grounds that the ordinance merely provided standards of qualifications and eligibility for employment.[5] A law which prohibited any person convicted of a felony and not subsequently pardoned from holding office in a waterfront union was not a bill of attainder because the "distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt" and the prohibition "embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction." [6]

### Ex Post Facto Laws

***Scope of the Provision.***—This clause, like the cognate restriction imposed on the Federal Government by § 9, relates only to penal and criminal legislation and not to civil laws which affect private rights adversely.[1] It is directed only against legislative action and does not touch erroneous or inconsistent decisions by the courts.[2] Even though a law is *ex post facto* and invalid as to

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[3] *Farmers & Merchants Bank* v. *Fed. Reserve Bank*, 262 U.S. 649, 659 (1923).

[4] *Cummings* v. *Missouri*, 4 Wall. (71 U.S.) 277, 323 (1867); *Klinger* v. *Missouri*, 13 Wall. (80 U.S.) 257 (1872); *Pierce* v. *Carskadon*, 16 Wall. (83 U.S.) 234, 239 (1873).

[5] *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 722–723 (1951). *Cf. Konigsberg* v. *State Bar of California*, 366 U.S. 36, 47 n. 9 (1961).

[6] *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960). Presumably, *United States* v. *Brown*, 381 U.S. 437 (1965), does not qualify this decision.

[1] *Calder* v. *Bull*, 3 Dall. (3 U.S.) 386, 390 (1798); *Watson* v. *Mercer*, 8 Pet. (33 U.S.) 88, 110 (1834); *Baltimore and Susquehanna Railroad Co.* v. *Nesbit*, 10 How. (51 U.S.) 395, 401 (1850); *Carpenter* v. *Pennsylvania*, 17 How. (58 U.S.) 456, 463 (1855); *Loche* v. *New Orleans*, 4 Wall. (71 U.S.) 172 (1867); *Orr* v. *Gilman*, 183 U.S. 278, 285 (1902); *Kentucky Union Co.* v. *Kentucky*, 219 U.S. 140 (1911).

[2] *Frank* v. *Mangum*, 237 U.S. 309, 344 (1915); *Ross* v. *Oregon*, 227 U.S. 150, 161 (1913). However, an unforeseeable judicial enlargement of a criminal statute so as to

crimes committed prior to its enactment, it is nonetheless valid as to subsequent offenses.[3] If it mitigates the rigor of the law in force at the time the crime was committed,[4] or if it merely penalizes the continuance of conduct which was lawfully begun before its passage, the statute is not *ex post facto.* Thus, measures penalizing the failure of a railroad to cut drains through existing embankments [5] or making illegal the continued possession of intoxicating liquors which were lawfully acquired [6] have been held valid.

***Denial of Future Privileges to Past Offenders.***—The right to practice a profession may be denied to one who was convicted of an offense before the statute was enacted if the offense reasonably may be regarded as a continuing disqualification for the profession. Without offending the Constitution, statutes barring a person from practicing medicine after conviction of a felony [7] or excluding convicted felons from waterfront union offices, unless pardoned or in receipt of a parole board's good conduct certificate [8] may be enforced against a person convicted before the measures were passed. But the test oath prescribed after the Civil War, whereby office holders, teachers, or preachers were required to swear that they had not participated in the Rebellion, was held invalid on the ground that it had no reasonable relation to fitness to perform official or professional duties, but rather was a punishment for past offenses.[9] A similar oath required of suitors in the courts also was held void.[10]

***Changes in Punishment.***—Statutes which changed an indeterminate sentence law to require a judge to impose the maximum sentence, whereas formerly he could impose a sentence between the minimum and maximum,[11] abolished a rule which prevented a

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encompass conduct not covered on the face of the statute operates like an *ex post facto* law if it is applied retroactively and violates due process in that event. *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964). *See Marks* v. *United States,* 430 U.S. 188 (1977) (applying *Bouie* in context of § 9, cl. 3). *But see Splawn* v. *California,* 431 U.S. 595 (1977) (rejecting application of *Bouie*). The Court itself has not always adhered to this standard. *See Ginzburg* v. *United States,* 383 U.S. 463 (1966).

[3] *Jachne* v. *New York,* 128 U.S. 189, 190 (1888).

[4] *Rooney* v. *North Dakota,* 196 U.S. 319, 325 (1905).

[5] *Chicago & Alton R.R.* v. *Tranbarger,* 238 U.S. 67 (1915).

[6] *Samuels* v. *McCurdy,* 267 U.S. 188 (1925).

[7] *Hawker* v. *New York,* 170 U.S. 189, 190 (1898). *See also Reetz* v. *Michigan,* 188 U.S. 505, 509 (1903); *Lehmann* v. *State Board of Public Accountancy,* 263 U.S. 394 (1923).

[8] *De Veau* v. *Braisted,* 363 U.S. 144, 160 (1960).

[9] *Cummings* v. *Missouri,* 4 Wall. (71 U.S.) 277, 316 (1867).

[10] *Pierce* v. *Carskadon,* 16 Wall. (83 U.S.) 234 (1873).

[11] *Lindsey* v. *Washington,* 301 U.S. 397 (1937). But note the limitation of *Lindsey* in *Dobbert* v. *Florida,* 432 U.S. 282, 298-301 (1977).

subsequent conviction of first-degree murder after a jury had found the accused guilty in the second-degree by a verdict which had been set aside,[12] required criminals sentenced to death to be kept thereafter in solitary confinement,[13] or allowed a warden to fix, within limits of one week, and keep secret the time of execution,[14] were held to be *ex post facto* as applied to offenses committed prior to their enactment. But laws providing heavier penalties for new crimes thereafter committed by habitual criminals,[15] changing the punishment from hanging to electrocution, fixing the place therefor in the penitentiary, and permitting the presence of a greater number of invited witnesses,[16] or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.[17]

In *Dobbert* v. *Florida*,[18] the Court may have formulated a new test for determining when a criminal statute *vis-a-vis* punishment is *ex post facto*. Defendant murdered two of his children; at the time of the commission of the offenses, Florida law provided the death penalty upon conviction for certain takings of life. Subsequent to the commission of the capital offenses, the Supreme Court held laws similar to Florida's unconstitutional to the extent that death was a sentence under them, although convictions obtained under the statutes were not to be overturned,[19] and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law which was sustained. Dobbert was convicted and sentenced to death under the new law which was enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether the old statute was constitutional or not, "it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of

[12] *Kring* v. *Missouri*, 107 U.S. 221 (1883).
[13] *Holden* v. *Minnesota*, 137 U.S. 483, 491 (1890).
[14] *Medley, Petitioner*, 134 U.S. 160, 171 (1890).
[15] *Gryger* v. *Burke*, 334 U.S. 728 (1948); *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); *Graham* v. *West Virginia*, 224 U.S. 616 (1912).
[16] *Malloy* v. *South Carolina*, 237 U.S. 180 (1915).
[17] *Rooney* v. *North Dakota*, 196 U.S. 319, 324 (1905).
[18] 432 U.S. 282, 297–298 (1977). Justices Stevens, Brennan, and Marshall dissented. Id., 304.
[19] *Furman* v. *Georgia*, 408 U.S. 238 (1972). The new law was sustained in *Proffitt* v. *Florida*, 428 U.S. 242 (1976).

culpability which the State ascribed to the act of murder." [20] Whether the "fair warning" standard is to have any prominent place in *ex post facto* jurisprudence may be an interesting question but it is problematical in any event whether the fact situation will occur often enough to make the principle applicable in very many cases.

***Changes in Procedure.***—An accused person does not have a right to be tried in all respects in accordance with the law in force when the crime charged was committed.[21] The mode of procedure may be changed so long as the substantial rights of the accused are not curtailed.[22] Laws shifting the place of trial from one county to another,[23] increasing the number of appellate judges and dividing the appellate court into divisions,[24] granting a right of appeal to the State,[25] changing the method of selecting and summoning jurors,[26] making separate trials for persons jointly indicted a matter of discretion for the trial court rather than a matter of right,[27] and allowing a comparison of handwriting experts [28] have been sustained over the objection that they were *ex post facto*. The contrary conclusion was reached, with respect to the application to felonies committed before a Territory was admitted to the Union, of the provision in the state constitution which permitted the trial of criminal cases by a jury of eight persons, instead of the common law jury of twelve which was guaranteed by the Sixth Amendment during the period of territorial government.[29]

**Obligation of Contracts**

***"Law" Defined.***—The term comprises statutes, constitutional provisions,[1] municipal ordinances,[2] and administrative regulations

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[20] Id., 432 U.S., 297.

[21] *Gibson* v. *Mississippi*, 162 U.S. 565, 590 (1896).

[22] *Duncan* v. *Missouri*, 152 U.S. 377, 382 (1894). *See also Dobbert* v. *Florida*, 432 U.S. 282, 292–297 (1977); *Splawn* v. *California*, 431 U.S. 595, 599–601 (1977).

[23] *Gut* v. *Minnesota*, 9 Wall. (76 U.S.) 35, 37 (1870).

[24] *Duncan* v. *Missouri*, 152 U.S. 377 (1894).

[25] *Mallett* v. *North Carolina*, 181 U.S. 589, 593 (1901).

[26] *Gibson* v. *Mississippi*, 162 U.S. 565, 588 (1896).

[27] *Beazell* v. *Ohio*, 269 U.S. 167 (1925).

[28] *Thompson* v. *Missouri*, 171 U.S. 380, 381 (1898).

[29] *Thompson* v. *Utah*, 170 U.S. 343 (1898).

[1] *Dodge* v. *Woolsey*, 18 How. (59 U.S.) 331 (1856); *Ohio & M. R. Co.* v. *McClure*, 10 Wall. (77 U.S.) 511 (1871); *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650 (1885); *Bier* v. *McGehee*, 148 U.S. 137, 140 (1893).

[2] *New Orleans Water-Works Co.* v. *Rivers*, 115 U.S. 674 (1885); *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1 (1898); *City of Vicksburg* v. *Waterworks Co.*, 202 U.S. 453 (1906); *Atlantic Coast Line* v. *City of Goldsboro*, 232 U.S. 548 (1914); *Cuyahoga Power Co.* v. *City of Akron*, 240 U.S. 462 (1916).

having the force and operation of statutes.[3] But are judicial decisions within the clause? The abstract principle of the separation of powers, at least until recently, forbade the idea that the courts "make" law and the word "pass" in the above clause seemed to confine it to the formal and acknowledged methods of exercise of the law-making function. Accordingly, the Court has frequently said that the clause does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights.[4] Nevertheless, there are important exceptions to this rule which are hereinafter set forth.

***Status of Judicial Decision.***—While the highest state court usually has final authority in determining the construction as well as the validity of contracts entered into under the laws of the State, and the national courts will be bound by their decision of such matters, nevertheless, for reasons which are fairly obvious, this rule does not hold when the contract is one whose obligation is alleged to have been impaired by state law.[5] Otherwise, the challenged state authority could be vindicated through the simple device of a modification or outright nullification by the state court of the contract rights in issue. Similarly, the highest state court usually has final authority in construing state statutes and determining their validity in relation to the state constitution. But this rule too has had to bend to some extent to the Supreme Court's interpretation of the obligation of contracts clause.[6]

Suppose the following situation: (1) a municipality, acting under authority conferred by a state statute, has issued bonds in aid of a railway company; (2) the validity of this statute has been sustained by the highest state court; (3) later the state legislature passes an act to repeal certain taxes to meet the bonds; (4) it is sus-

[3] Ibid.; *see also Grand Trunk Ry.* v. *Indiana R.R. Comm.*, 221 U.S. 400 (1911); *Appleby* v. *Delaney*, 271 U.S. 403 (1926).

[4] *Central Land Company* v. *Laidley*, 159 U.S. 103 (1895). *See also N.O. Water-Works Co.* v. *La. Sugar Co.*, 125 U.S. 18 (1888); *Hanford* v. *Davies*, 163 U.S. 273 (1896); *Ross* v. *Oregon*, 227 U.S. 150 (1913); *Detroit United Ry.* v. *Michigan*, 242 U.S. 238 (1916); *Long Sault Development Co.* v. *Call*, 242, U.S. 272, (1916); *McCoy* v. *Union Elevated R. Co.*, 247 U.S. 354 (1918); *Columbia G. & E. Ry.* v. *South Carolina*, 261 U.S. 236 (1923); *Tidal Oil Co.* v. *Flannagan*, 263 U.S. 444 (1924).

[5] *Jefferson Branch Bank* v. *Skelly*, 1 Bl. (66 U.S.) 436, 443 (1862); *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. (68 U.S.) 116, 145 (1863); *Wright* v. *Nagle*, 101 U.S. 791, 793 (1880); *McGahey* v. *Virginia*, 135 U.S. 662, 667 (1890); *Scott* v. *McNeal*, 154 U.S. 34, 35 (1894); *Stearns* v. *Minnesota*, 179 U.S. 223, 232–233 (1900); *Coombes* v. *Getz*, 285 U.S. 434, 441 (1932); *Atlantic Coast Line R. Co.* v. *Phillips*, 332 U.S. 168, 170 (1947).

[6] *McCullough* v. *Virginia*, 172 U.S. 102 (1898); *Houston & Texas Central R. Co.* v. *Texas*, 177 U.S. 66, 76, 77 (1900); *Hubert* v. *New Orleans*, 215 U.S. 170, 175 (1909); *Carondelet Canal Co.* v. *Louisiana*, 233 U.S. 362, 376 (1914); *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U.S. 164, 171 (1914).

tained in doing so by a decision of the highest state court holding that the statute authorizing the bonds was unconstitutional *ab initio.* In such a case the Supreme Court would take an appeal from the state court and would reverse the latter's decision of unconstitutionality because of its effect in rendering operative the act to repeal the tax.[7]

Suppose further, however, that the state court has reversed itself on the question of the constitutionality of the bonds in a suit by a creditor for payment without there having been an act of repeal. In this situation the Supreme Court would still afford relief if the case is one between citizens of different States, which reaches it via a lower federal court.[8] This is because in cases of this nature the Court formerly felt free to determine questions of fundamental justice for itself. Indeed, in such a case, the Court has apparently in the past regarded itself as free to pass upon the constitutionality of the state law authorizing the bonds even though there has been no prior decision by the highest state court sustaining them, the idea being that contracts entered into simply on the faith of the *presumed* constitutionality of a state statute are entitled to this protection.[9]

In other words, in cases of which it has jurisdiction because of diversity of citizenship, the Court has held that the obligation of contracts is capable of impairment by subsequent judicial decisions no less than by subsequent statutes and that it is able to prevent such impairment. In cases, on the other hand, of which it obtains jurisdiction only on the constitutional ground and by appeal from a state court, it has always adhered in terms to the doctrine that the word "laws" as used in Article I, § 10, does not comprehend judicial decisions. Yet even in these cases, it will intervene to protect contracts entered into on the faith of existing decisions from an impairment which is the direct result of a reversal of such decisions, but there must be in the offing, as it were, a statute of some kind—

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[7] *State Bank of Ohio* v. *Knoop,* 16 How. (57 U.S.) 369 (1854), and *Ohio Life Insurance and Trust Co.* v. *Debolt,* 16 How. (57 U.S.) 416 (1854) are the leading cases. *See also Jefferson Branch Bank* v. *Skelly,* 1 Bl. (66 U.S.) 436 (1862); *Louisiana* v. *Pilsbury,* 105 U.S. 278 (1882); *McGahey* v. *Virginia,* 135 U.S. 662 (1890); *Mobile & Ohio Railroad* v. *Tennessee,* 153 U.S. 486 (1894); *Bacon* v. *Texas,* 163 U.S. 207 (1896); *McCullough* v. *Virginia,* 172 U.S. 102 (1898).

[8] *Gelpcke* v. *Dubuque,* 1 Wall. (68 U.S.) 175, 206 (1865); *Havemayer* v. *Iowa County,* 3 Wall. (70 U.S.) 294 (1866); *Thomson* v. *Lee County,* 3 Wall. (70 U.S.) 327 (1866); *The City* v. *Lamson,* 9 Wall. (76 U.S.) 477 (1870); *Olcott* v. *The Supervisors,* 16 Wall. (83 U.S.) 678 (1873); *Taylor* v. *Ypsilanti,* 105 U.S. 60 (1882); *Anderson* v. *Santa Anna,* 116 U.S. 356 (1886); *Wilkes County* v. *Coler,* 180 U.S. 506 (1901).

[9] *Great Southern Hotel Co.* v. *Jones,* 193 U.S. 532, 548 (1904).

one possibly many years older than the contract rights involved—on which to pin its decision.[10]

In 1922 Congress, through an amendment to the Judicial Code, endeavored to extend the reviewing power of the Supreme Court to suits involving ". . . the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States. . . .' " This appeared to be an invitation to the Court to say frankly that the obligation of a contract can be impaired as well by a subsequent decision as by a subsequent statute. The Court, however, declined the invitation in an opinion by Chief Justice Taft which reviewed many of the cases covered in the preceeding paragraphs.

Dealing with *Gelpcke* and adherent decisions, Chief Justice Taft said: "These cases were not writs of error to the Supreme Court of a State. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. *Burgess* v. *Seligman,* 107 U.S. 20 (1883)." [11] While doubtless this was an available explanation in 1924, the decision in 1938 in *Erie Railroad Co.* v. *Tompkins,*[12] so cut down the power of the federal courts to decide diversity of citizenship cases according to their own notions of "general principles of common law" as to raise the question whether the Court will not be required eventually to put *Gelpcke* and its companions and descendants squarely on the obligation of contracts clause or else abandon them.

***"Obligation" Defined.***—A contract is analyzable into two elements: the *agreement,* which comes from the parties, and the *obligation,* which comes from the law and makes the agreement bind-

[10] *Sauer* v. *New York,* 206 U.S. 536 (1907); *Muhlker* v. *New York & Harlem Railroad Co.,* 197 U.S. 544, 570 (1905).

[11] *Tidal Oil Company* v. *Flanagan,* 263 U.S. 444, 450, 451–452 (1924).

[12] 304 U.S. 64 (1938).

ing on the parties. The concept of obligation is an importation from the Civil Law and its appearance in the contracts clause is supposed to have been due to James Wilson, a graduate of Scottish universities and a Civilian. Actually, the term as used in the contracts clause has been rendered more or less superfluous by the doctrine that the law in force when a contract is made enters into and comprises a part of the contract itself.[13] Hence, the Court sometimes recognizes the term in its decisions applying the clause, sometimes ignores it. In *Sturges* v. *Crowninshield,*[14] Marshall defined "obligation of contract" as "the law which binds the parties to perform their agreement"; but a little later the same year he sets forth the points presented for consideration in *Dartmouth College* v. *Woodward* [15] to be: "1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?" [16] The word "obligation" undoubtedly does carry the implication that the Constitution was intended to protect only *executory* contracts—i.e., contracts still awaiting performance, but this implication was early rejected for a certain class of contracts, with immensely important result for the clause.

***"Impair" Defined.***—"The obligations of a contract," says Chief Justice Hughes for the Court in *Home Building & Loan Assn.* v. *Blaisdell,*[17] "are impaired by a law which renders them invalid, or releases or extinguishes them . . . , and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights." [18] But he adds: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." [19] In short, the law from which

[13] *Walker* v. *Whitehead,* 16 Wall. (83 U.S.) 314 (1873); *Wood* v. *Lovett,* 313 U.S. 362, 370 (1941).

[14] 4 Wheat. (17 U.S.) 122, 197 (1819); *see also Curran* v. *Arkansas,* 15 How. (56 U.S.) 304 (1854).

[15] 4 Wheat. (17 U.S.) 518 (1819).

[16] Id., 627.

[17] 290 U.S. 398 (1934).

[18] Id., 431.

[19] Id., 435. *And see City of El Paso* v. *Simmons,* 379 U.S. 497 (1965).

the obligation stems must be understood to include constitutional law and, moreover a "progressive" constitutional law.[20]

***Vested Rights Not Included.***—The term "contracts" is used in the contracts clause in its popular sense of an agreement of minds. The clause therefore does not protect vested rights that are not referable to such an agreement between the State and an individual, such as the right of recovery under a judgment. The individual in question may have a case under the Fourteenth Amendment, but not one under Article I, § 10.[21]

***Public Grants Which Are Not "Contracts".***—Not all grants by a State constitute "contracts" within the sense of Article I, § 10. In his *Dartmouth College* decision, Chief Justice Marshall conceded that "if the act of incorporation be a grant of political power, if it creates a civil institution, to be employed in the administration of the government . . . the subject is one in which the legislature of the State may act according to its own judgment," unrestrained by the Constitution [22]—thereby drawing a line between "public" and "private" corporations which remained undisturbed for more than half a century.[23]

It has been subsequently held many times that municipal corporations are mere instrumentalities of the State for the more convenient administration of local governments, whose powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the legislature.[24] The same principle applies, moreover, to the property

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[20] "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency." Justice Black, in *Wood* v. *Lovett*, 313 U.S. 362, 383 (1941).

[21] *Crane* v. *Hahlo*, 258 U.S. 142, 145–146 (1922); *Louisiana ex rel. Folsom* v. *Mayor of New Orleans*, 109 U.S. 285, 288 (1883); *Morley* v. *Lake Shore Railway Co.*, 146 U.S. 162, 169 (1892). That the obligation of contracts clause did not protect vested rights merely as such was stated by the Court as early as *Satterlee* v. *Matthewson*, 2 Pet. (27 U.S.) 380, 413 (1829); and again in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. (36 U.S.) 420, 539–540 (1837).

[22] *Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518, 629 (1819).

[23] In *Munn* v. *Illinois*, 94 U.S. 113 (1877) a category of "business affected with a public interest" and whose property is "impressed with a public use" was recognized. A corporation engaged in such a business becomes a "quasi-public" corporation, the power of the State to regulate which is larger than in the case of a purely private corporation. Inasmuch as most corporations receiving public franchises are of this character, the final result of *Munn* v. *Illinois* was to enlarge the police power of the State in the case of the most important beneficiaries of the *Dartmouth College* decision.

[24] *Meriwether* v. *Garrett*, 102 U.S. 472 (1880); *Covington* v. *Kentucky*, 173 U.S. 231 (1899); *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1907).

rights which the municipality derives either directly or indirectly from the State. This was first held as to the grant of a franchise to a municipality to operate a ferry and has since then been recognized as the universal rule.[25] It was stated in a case decided in 1923 that the distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity, while it limited the legal liability of municipalities for the negligent acts or omissions of its officers or agents, did not, on the other hand, furnish ground for the application of constitutional restraints against the State in favor of its own municipalities.[1] Thus, no contract rights were impaired by a statute relocating a county seat, even though the former location was by law to be "permanent" and the citizens of the community had donated land and furnished bonds for the erection of public buildings.[2] Similarly, a statute changing the boundaries of a school district, giving to the new district the property within its limits which had belonged to the former district, and requiring the new district to assume the debts of the old district, did not impair the obligation of contracts.[3] Nor was the contracts clause violated by state legislation authorizing state control over insolvent communities through a Municipal Finance Commission.[4]

On the same ground of public agency, neither appointment nor election to public office creates a contract in the sense of Article I, § 10, whether as to tenure, or salary, or duties, all of which remain, so far as the Constitution of the United States is concerned, subject to legislative modification or outright repeal.[5] Indeed, there can be no such thing in this country as property in office, although the common law sustained a different view which sometimes found reflection in early cases.[6] When, however, services have once been

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[25] *East Hartford* v. *Hartford Bridge Co.*, 10 How. (51 U.S.) 511 (1851); *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1907).

[1] *City of Trenton* v. *New Jersey* 262 U.S. 182, 191 (1923).

[2] *Newton* v. *Commissioners*, 100 U.S. 548 (1880).

[3] *Michigan ex rel. Kies* v. *Lowrey*, 199 U.S. 233 (1905).

[4] *Faitoute Co.* v. *City of Asbury Park*, 316 U.S. 502 (1942).

[5] *Butler* v. *Pennsylvania*, 10 How. (51 U.S.) 402 (1850); *Fisk* v. *Jefferson Policy Jury*, 116 U.S. 131 (1885); *Dodge* v. *Board of Education*, 302 U.S. 74 (1937); *Mississippi ex rel. Robertson* v. *Miller*, 276 U.S. 174 (1928).

[6] *Butler* v. *Pennsylvania*, 10 How. (51 U.S.) 420 (1850). *Cf. Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803); *Hoke* v. *Henderson*, 154 N.C. (4 Dev.) 1 (1833). *See also United States* v. *Fisher*, 109 U.S. 143 (1883); *United States* v. *Mitchell*, 109 U.S. 146 (1883); *Crenshaw* v. *United States*, 134 U.S. 99 (1890).

rendered, there arises an implied contract that they shall be compensated at the rate which was in force at the time they were rendered.[7] Also, an express contract between the State and an individual for the performance of specific services falls within the protection of the Constitution. Thus a contract made by the governor pursuant to a statute authorizing the appointment of a commissioner to conduct, over a period of years, a geological, mineralogical, and agricultural survey of the State, for which a definite sum had been authorized, was held to have been impaired by repeal of the statute.[8] But a resolution of a local board of education reducing teachers' salaries for the school year 1933–1934, pursuant to an act of the legislature authorizing such action, was held not to impair the contract of a teacher who, having served three years, was by earlier legislation exempt from having his salary reduced except for inefficiency or misconduct.[9] Similarly, it was held that an Illinois statute which reduced the annuity payable to retired teachers under an earlier act did not violate the contracts clause, since it had not been the intention of the earlier act to propose a contract but only to put into effect a general policy.[10] On the other hand, the right of one, who had become a 'permanent teacher" under the Indiana Teachers Tenure Act of 1927, to continued employment was held to be contractual and to have been impaired by the repeal in 1933 of the earlier act.[11]

***Tax Exemptions: When Not "Contracts".***—From a different point of view, the Court has sought to distinguish between grants of privileges, whether to individuals or to corporations, which are contracts and those which are mere revocable licenses, although on account of the doctrine of presumed consideration mentioned earlier, this has not always been easy to do. In pursuance of the precedent set in *New Jersey* v. *Wilson,*[12] the legislature of a State "may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation, to which such property shall be subjected," and such an exemption is frequently a contract within the sense of the Constitution. Indeed this is always so when the immunity is conferred upon a corpora-

[7] *Fisk* v. *Jefferson Police Jury,* 116 U.S. 131 (1885); *Mississippi ex rel. Robertson* v. *Miller,* 276 U.S. 174 (1928).

[8] *Hall* v. *Wisconsin,* 103 U.S. 5 (1880). *Cf. Higginbotham* v. *City of Baton Rouge,* 306 U.S. 535 (1930).

[9] *Phelps* v. *Board of Education,* 300 U.S. 319 (1937).

[10] *Dodge* v. *Board of Education,* 302 U.S. 74 (1937).

[11] *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95 (1938).

[12] 7 Cr. (11 U.S.) 164 (1812).

tion by the clear terms of its charter.[13] When, on the other hand, an immunity of this sort springs from general law, its precise nature is more open to doubt, as a comparison of decisions will serve to illustrate.

In *State Bank of Ohio* v. *Knoop*,[14] a closely divided Court held that a general banking law of Ohio, which provided that companies complying therewith and their stockholders should be exempt from all but certain taxes, was, as to a bank organized under it and its stockholders, a contract within the meaning of Article I, § 10. The provision was not, the Court said, "a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted." [15] When, however, the State of Michigan pledged itself, by a general legislative act, not to tax any corporation, company, or individual undertaking to manufacture salt in the State from water there obtained by boring on property used for this purpose and, furthermore, to pay a bounty on the salt so manufactured, it was held not to have engaged itself within the constitutional sense. "General encouragements," said the Court, "held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time." [16] So far as exemption from taxation is concerned the difference between these two cases is obviously slight, but the later one is unquestionable authority for the proposition that legislative bounties are repealable at will.

Furthermore, exemptions from taxation have in certain cases been treated as gratuities repealable at will, even when conferred by specific legislative enactments. This would seem always to be the case when the beneficiaries were already in existence when the exemption was created and did nothing of a more positive nature to qualify for it than to continue in existence.[17] Yet the cases are

[13] *The Delaware Railroad Tax*, 18 Wall. (85 U.S.) 206, 225 (1874); *Pacific Railroad Company* v. *Maguire*, 20 Wall. (87 U.S.) 36, 43 (1874); *Humphrey* v. *Pegues*, 16 Wall. (83 U.S.) 244, 249 (1873); *Home of the Friendless* v. *Rouse*, 8 Wall. (75 U.S.) 430, 438 (1869).

[14] 16 How. (57 U.S.) 369 (1854).

[15] Id., 382–383.

[16] *Salt Company* v. *East Saginaw*, 13 Wall. (80 U.S.) 373, 379 (1872). *See also Welch* v. *Cook*, 97 U.S. 541 (1879); *Grand Lodge* v. *New Orleans*, 166 U.S. 143 (1897); *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U.S. 379 (1903). *Cf. Ettor* v. *Tacoma*, 228 U.S. 148 (1913), in which it was held that the repeal of a statute providing for consequential damages caused by changes of grades of streets could not constitutionally affect an already accrued right to compensation.

[17] *See Rector of Christ Church, Phila.* v. *County of Philadelphia*, 24 How. (65 U.S.) 300, 302 (1861); *Seton Hall College* v. *South Orange*, 242 U.S. 100 (1916).

not always easy to explain in relation to each other, except in light of the fact that the Court's point of view has altered from time to time.[18]

***"Contracts" Include Public Contracts and Corporate Charters.***— The question which was settled very early was whether the clause was intended to be applied solely in protection of private contracts or in the protection also of public grants, or, more broadly, in protection of public contracts, in short, those to which a State is a party.[19] Support for the affirmative answer accorded this question could be derived from the following sources. For one thing, the clause departed from the comparable provision in the Northwest Ordinance (1787) in two respects: first, in the *presence* of the word "obligation"; secondly, in the *absence* of the word "private". There is good reason for believing that Wilson may have been responsible for both alterations, inasmuch as two years earlier he had denounced a current proposal to repeal the Bank of North America's Pennsylvania charter in the following words: "If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, every precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politicks, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction." [20]

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[18] Compare the above cases with *Home of the Friendless* v. *Rouse*, 8 Wall. (75 U.S.) 430, 437 (1869); *Illinois Central Railroad* v. *Decatur*, 147 U.S. 190 (1893), with *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U.S. 379 (1903).

[19] According to Benjamin F. Wright, throughout the first century of government under the Constitution "the contract clause had been considered in almost forty per cent of all cases involving the validity of State legislation," and of these the vast proportion involved legislative grants of one type or other, the most important category being charters of incorporation. However, the numerical prominence of such grants in the cases does not overrate their relative importance from the point of view of public interest. B. Wright, *The Contract Clause of the Constitution*, (Boston: 1938), 95.

Madison explained the clause by allusion to what had occurred "in the internal administration of the States" in the years preceding the Constitutional Convention, in regard to private debts. A violation of contracts had become familiar in the form of depreciated paper made a legal tender, of property substituted for money, of installment laws, and of the occlusions of the courts of justice." 3 M. Farrand, *Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 548; *The Federalist*, No. 44 (Modern Library ed. 1937).

[20] 2 *The Works of James Wilson*, R. McCloskey ed. (Cambridge: 1967), 834.

Furthermore, in its first important constitutional case, that of *Chisholm* v. *Georgia,*[21] the Court ruled that its original jurisdiction extended to an action in assumpsit brought by a citizen of South Carolina against the State of Georgia. This construction of the federal judicial power was, to be sure, promptly repealed by the Eleventh Amendment, but without affecting the implication that the contracts protected by the Constitution included public contracts.

One important source of this diversity of opinion is to be found in that ever welling spring of constitutional doctrine in early days, the prevalence of natural law notions and the resulting vague significance of the term "law." In *Sturges* v. *Crowninshield,* Marshall defined the obligation of contracts as "the law which binds the parties to perform their undertaking." Whence, however, comes this law? If it comes from the State alone, which Marshall was later to deny even as to private contracts,[22] then it is hardly possible to hold that the States' own contracts are covered by the clause, which manifestly does not *create* an obligation for contracts but only protects such obligation as already exists. But, if, on the other hand, the law furnishing the obligation of contracts comprises Natural Law and kindred principles, as well as law which springs from state authority, then, inasmuch as the State itself is presumably bound by such principles, the State's own obligations, so far as harmonious with them, are covered by the clause.

*Fletcher* v. *Peck,*[23] has the double claim to fame in that it was the first case in which the Supreme Court held a state enactment to be in conflict with the Constitution, and also the first case to hold that the contracts clause protected public grants. By an act passed on January 7, 1795, the Georgia Legislature directed the sale to four land companies of public lands comprising most of what are now the States of Alabama and Mississippi. As soon became known, the passage of the measure had been secured by open and wholesale bribery. So when a new legislature took over in the winter of 1795–1796, almost its first act was to revoke the sale made the previous year.

Meantime, however, the land companies had disposed of several millions of acres of their holdings to speculators and prospective settlers, and following the rescinding act some of these took counsel with Alexander Hamilton as to their rights. In an opinion which was undoubtedly known to the Court when it decided *Fletcher* v. *Peck,* Hamilton characterized the repeal as contravening "the

[21] 2 Dall. (2 U.S.) 419 (1793).
[22] *Ogden* v. *Saunders,* 12 Wheat. (25 U.S.) 213, 338 (1827).
[23] 6 Cr. (10 U.S.) 87 (1810).

first principles of natural justice and social policy," especially so far as it was made, "to the prejudice . . . of third persons . . . innocent of the alleged fraud or corruption; . . . moreover," he added, "the Constitution of the United States, article first, section tenth, declares that no State shall pass a law impairing the obligations of contract. This must be equivalent to saying no State shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a State or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so." [24] In the debate to which the "Yazoo Land Frauds," as they were contemporaneously known, gave rise in Congress, Hamilton's views were quoted frequently.

So far as it invoked the obligation of contracts clause, Marshall's opinion in *Fletcher* v. *Peck* performed two creative acts. He recognized that an obligatory contract was one still to be performed—in other words, was an executory contract, also that a grant of land was an executed contract—a conveyance. But, he asserted, every grant is attended by "an implied contract" on the part of the grantor not to claim again the thing granted. Thus, grants are brought within the category of contracts having continuing obligation and so within Article I, § 10. But the question still remained of the nature of this obligation. Marshall's answer to this can only be inferred from his statement at the end of his opinion. The State of Georgia, he says, "was restrained" from the passing of the rescinding act "either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States." [25]

The protection thus thrown about land grants was presently extended, in the case of *New Jersey* v. *Wilson,*[1] to a grant of immu-

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[24] B. Wright, *The Contract Clause of the Constitution* (Boston: 1938), 22. Professor Wright dates Hamilton's pamphlet, 1796.

[25] 6 Cr. (10 U.S.) 87, 139 (1810). Justice Johnson, in his concurring opinion, relied exclusively on general principles. "I do not hesitate to declare, that a State does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." Id., 143.

[1] 7 Cr. (11 U.S.) 164 (1812). The exemption from taxation which was involved in this case was held in 1886 to have lapsed through the acquiescence for sixty years

nity from taxation which the State of New Jersey had accorded certain Indian lands, and several years after that, in the *Dartmouth College* case,[2] to the charter privileges of an eleemosynary corporation.

In *City of El Paso* v. *Simmons*,[3] the Court held, over a vigorous dissent by Justice Black, that Texas had not violated this clause when it amended its laws governing the sale of public lands so as to restrict the previously unlimited right of a delinquent to reinstate himself upon forfeited land by a single payment of all past interest due.

***Corporate Charters: Different Ways of Regarding.***—There are three ways in which the charter of a corporation may be regarded. In the first place, it may be thought of simply as a license terminable at will by the State, like a liquor-seller's license or an auctioneer's license, but affording the incorporators, so long as it remains in force, the privileges and advantages of doing business in the form of a corporation. Nowadays, indeed, when corporate charters are usually issued to all legally qualified applicants by an administrative officer who acts under a general statute, this would probably seem to be the natural way of regarding them were it not for the *Dartmouth College* decision. But in 1819 charters were granted directly by the state legislatures in the form of special acts and there were very few profit-taking corporations in the country. The later extension of the benefits of the *Dartmouth College* decision to corporations organized under general law took place without discussion.

Secondly, a corporate charter may be regarded as a franchise constituting a vested or property interest in the hands of the holders, and therefore as forfeitable only for abuse or in accordance with its own terms. This is the way in which some of the early state courts did regard them at the outset.[4] It is also the way in

by the owners of the lands in the imposition of taxes upon these. *Given* v. *Wright*, 117 U.S. 648 (1886).

[2] *Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518 (1819).

[3] 379 U.S. 497 (1965). *See also Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 278–279 (1969).

[4] In 1806 Chief Justice Parsons of the Supreme Judicial Court of Massachusetts, without mentioning the contracts clause, declared that rights legally vested in a corporation cannot be "controlled of destroyed by a subsequent statute, unless a power [for that purpose] be reserved to the legislature in the act of incorporation," *Wales* v. *Stetson*, 2 Mass. 142 (1806). *See also Stoughton* v. *Baker*, 4 Mass. 521 (1808) to like effect; *cf. Locke* v. *Dane*, 9 Mass. 360 (1812) in which it is said that the purpose of the contracts clause was to provide against paper money and insolvent laws. Together these holdings add up to the conclusion that the reliance of the Massachusetts court was on "fundamental principles," rather than the contracts clause.

which Blackstone regarded them in relation to the royal prerogative, although not in relation to the sovereignty of Parliament, and the same point of view found expression in Story's concurring opinion in *Dartmouth College* v. *Woodward,* as it did also in Webster's argument in that case.[5]

The third view is the one formulated by Chief Justice Marshall in his controlling opinion in *Dartmouth College* v. *Woodward,*[6] This is that the charter of Dartmouth College, a purely private institution, was the outcome and partial record of a contract between the donors of the college, on the one hand, and the British Crown, on the other, and the contract still continued in force between the State of New Hampshire, as the successor to the Crown and Government of Great Britain, and the trustees, as successors to the donors. The charter, in other words, was not simply a grant—rather it was the documentary record of a still existent agreement between still existent parties.[7] Taking this view, which he developed with great ingenuity and persuasiveness, Marshall was able to appeal to the obligation of contracts clause directly, and without further use of his fiction in *Fletcher* v. *Peck* of an executory contract accompanying the grant.

A difficulty still remained, however, in the requirement that a contract, before it can have obligation, must import consideration, that is to say, must be shown not to have been entirely gratuitous on either side. Moreover, the consideration which induced the Crown to grant a charter to Dartmouth College was not merely a speculative one. It consisted of the donations of the donors to the important public interest of education. Fortunately or unfortunately, in dealing with this phase of the case, Marshall used more sweeping terms than were needed. "The objects for which a corporation is created," he wrote, "are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant." In other words, the simple fact of the charter having been granted imports consideration from the point of view of the State.[8] With this doctrine before it, the Court in *Providence Bank* v. *Billings,*[9] and again in

[5] 4 Wheat. (17 U.S.), 577–595 (Webster's argument); id., 666 (Story's opinion). *See also* Story's opinion for the Court in *Terrett* v. *Taylor,* 9 Cr. (13 U.S.) 43 (1815).

[6] 4 Wheat. (17 U.S.) 518 (1819).

[7] Id., 627.

[8] Id., 637; *see also Home of the Friendless* v. *Rouse,* 8 Wall. (75 U.S.) 430, 437 (1869).

[9] 4 Pet. (29 U.S.) 514 (1830).

*Charles River Bridge* v. *Warren Bridge,*[10] admitted without discussion of the point, the applicability of the *Dartmouth College* decision to purely business concerns.

***Reservation of Right to Alter or Repeal Corporate Charters.***—It is next in order to consider four principles or doctrines whereby the Court has itself broken down the force of the *Dartmouth College* decision in great measure in favor of state legislative power. By the logic of the *Dartmouth College* decision itself, the State may reserve in a corporate charter the right to "amend, alter, and repeal" the same, and such reservation becomes a part of the contract between the State and the incorporators, the obligation of which is accordingly not impaired by the exercise of the right.[11] Later decisions recognize that the State may reserve the right to amend, alter, and repeal by general law, with the result of incorporating the reservation in all charters of subsequent date.[12] There is, however, a difference between a reservation by a statute and one by constitutional provision. While the former may be repealed as to a subsequent charter by the specific terms thereof, the latter may not.[13]

Is the right which is reserved by a State to "amend" or "alter" a charter without restriction? When it is accompanied, as it generally is, by the right to "repeal," one would suppose that the answer to this question was self-evident. Nonetheless, there are a number of judicial dicta to the effect that this power is not without limit, that it must be exercised reasonably and in good faith, and that the alterations made must be consistent with the scope and object of the grant.[14] Such utterances amount, apparently, to little more than an anchor to windward, for while some of the state courts have applied tests of this nature to the disallowance of legislation, it does not appear that the Supreme Court of the United States has ever done so.[15]

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[10] 11 Pet. (36 U.S.) 420 (1837).

[11] *Dartmouth College* v. *Woodward,* 4 Wheat. (17 U.S.) 518, 712 (1819) (Justice Story).

[12] *Home of the Friendless* v. *Rouse,* 8 Wall. (75 U.S.) 430, 438 (1869); *Pennsylvania College Cases,* 13 Wall. (80 U.S.) 190, 213 (1872); *Miller* v. *New York,* 15 Wall. (82 U.S.) 478 (1873); *Murray* v. *Charleston,* 96 U.S. 432 (1878); *Greenwood* v. *Freight Co.,* 105 U.S. 13 (1882); *Chesapeake & Ohio Railway Co.* v. *Miller,* 114 U.S. 176 (1885); *Louisville Water Company* v. *Clark,* 143 U.S. 1 (1892).

[13] *New Jersey* v. *Yard,* 95 U.S. 104, 111 (1877).

[14] *See Holyoke Company* v. *Lyman,* 15 Wall. (82 U.S.) 500, 520 (1873), *See also Shields* v. *Ohio,* 95 U.S. 319 (1877); *Fair Haven R.R.* v. *New Haven,* 203 U.S. 379 (1906); *Berea College* v. *Kentucky,* 211 U.S. 45 (1908). Also *Lothrop* v. *Stedman,* 15 Fed. Cas. 922 (No. 8519) (C.C.D. Conn. 1875) where the principles of natural justice are thought to set a limit to the power.

[15] *See* in this connection the cases cited by Justice Sutherland in his opinion for the Court in *Phillips Petroleum Co.* v. *Jenkins,* 297 U.S. 629 (1936).

Quite different is it with the distinction pointed out in the cases between the franchises and privileges which a corporation derives from its charter and the rights of property and contract which accrue to it in the course of its existence. Even the outright repeal of the former does not wipe out the latter or cause them to escheat to the State. The primary heirs of the defunct organization are its creditors, but whatever of value remains after their valid claims are met goes to the former shareholders.[16] By the earlier weight of authority, on the other hand, persons who contract with companies whose charters are subject to legislative amendment or repeal do so at their own risk; any "such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter. . . ." [17] But later holdings becloud this rule.[18]

***Corporation Subject to the Law and Police Power.***—But suppose the State neglects to reserve the right to amend, alter, or repeal—is it, then, without power to control its corporate creatures? By no means. Private corporations, like other private persons, are always presumed to be subject to the legislative power of the State, from which it follows that immunities conferred by charter are to be treated as exceptions to an otherwise controlling rule. This principle was recognized by Chief Justice Marshall in the case of *Providence Bank* v. *Billings*,[19] in which he held that in the absence of express stipulation or reasonable implication to the contrary in its charter, the bank was subject to the taxing power of the State, notwithstanding that the power to tax is the power to destroy.

And of course the same principle is equally applicable to the exercise by the State of its police powers. Thus, in what was perhaps the leading case before the Civil War, the Supreme Court of Vermont held that the legislature of that State had the right, in furtherance of the public safety, to require chartered companies operating railways to fence in their tracks and provide cattle guards. In a matter of this nature, said the court, corporations are on a level with individuals engaged in the same business, unless, from

[16] *Curran* v. *Arkansas*, 15 How. (56 U.S.) 304 (1853); *Shields* v. *Ohio*, 95 U.S. 319 (1877); *Greenwood* v. *Freight Co.*, 105 U.S. 13 (1882); *Adirondack Railway Co.* v. *New York*, 176 U.S. 335 (1900); *Stearns* v. *Minnesota*, 179 U.S. 223 (1900); *Chicago, M. & St. P. R.* v. *Wisconsin*, 238 U.S. 491 (1915); *Coombes* v. *Getz*, 285 U.S. 434 (1932).

[17] *Pennsylvania College Cases*, 13 Wall. (80 U.S.) 190, 218 (1872). *See also Calder* v. *Michigan*, 218 U.S. 591 (1910).

[18] *Lake Shore & Michigan Southern Railway Co.* v. *Smith*, 173 U.S. 684, 690 (1899); *Coombes* v. *Getz*, 285 U.S. 434 (1932). Both these decisions cite *Greenwood* v. *Freight Co.*, 105 U.S. 13, 17 (1882), but without apparent justification.

[19] 4 Pet. (29 U.S.) 514 (1830).

their charter, they can prove the contrary.[20] Since then the rule has been applied many times in justification of state regulation of railroads,[21] and even of the application of a state prohibition law to a company which had been chartered expressly to manufacture beer.[22]

***Strict Construction of Charters, Tax Exemptions.***—Long, however, before the cases last cited were decided, the principle which they illustrate had come to be powerfully reinforced by two others, the first of which is that all charter privileges and immunities are to be strictly construed as against the claims of the State, or as it is otherwise often phrased, "nothing passes by implication in a public grant."

The leading case was that of the *Charles River Bridge* v. *Warren Bridge,*[23] which was decided shortly after Chief Justice Marshall's death by a substantially new Court. The question at issue was whether the charter of the complaining company, which authorized it to operate a toll bridge, stood in the way of the State's permitting another company of later date to operate a free bridge in the immediate vicinity. Inasmuch as the first company could point to no clause in its charter which specifically vested it with an exclusive right, the Court held the charter of the second company to be valid on the principle just stated. Justice Story, pre-

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[20] *Thorpe* v. *Rutland & Burlington R. Company,* 27 Vt. 140 (1854).

[21] Thus a railroad may be required, at its own expense and irrespective of benefits to itself, to eliminate grade crossings in the interest of the public safety, *New York & N.E. Railroad* v. *Bristol,* 151 U.S. 556 (1894), to make highway crossings reasonably safe and convenient for public use, *Great Northern Ry. Co.* v. *Minnesota ex rel. Clara City,* 246 U.S. 434 (1918), to repair viaducts, *Northern Pacific Railway* v. *Duluth,* 208 U.S. 583 (1908), and to fence its right of way, *Minneapolis & St. L. Ry.* v. *Emmons,* 149 U.S. 364 (1893). Though a railroad company owns the right of way along a street, the city may require it to lay tracks to conform to the established grade; to fill in tracks at street intersections; and to remove tracks from a busy street intersection, when the attendant disadvantage and expense are small and the safety of the public appreciably enhanced *Denver & R.G.R. Co.* v. *Denver,* 250 U.S. 241 (1919).

Likewise the State, in the public interest, may require a railroad to reestablish an abandoned station, even though the railroad commission had previously authorized its abandonment on condition that another station be established elsewhere, a condition which had been complied with. *Railroad Co.* v. *Hammersley,* 104 U.S. 1 (1881). It may impose upon a railroad liability for fire communicated by its locomotives, even though the State had previously authorized the company to use said type of locomotive power, *St. Louis & San Francisco Railway* v. *Mathews,* 165 U.S. 1, 5 (1897), and it may penalize the failure to cut drains through embankments so as to prevent flooding of adjacent lands. *Chicago & Alton R.R.* v. *Tranbarger,* 238 U.S. 67 (1915).

[22] *Beer Co.* v. *Massachusetts,* 97 U.S. 25 (1878). *See also Fertilizing Co.* v. *Hyde Park,* 97 U.S. 659 (1878); *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, 345 (1909).

[23] 11 Pet. (36 U.S.) 420 (1837).

sented a vigorous dissent, in which he argued cogently, but unavailingly, that the monopoly claimed by the Charles River Bridge Company was fully as reasonable an implication from the terms of its charter and the circumstances surrounding its concession as perpetuity had been from the terms of the Dartmouth College charter and the environing transaction.

The Court was in fact making new law, because it was looking at things from a new point of view. This was the period when judicial recognition of the Police Power began to take on a doctrinal character. It was also the period when the railroad business was just beginning. Chief Justice Taney's opinion evinces the influence of both these developments. The power of the State to provide for its own internal happiness and prosperity was not, he asserted, to be pared away by mere legal intendments, nor was its ability to avail itself of the lights of modern science to be frustrated by obsolete interests such as those of the old turnpike companies, the charter privileges of which, he apprehended, might easily become a bar to the development of transportation along new lines.[24]

The rule of strict construction has been reiterated by the Court many times. In the Court's opinion in *Blair* v. *City of Chicago*,[25] decided nearly seventy years after the *Charles River Bridge* case, it said: "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privilege may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. . . . The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.' " [1]

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[24] Id., 548–553.

[25] 201 U.S. 400 (1906).

[1] Id., 471–472, citing *The Binghamton Bridge*, 3 Wall. (70 U.S.) 51, 75 (1866).

An excellent illustration of the operation of the rule in relation to tax exemptions was furnished by the derivative doctrine that an immunity of this character must be deemed as intended solely for the benefit of the corporation receiving it and hence, in the absence of express permission by the State, may not be passed on to a successor.[2] Thus, where two companies, each exempt from taxation, were permitted by the legislature to consolidate, the new corporation was held to be subject to taxation.[3] Again, a statute which granted a corporation all "the rights and privileges" of an earlier corporation was held not to confer the latter's "immunity" from taxation.[4] Yet again, a legislative authorization of the transfer by one corporation to another of the former's "estate, property, right, privileges, and franchises" was held not to clothe the later company with the earlier one's exemption from taxation.[5]

Furthermore, an exemption from taxation is to be strictly construed even in the hands of one clearly entitled to it. So the exemption conferred by its charter on a railway company was held not to extend to branch roads constructed by it under a later statute.[6] Also, a general exemption of the property of a corporation from taxation was held to refer only to the property actually employed in its business.[7] Also, the charter exemption of the capital stock of a railroad from taxation "for ten years after completion of the said road" was held not to become operative until the completion of the road.[8] So also the exemption of the campus and endowment fund of a college was held to leave other lands of the college, though a part of its endowment, subject to taxation.[9] Provisions in a statute that bonds of the State and its political subdivisions were not to be taxed and should not be taxed were held not to exempt interest on them from taxation as income of the owners.[10]

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[2] *Memphis & L. R. Co.* v. *Commissioners*, 112 U.S. 609, 617 (1884). *See also Morgan* v. *Louisiana*, 93 U.S. 217 (1876); *Wilson* v. *Gaines*, 103 U.S. 417 (1881); *Louisville & Nashville R.R. Co.* v. *Palmes*, 109 U.S. 244, 251 (1883); *Norfolk & Western Railroad* v. *Pendleton*, 156 U.S. 667, 673 (1895); *Pickard* v. *East Tennessee, V. & G.R. Co.*, 130 U.S. 637, 641 (1889).

[3] *Atlantic & Gulf R. Co.* v. *Georgia*, 98 U.S. 359, 365 (1879).

[4] *Phoenix F. & M. Ins. Co.* v. *Tennessee*, 161 U.S. 174 (1896).

[5] *Rochester Railway Co.* v. *Rochester*, 205 U.S. 236 (1907); followed in *Wright* v. *Georgia R.R. & Banking Co.*, 216 U.S. 420 (1910); *Rapid Transit Corp.* v. *New York*, 303 U.S. 573 (1938). *Cf. Tennessee* v. *Whitworth*, 117 U.S. 139 (1886), the authority of which is respected in the preceding case.

[6] *Chicago, B. & K.C. R.* v. *Guffey*, 120 U.S. 569 (1887).

[7] *Ford* v. *Delta and Pine Land Company*, 164 U.S. 662 (1897).

[8] *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U.S. 665 (1886).

[9] *Millsaps College* v. *City of Jackson*, 275 U.S. 129 (1927).

[10] *Hale* v. *State Board*, 302 U.S. 95 (1937).

***Strict Construction and the Police Power.***—The police power, too, has frequently benefited from the doctrine of strict construction, although this recourse is today seldom, if ever, necessary in this connection. Some of the more striking cases may be briefly summarized. The provision in the charter of a railway company permitting it to set reasonable charges still left the legislature free to determine what charges were reasonable.[11] On the other hand, when a railway agreed to accept certain rates for a specified period, it thereby foreclosed the question of the reasonableness of such rates.[12] The grant to a company of the right to supply a city with water for twenty-five years was held not to prevent a similar concession to another company by the same city.[13] The promise by a city in the charter of a water company not to make a similar grant to any other person or corporation was held not to prevent the city itself from engaging in the business.[14] A municipal concession to a water company which was to run for thirty years and which was accompanied by the provision that the "said company shall charge the following rates," was held not to prevent the city from reducing such rates.[15] But more broadly, the grant to a municipality of the power to regulate the charges of public service companies was held not to bestow the right to contract away this power.[16] Indeed, any claim by a private corporation that it received the rate-making power from a municipality must survive a two-fold challenge: first, as to the right of the municipality under its charter to make such a grant, secondly, as to whether it has actually done so, and in both respects an affirmative answer must be based on express words and not on implication.[17]

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[11] *Railroad Commission Cases (Stone* v. *Farmers' Loan & Trust Co.)*, 116 U.S. 307, 330 (1886), extended in *Southern Pacific Co.* v. *Campbell*, 230 U.S. 537 (1913) to cases in which the word "reasonable" does not appear to qualify the company's right to prescribe tolls. *See also American Bridge Co.* v. *Comm.*, 307 U.S. 486 (1939).

[12] *Georgia Ry. Co.* v. *Town of Decatur*, 262 U.S. 432 (1923). *See also Southern Iowa Elec. Co.* v. *City of Charlton*, 255 U.S. 539 (1921).

[13] *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 15 (1898).

[14] *Skaneateles Water Co.* v. *Village of Skaneateles*, 184 U.S. 354 (1902); *Water Co.* v. *City of Knoxville*, 200 U.S. 22 (1906); *Madera Water Works* v. *City of Madera*, 228 U.S. 454 (1913).

[15] *Rogers Park Water Company* v. *Fergus*, 180 U.S. 624 (1901).

[16] *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 211 U.S. 265 (1908); *Wyandotte Gas Co.* v. *Kansas*, 231 U.S. 622 (1914).

[17] *See also Puget Sound Traction Co.* v. *Reynolds*, 244 U.S. 574 (1917). "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed." Justice Black for the Court in *Keefe* v. *Clark*, 322 U.S. 393, 396–397 (1944).

***Doctrine of Inalienability as Applied to Eminent Domain, Taxing, and Police Powers.***—The second of the doctrines mentioned above whereby the principle of the subordination of all persons, corporate and individual alike, to the legislative power of the State has been fortified, is the doctrine that certain of the State's powers are inalienable, and that any attempt by a State to alienate them, upon any consideration whatsoever, is *ipso facto* void and hence incapable to producing a "contract" within the meaning of Article I, § 10. One of the earliest cases to assert this principle occurred in New York in 1826. The corporation of the City of New York, having conveyed certain lands for the purposes of a church and cemetery together with a covenant for quiet enjoyment, later passed a by-law forbidding their use as a cemetery. In denying an action against the city for breach of covenant, the state court said the defendants "had no power as a party, [to the covenant] to make a contract which should control or embarrass their legislative powers and duties." [18]

The Supreme Court first applied similar doctrine in 1848 in a case involving a grant of exclusive right to construct a bridge at a specified locality. Sustaining the right of the State of Vermont to make a new grant to a competing company, the Court held that the obligation of the earlier exclusive grant was sufficiently recognized in making just compensation for it; and that corporate franchises, like all other forms of property, are subject to the overruling power of eminent domain.[19] This reasoning was reinforced by an appeal to the theory of state sovereignty, which was held to involve the corollary of the inalienability of all the principal powers of a State.

The subordination of all charter rights and privileges to the power of eminent domain has been maintained by the Court ever since; not even an explicit agreement by the State to forego the exercise of the power will avail against it.[20] Conversely, the State may revoke an improvident grant of public property without recourse to the power of eminent domain, such a grant being inherently beyond the power of the State to make. So when the legislature of Illinois in 1869 devised to the Illinois Central Railroad Company, its successors and assigns, the State's right and title to nearly a thousand acres of submerged land under Lake Michigan along the harbor front of Chicago, and four years later sought to

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[18] *Brick Presbyterian Church* v. *New York*, 5 Cow. (N.Y.) 538, 540 (1826).

[19] *West River Bridge Company* v. *Dix*, 6 How. (47 U.S.) 507 (1848). *See also Backus* v. *Lebanon*, 11 N.H. 19 (1840); *White River Turnpike Co.* v. *Vermont Cent. R. Co.*, 21 Vt. 590 (1849); and *Bonaparte* v. *Camden & A.R. Co.*, 3 Fed. Cas. 821 (No. 1617) (C.C.D.N.J. 1830).

[20] *Pennsylvania Hospital* v. *City of Philadelphia*, 245 U.S. 20 (1917).

repeal the grant, the Court, a four-to-three decision, sustained an action by the State to recover the lands in question. Said Justice Field, speaking for the majority: "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. . . . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time." [21]

On the other hand, repeated endeavors to subject tax exemptions to the doctrine of inalienability, though at times supported by powerful minorities on the Bench, have failed.[22] As recently as January, 1952, the Court ruled that the Georgia Railway Company was entitled to seek an injunction in the federal courts against an attempt by Georgia's Revenue Commission to compel it to pay *ad valorem* taxes contrary to the terms of its special charter issued in 1833. In answer to the argument that this was a suit contrary to the Eleventh Amendment the Court declared that the immunity from federal jurisdiction created by the Amendment "does not extend to individuals who act as officers without constitutional authority." [23]

The leading case involving the police power was *Stone* v. *Mississippi*.[24] In 1867, the legislature of Mississippi chartered a company to which it expressly granted the power to conduct a lottery. Two years later the State adopted a new Constitution which contained a provision forbidding lotteries, and a year later the legislature passed an act to put this provision into effect. In upholding this act and the constitutional provision on which it was based, the Court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights," and these agencies can neither give away nor sell their discretion. All that

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[21] *Illinois Central R. Co.* v. *Illinois*, 146 U.S. 387, 453, 455 (1892).

[22] *See* especially *Home of the Friendless* v. *Rouse*, 8 Wall. (75 U.S.) 430 (1869), and *The Washington University* v. *Rouse*, 8 Wall. (75 U.S.) 439 (1869).

[23] *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 305–306 (1952). The Court distinguished *In re Ayers*, 123 U.S. 443 (1887) on the ground that the action there was barred "as one in substance directed at the State merely to obtain specific performance of a contract with the State." 342 U.S., 305.

[24] 101 U.S. 814 (1880).

one can get by a charter permitting the business of conducting a lottery "is suspension of certain governmental rights in his favor, subject to withdrawal at will." [25]

The Court shortly afterward applied the same reasoning in a case in which was challenged the right of Louisiana to invade the exclusive privilege of a corporation engaged in the slaughter of cattle in New Orleans by granting another company the right to engage in the same business. Although the State did not offer to compensate the older company for the lost monopoly, its action was sustained on the ground that it had been taken in the interest of the public health.[1] When, however, the City of New Orleans, in reliance on this precedent, sought to repeal an exclusive franchise which it had granted a company for fifty years to supply gas to its inhabitants, the Court interposed its veto, explaining that in this instance neither the public health, the public morals, nor the public safety was involved.[2]

Later decisions, nonetheless, apply the principle of inalienability broadly. To quote from one: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power to the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise." [3]

It would scarcely suffice today for a company to rely upon its charter privileges or upon special concessions from a State in resisting the application to it of measures alleged to have been enacted under the police power thereof; if this claim is sustained, the obligation of the contract clause will not avail, and if it is not, the due process of law clause of the Fourteenth Amendment will furnish a sufficient reliance. That is to say, the discrepancy which once existed between the Court's theory of an overriding police power in these two adjoining fields of constitutional law is today apparently at an end. Indeed, there is usually no sound reason why

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[25] Id., 820–821.

[1] *Butcher's Union Co.* v. *Crescent City Co.*, 111 U.S. 746 (1884).

[2] *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650 (1885).

[3] *Atlantic Coast Line R. Co.* v. *City of Goldsboro*, 232 U.S. 548, 558 (1914). *See also Chicago & Alton Railroad* v. *Tranbarger*, 238 U.S. 67 (1915); *Pennsylvania Hospital* v. *Philadelphia*, 245 U.S. 20 (1917); where the police power and eminent domain are treated on the same basis in respect of inalienability; *Wabash Railroad Company* v. *Defiance*, 167 U.S. 88, 97 (1897); *Home Tel. & Tel.* v. *City of Los Angeles*, 211 U.S. 265 (1908).

rights based on public grant should be regarded as more sacrosanct than rights which involve the same subject matter but are of different provenience.

***Private Contracts.***—The term "private contract" is, naturally, not all-inclusive. A judgment, though granted in favor of a creditor, is not a contract in the sense of the Constitution,[4] nor is marriage.[5] And whether a particular agreement is a valid contract is a question for the courts, and finally for the Supreme Court, when the protection of the contract clause is invoked.[6]

The question of the nature and source of the obligation of a contract, which went by default in *Fletcher* v. *Peck* and the *Dartmouth College Case*, with such vastly important consequences, had eventually to be met and answered by the Court in connection with private contracts. The first case involving such a contract to reach the Supreme Court was *Sturges* v. *Crowninshield*[7] in which a debtor sought escape behind a state insolvency act of later date than his note. The act was held inoperative, but whether this was because of its retroactivity in this particular case or for the broader reason that it assumed to excuse debtors from their promises was not at the time made clear. As noted earlier, Chief Justice Marshall's definition on this occasion of the obligation of a contract as the law which binds the parties to perform their undertakings was not free from ambiguity, owing to the uncertain connotation of the term *law*.

These obscurities were finally cleared up for most cases in *Ogden* v. *Saunders*,[8] in which the temporal relation of the statute and the contract involved was exactly reversed—the former antedating the latter. Marshall contended, but unsuccessfully, that the statute was void, inasmuch as it purported to release the debtor from that original, intrinsic obligation which always attaches under natural law to the acts of free agents. "When," he wrote,

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[4] *Morley* v. *Lake Shore Railway Co.*, 146 U.S. 162 (1892); *New Orleans* v. *N.O. Water Works Co.*, 142 U.S. 79 (1891); *Missouri & Ark L. & M. Co.* v. *Sebastion County*, 249 U.S. 170 (1919). *But cf. Livingston's Lessee* v. *Moore*, 7 Pet. (32 U.S.) 469, 549 (1833); and *Garrison* v. *New York*, 21 Wall. (88 U.S.) 196, 203 (1875), suggesting that a different view was earlier entertained in the case of judgments in actions of debt.

[5] *Maynard* v. *Hill*, 125 U.S. 190 (1888); *Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518, 629 (1819). *Cf. Andrews* v. *Andrews*, 188 U.S. 14 (1903). The question whether a wife's rights in the community property under the laws of California were of a contractual nature was raised but not determined in *Moffit* v. *Kelly*, 218 U.S. 400 (1910).

[6] *New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79 (1891); *Zane* v. *Hamilton County*, 189 U.S. 370, 381 (1903).

[7] 4 Wheat. (17 U.S.) 122 (1819).

[8] 12 Wheat. (25 U.S.) 213 (1827).

"we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contracts," and that they took their views on these subjects from those sources. He also posed the question of what would happen to the obligation of contracts clause if States might pass acts declaring that all contracts made subsequently thereto should be subject to legislative control.[9]

For the first and only time a majority of the Court abandoned the Chief Justice's leadership. Speaking by Justice Washington it held that the obligation of private contracts is derived from the municipal law—state statutes and judicial decisions—and that the inhibition of Article I, § 10, is confined to legislative acts made after the contracts affected by them, subject to the following exception. By a curiously complicated line of reasoning it was also held in the same case that when the creditor is a nonresident, then a State by an insolvency law may not alter the former's rights under a contract, albeit one of later date.

With the proposition established that the obligation of a private contract comes from the *municipal* law in existence when the contract is made, a further question presents itself, namely, what part of the municipal law is referred to? No doubt, the law which determines the validity of the contract itself is a part of such law. Also part of such law is the law which interprets the terms used in the contract, or which supplies certain terms when others are used, as for instance, constitutional provisions or statutes which determine what is "legal tender" for the payment of debts, or judicial decisions which construe the term "for value received" as used in a promissory note, and so on. In short, any law which at the time of the making of a contract goes to measure the rights and duties of the parties to it in relation to each other enters into its obligation.

***Remedy a Part of the Private Obligation.***—Suppose, however, that one of the parties to a contract fails to live up to his obligation as thus determined. The contract itself may now be regarded as at an end, but the injured party, nevertheless, has a new set of rights in its stead, those which are furnished him by the remedial law, including the law of procedure. In the case of a mortgage, he may foreclose; in the case of a promissory note, he may sue; and in certain cases, he may demand specific performance. Hence the further

[9] Id., 353-354.

question arises, whether this remedial law is to be considered a part of the law supplying the obligation of contracts. Originally, the predominating opinion was negative, since as we have just seen, this law does not really come into operation until the contract has been broken. Yet it is obvious that the sanction which this law lends to contracts is extremely important—indeed, indispensable. In due course it became the accepted doctrine that that part of the law which supplies one party to a contract with a remedy if the other party does not live up to his agreement, as authoritatively interpreted, entered into the "obligation of contracts" in the constitutional sense of this term, and so might not be altered to the material weakening of existing contracts. In the Court's own words: "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable . . ." [10]

This rule was first definitely announced in 1843 in the case of *Bronson* v. *Kinzie.*[11] Here an Illinois mortgage giving the mortgagee an unrestricted power of sale in case of the mortgagor's fault was involved, along with a later act of the legislature which required mortgaged premises to be sold for not less than two-thirds of the appraised value and allowed the mortgagor a year after the sale to redeem them. It was held that the statute, in altering the preexisting remedies to such an extent, violated the constitutional prohibition and hence was void. The year following a like ruling was made in the case of *McCracken* v. *Hayward* [12] as to a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value.

But the rule illustrated by these cases does not signify that a State may make no changes in its remedial or procedural law which affect existing contracts. "Provided," the Court has said, "a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract, the Legislature may modify or change existing remedies or prescribe new modes of procedure." [13] Thus, States are constantly remodelling

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[10] *United States ex rel. Von Hoffman* v. *Quincy*, 4 Wall. (71 U.S.) 535, 552 (1867).
[11] 1 How. (42 U.S.) 311 (1843).
[12] 2 How. (43 U.S.) 608 (1844).
[13] *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U.S. 437, 439 (1903); *City & Lake Railroad* v. *New Orleans*, 157 U.S. 219 (1895).

their judicial systems and modes of practice unembarrassed by the obligation of contracts clause.[14] The right of a State to abolish imprisonment for debt was early asserted.[15] Again the right of a State to shorten the time for the bringing of actions has been affirmed even as to existing causes of action, but with the proviso added that a reasonable time must be left for the bringing of such actions.[16] On the other hand, a statute which withdrew the judicial power to enforce satisfaction of a certain class of judgments by mandamus was held invalid.[17] In the words of the Court: "Every case must be determined upon its own circumstances;" [18] and it later added: "In all such cases the question becomes . . . one of reasonableness, and of that the legislature is primarily the judge." [19]

There is one class of cases resulting from the doctrine that the law of remedy constitutes a part of the obligation of a contract to which a special word is due. This comprises cases in which the contracts involved were municipal bonds. While a city is from one point of view but an emanation from the government's sovereignty and an agent thereof, when it borrows money it is held to be acting in a corporate or private capacity and so to be suable on its contracts. Furthermore, as was held in the leading case of *United States ex rel. Von Hoffman* v. *Quincy,*[20] "where a State has author-

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[14] *Antoni* v. *Greenhow,* 107 U.S. 769 (1883).

[15] The right was upheld in *Mason* v. *Haile,* 12 Wheat. (25 U.S.) 370 (1827), and again in *Penniman's Case,* 103 U.S. 714 (1881).

[16] *McGahey* v. *Virginia,* 135 U.S. 662 (1890).

[17] *Louisiana* v. *New Orleans,* 102 U.S. 203 (1880).

[18] *United States ex rel. Von Hoffman* v. *Quincy,* 4 Wall. (71 U.S.) 535, 554 (1867).

[19] *Antoni* v. *Greenhow,* 107 U.S. 769, 775 (1883). Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: *Jackson* v. *Lamphire,* 3 Pet. (28 U.S.) 280 (1830); *Hawkins* v. *Barney's Lessee,* 5 Pet. (30 U.S.) 457 (1831); *Crawford* v. *Branch Bank of Mobile* 7 How. (48 U.S.) 279 (1849); *Curtis* v. *Whitney,* 13 Wall. (80 U.S.) 68 (1872); *Railroad Co.* v. *Hecht,* 95 U.S. 168 (1877); *Terry* v. *Anderson,* 95 U.S. 628 (1877); *Tennessee* v. *Sneed,* 96 U.S. 69 (1877); *South Carolina* v. *Gaillard,* 101 U.S. 433 (1880); *Louisiana* v. *New Orleans,* 102 U.S. 203 (1880); *Connecticut Mut. Life Ins. Co.* v. *Cushman,* 108 U.S. 51 (1883); *Vance* v. *Vance,* 108 U.S. 514 (1883); *Gilfillan* v. *Union Canal Co.,* 109 U.S. 401 (1883); *Hill* v. *Merchant's Ins. Co.,* 134 U.S. 515 (1890); *City & Lake Railroad* v. *New Orleans,* 157 U.S. 219 (1895); *Red River Valley Bank* v. *Craig,* 181 U.S. 548 (1901); *Wilson* v. *Standefer,* 184 U.S. 399 (1902); *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U.S. 437 (1903); *Waggoner* v. *Flack,* 188 U.S. 595 (1903); *Bernheimer* v. *Converse,* 206 U.S. 516 (1907); *Henley* v. *Myers,* 215 U.S. 373 (1910); *Selig* v. *Hamilton,* 234 U.S. 652 (1914); *Security Bank* v. *California,* 263 U.S. 282 (1923); *United States Mortgage Co.* v. *Matthews,* 293 U.S. 232 (1934); *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

Compare the following cases, where changes in remedies were deemed to be of such character as to interfere with substantial rights: *Wilmington & Weldon R.R.* v. *King,* 91 U.S. 3 (1875); *Memphis* v. *United States,* 97 U.S. 293 (1878); *Virginia Coupon Cases (Poindexter* v. *Greenhow),* 114 U.S. 269, 270, 298, 299 (1885); *Effinger* v. *Kenney,* 115 U.S. 566 (1885); *Fisk* v. *Jefferson Police Jury,* 116 U.S. 131 (1885); *Bradley* v. *Lightcap,* 195 U.S. 1 (1904); *Bank of Minden* v. *Clement,* 256 U.S. 126 (1921).

[20] 4 Wall. (71 U.S.) 535, 554-555 (1867).

ized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." In this case the Court issued a mandamus compelling the city officials to levy taxes for the satisfaction of a judgment on its bonds in accordance with the law as it stood when the bonds were issued.[21] Nor may a State by dividing an indebted municipality among others enable it to escape its obligations. The debt follows the territory and the duty of assessing and collecting taxes to satisfy it devolves upon the succeeding corporations and their officers.[22] But where a municipal organization has ceased practically to exist through the vacation of its offices, and the government's function is exercised once more by the State directly, the Court has thus far found itself powerless to frustrate a program of repudiation.[23] However, there is no reason why the State should enact the role of *particeps criminis* in an attempt to relieve its municipalities of the obligation to meet their honest debts. Thus, in 1931, during the Great Depression, New Jersey created a Municipal Finance Commission with power to assume control over its insolvent municipalities. To the complaint of certain bondholders that this legislation impaired the contract obligations of their debtors, the Court, speaking by Justice Frankfurter, pointed out that the practical value of an unsecured claim against a city is "the effectiveness of the city's taxing power," which the legislation under review was designed to conserve.[24]

***Private Contracts and the Police Power.***—The increasing subjection of public grants to the police power of the States has been previously pointed out. That purely private contracts should be in any stronger situation in this respect obviously would be anomalous in the extreme. In point of fact, the ability of private parties to curtail governmental authority by the easy device of contracting with one another is, with an exception to be noted, even less than

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[21] *See also Nelson* v. *St. Martin's Parish*, 111 U.S. 716 (1884).

[22] *Mobile* v. *Watson*, 116 U.S. 289 (1886); *Graham* v. *Folsom*, 200 U.S. 248 (1906).

[23] *Heine* v. *Levee Commissioners*, 19 Wall. (86 U.S.) 655 (1874). *Cf.*, *Virginia* v. *West Virginia*, 246 U.S. 565 (1918).

[24] *Faitoute Co.* v. *City of Asbury Park*, 316 U.S. 502, 510 (1942). Alluding to the ineffectiveness of purely judicial remedies against defaulting municipalities, Justice Frankfurter says: "For there is no remedy when resort is had to 'devices and contrivances' to nullify the taxing power which can be carried out only through authorized officials. *See Rees* v. *City of Watertown*, 19 Wall. (86 U.S.) 107, 124 (1874). And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (*see* Raymond, *State and Municipal Bonds*, 342-343), and evasion of service by tax collectors, thus making impotent a court's mandate. *Yost* v. *Dallas County*, 236 U.S. 50, 57 (1915)." Id., 511.

that of the State to tie its own hands by contracting away its own powers. So, when it was contended in an early Pennsylvania case that an act prohibiting the issuance of notes by unincorporated banking associations was violative of the obligation of contracts clause because of its effect upon certain existing contracts of members of such association, the state Supreme Court answered: "But it is said, that the members had formed a contract *between themselves*, which would be dissolved by the stoppage of their business. And what then? Is that such a violation of contracts as is prohibited by the Constitution of the United States? Consider to what such a construction would lead. Let us suppose, that in one of the States there is no law against gaming, cock-fighting, horse-racing or public masquerades, and that companies should be formed for the purpose of carrying on these practices. . . ." Would the legislature then be powerless to prohibit them? The answer returned, of course, was no.[25]

The prevailing doctrine was stated by the Supreme Court of the United States in the following words: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . . In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good." [1]

So, in an early case we find a state recording act upheld as applying to deeds dated before the passage of the act.[2] Later cases have brought the police power in its more customary phases into contact with private as well as with public contracts. Lottery tickets, valid when issued, were necessarily invalidated by legislation prohibiting the lottery business; [3] contracts for the sale of beer, valid when entered into, were similarly nullified by a state prohibition law; [4] and contracts of employment were modified by later

[25] *Myers* v. *Irwin*, 2 S. & R. (Pa.), 367, 372 (1816); *see*, to the same effect, *Lindenmuller* v. *The People*, 33 Barb. (N.Y.) 548 (1861); *Brown* v. *Penobscot Bank*, 8 Mass. 445 (1812).

[1] *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905).

[2] *Jackson* v. *Lamphire*, 3 Pet. (28 U.S.) 280 (1830). *See also Phalen* v. *Virginia*, 8 How. (49 U.S.) 163 (1850).

[3] *Stone* v. *Mississippi*, 101 U.S. 814 (1880).

[4] *Beer Co.* v. *Massachusetts*, 97 U.S. 25 (1878).

laws regarding the liability of employers and workmen's compensation.[5] Likewise a contract between plaintiff and defendant did not prevent the State from making the latter a concession which rendered the contract worthless;[6] nor did a contract as to rates between two railway companies prevent the State from imposing different rates;[7] nor did a contract between a public utility company and a customer protect the rates agreed upon from being superseded by those fixed by the State.[8] Similarly, a contract for the conveyance of water beyond the limits of a State did not prevent the State from prohibiting such conveyance.[9]

But the most striking exertions of the police power touching private contracts, as well as other private interests within recent years have been evoked by war and economic depression. Thus, in World War I, the State of New York enacted a statute which, declaring that a public emergency existed, forbade the enforcement of covenants for the surrender of the possession of premises on the expiration of leases, and wholly deprived for a period owners of dwellings, including apartment and tenement houses, within the City of New York and contiguous counties, of possessory remedies for the eviction from their premises of tenants in possession when the law took effect, providing the latter were able and willing to pay a reasonable rent. In answer to objections leveled against this legislation on the basis of the obligation of contracts clause, the Court said: "But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be."[10] In a subsequent case, however, the Court added that, while the declaration by the legislature of a justifying emergency was entitled to great respect, it was not conclusive; a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change," and whether they have changed was always open to judicial inquiry.[11]

Summing up the result of the cases above referred to, Chief Justice Hughes, speaking for the Court in *Home Building & Loan Assn.* v. *Blaisdell*,[12] remarked in 1934: "It is manifest from this

[5] *New York Central R. Co.* v. *White*, 243 U.S. 188 (1917). In this and the preceding two cases the legislative act involved did not except from its operation existing contracts.

[6] *Manigault* v. *Springs*, 199 U.S. 473 (1905).

[7] *Portland Ry. Co.* v. *Oregon R. Comm.*, 229 U.S. 397 (1913).

[8] *Midland Co.* v. *Kansas City Power Co.*, 300 U.S. 109 (1937).

[9] *Hudson Water Co.* v. *McCarter*, 209 U.S. 349 (1908).

[10] *Marcus Brown Co.* v. *Feldman*, 256 U.S. 170, 198 (1921), followed in *Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922).

[11] *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, 547–548 (1924).

[12] 290 U.S. 398 (1934).

review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. . . . The principle of this development is . . . that the reservation of the reasonable exercise of the protective power of the States is read into all contracts . . ." [13]

***Evaluation of the Clause Today.***—It should not be inferred that the obligation of contracts clause is today totally moribund. Even prior to the most recent decisions, it still furnished the basis for some degree of judicial review as to the substantiality of the factual justification of a professed exercise by a state legislature of its police power, and in the case of legislation affecting the remedial rights of creditors, it still affords a solid and palpable barrier against legislative erosion. Nor is this surprising in view of the fact that, as we have seen, such rights were foremost in the minds of the framers of the clause. The Court's attitude toward insolvency laws, redemption laws, exemption laws, appraisement laws and the like, has always been that they may not be given retroactive operation,[14] and the general lesson of these earlier cases is confirmed by the Court's decisions between 1934 and 1945 in certain cases involving state moratorium statutes. In *Home Building & Loan Assn.* v. *Blaisdell,*[15] the leading case, a closely divided Court sustained

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[13] Id., 442, 444. *See also Veix* v. *Sixth Ward Assn.* 310 U.S. 32 (1940), in which was sustained a New Jersey statute amending in view of the Depression the law governing building and loan associations. The authority of the State to safeguard the vital interests of the people, said Justice Reed, "extends to economic needs as well." Id., 39. In *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 531-532 (1949), the Court dismissed out-of-hand a suggestion that a state law outlawing union security agreements was an invalid impairment of existing contracts, citing *Blaisdell* and *Veix*.

[14] *See* especially *Edwards* v. *Kearzey*, 96 U.S. 595 (1878); *Barnitz* v. *Beverly*, 163 U.S. 118 (1896).

[15] 290 U.S. 398 (1934).

the Minnesota Moratorium Act of April 18, 1933, which, reciting the existence of a severe financial and economic depression for several years and the frequent occurrence of mortgage foreclosure sales for inadequate prices, and asserting that these conditions had created an economic emergency calling for the exercise of the State's police power, authorized its courts to extend the period for redemption from foreclosure sales for such additional time as they might deem just and equitable, although in no event beyond May 1, 1935.

The act also left the mortgage or in possession during the period of extension, subject to the requirement that he pay a reasonable rental for the property as fixed by the court. Contemporaneously, however, less carefully drawn statutes from Missouri and Arkansas, acts which were not as considerate of creditor's rights, were set aside as violative of the contracts clause.[16] "A State is free to regulate the procedure in its courts even with reference to contracts already made," said Justice Cardozo for the Court, "and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. . . . What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." [17] On the other hand, in the most recent of this category of cases, the Court gave its approval to an extension by the State of New York of its moratorium legislation. While recognizing that business conditions had improved, the Court was of the opinion that there was reason to believe that " 'the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate.' " [18]

And meantime the Court had sustained legislation of the State of New York under which a mortgagee of real property was denied a deficiency judgment in a foreclosure suit where the state court

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[16] *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426 (1934); *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935).

[17] Id., 62.

[18] *East New York Bank* v. *Hahn*, 326 U.S. 230, 235 (1945), quoting New York Legislative Document (1942), No. 45, p. 25.

found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage.[19] "Mortgagees," the Court said, "are constitutionally entitled to no more than payment in full. . . . To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. . . . The contract clause does not protect such a strategical, procedural advantage." [20]

More important, the Court has been at pains most recently to reassert the vitality of the clause, although one may wonder whether application of the clause will be more than episodic.

"[T]he Contract Clause remains a part of our written Constitution." [21] So saying, the Court struck down state legislation in two instances, one law involving the government's own contractual obligation and the other affecting private contracts.[22] A finding that a contract has been "impaired" in some way is merely the preliminary step in evaluating the validity of the state action.[23] But in both cases the Court applied a stricter-than-usual scrutiny to the statutory action, in the public contracts case precisely because it was its own obligation that the State was attempting to avoid and in the private contract case, apparently, because the legislation was in aid of a "narrow class".[24] The approach in any event is one of balancing. "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage.

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[19] *Honeyman* v. *Jacobs*, 306 U.S. 539 (1939). *See also Gelfert* v. *National City Bank*, 313 U.S. 221 (1941).

[20] Id., 233–234.

[21] *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 16 (1977). "It is not a dead letter." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 (1978). A majority of the Court seems fully committed to using the clause. Only Justices Brennan, White, and Marshall dissented in both cases. Chief Justice Burger and Justices Rehnquist and Stevens joined both opinions of the Court. Of the three remaining Justices, who did not participate in one or the other case, Justice Blackmun wrote the opinion in *United States Trust* while Justice Stewart wrote the opinion in *Spannaus* and Justice Powell joined it.

[22] *United States Trust* involved a repeal of a covenant statutorily enacted to encourage persons to purchase New York-New Jersey Port Authority bonds by limiting the Authority's ability to subsidize rail passenger transportation. *Spannaus* involved a statute requiring prescribed employers who had a qualified pension plan to provide funds sufficient to cover full pensions for all employees who had worked at least 10 years if the employer either terminated the plan or closed his offices in the State, a law that greatly altered the company's liabilities under its contractual pension plan.

[23] 431 U.S., 21; 438 U.S., 244.

[24] 431 U.S., 22–26; 438 U.S., 248.

Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." [25] Having determined that a severe impairment had resulted in both cases,[26] the Court moved on to assess the justification for the state action. In *United States Trust,* the test utilized by the Court was that an impairment would be upheld only if it were "necessary" and "reasonable" to serve an important public purpose. But the two terms were given somewhat restrictive meanings. Necessity is shown only when the State's objectives could not have been achieved through less dramatic modifications of the contract; reasonableness is a function of the extent to which alteration of the contract was prompted by circumstances unforeseen at the time of its formation. The repeal of the covenant in issue was found to fail both prongs of the test.[27] In *Spannaus,* the Court drew from its prior cases four standards: did the law deal with a broad generalized economic or social problem, did it operate in an area already subject to state regulation at the time the contractual obligations were entered into, did it effect simply a temporary alteration of the contractual relationship, and did the law operate upon a broad class of affected individuals or concerns. The Court found that the challenged law did not possess any of these attributes and thus struck it down.[28]

Whether these two cases portend an active judicial review of economic regulatory activities, in contrast to the extreme deference shown such legislation under the due process and equal protection clauses, is problematical. Both cases contain language emphasizing the breadth of the police powers of government that may be used to further the public interest and admitting limited judicial scrutiny. Nevertheless, "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." [29]

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[25] 438 U.S., 245.

[26] 431 U.S., 17-21 (the Court was unsure of the value of the interest impaired but deemed it "an important security provision"); 438 U.S. 244-247 (statute mandated company to recalculate, and in one lump sum, contributions previously adequate).

[27] 431 U.S., 25-32 (State could have modified the impairment to achieve its purposes without totally abandoning the covenant, though the Court reserved judgment whether lesser impairments would have been constitutional, id., 30 n. 28, and it had alternate means to achieve its purposes; the need for mass transportation was obvious when covenant was enacted and State could not claim that unforeseen circumstances had arisen.)

[28] 438 U.S., 244-251.

[29] Id., 242 (emphasis by Court).

Clause 2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

**Duties on Exports or Imports**

***Scope.***—Only articles imported from or exported to a foreign country, or "a place over which the Constitution has not extended its commands with respect to imports and their taxation," are comprehended by the terms "imports" and "exports." [1] With respect to exports, the exemption from taxation "attaches to the export and not to the article before its exportation," [2] requiring an essentially factual inquiry into whether there have been acts of movement toward a final destination constituting sufficient entrance into the export stream as to invoke the protection of the clause.[3] To determine how long imported wares remain under the protection of this clause, the Supreme Court enunciated the original package doctrine in the leading case of *Brown* v. *Maryland*. "When the importer has so acted upon the thing imported," wrote Chief Justice Marshall, "that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution." [4] A box, case or bale in which separate parcels of goods have been placed by the foreign seller is regarded as the original package, and upon the opening of such container for the purpose of using the separate parcels, or of exposing them for sale, each loses its character as an import and

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[1] *Hooeven & Allison Co.* v. *Evatt*, 324 U.S. 652, 673 (1945). Goods brought from another State are not within the clause. *Woodruff* v. *Parham*, 8 Wall. (75 U.S.) 123 (1869).

[2] *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904).

[3] *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69 (1946); *Empress Siderurgica* v. *County of Merced*, 337 U.S. 154 (1947); *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974).

[4] 12 Wheat. (25 U.S.) 419, 441–442 (1827).

becomes subject to taxation as a part of the general mass of property in the State.[5] Imports for manufacture cease to be such when the intended processing takes place,[6] or when the original packages are broken.[7] Where a manufacturer imports merchandise and stores it in his warehouse in the original packages, that merchandise does not lose its quality as an import, at least so long as it is not required to meet such immediate needs.[8] The purchaser of imported goods is deemed to be the importer if he was the efficient cause of the importation, whether the title to the goods vested in him at the time of shipment, or after its arrival in this country.[9] A state franchise tax measured by properly apportioned gross receipts may be imposed upon a railroad company in respect of the company's receipts for services in handling imports and exports at its marine terminal.[10]

***Privilege Taxes.***—A state law requiring importers to take out a license to sell imported goods amounts to an indirect tax on imports and hence is unconstitutional.[11] Likewise, a franchise tax upon foreign corporations engaged in importing nitrate and selling it in the original packages,[12] a tax on sales by brokers [13] and auctioneers [14] of imported merchandise in original packages, and a tax on the sale of goods in foreign commerce consisting of an annual license fee plus a percentage of gross sales,[15] have been held invalid. On the other hand, pilotage fees,[16] a tax upon the gross sales of a purchaser from the importer,[17] a license tax upon dealing in fish which, through processing, handling, and sale, have lost their distinctive character as imports,[18] an annual license fee imposed

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[5] *May* v. *New Orleans*, 178 U.S. 496, 502 (1900).

[6] Id., 501; *Gulf Fisheries Co.* v. *MacInerney*, 276 U.S. 124 (1928); *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940).

[7] *Low* v. *Austin*, 13 Wall. (80 U.S.) 29 (1872); *May* v. *New Orleans*, 178 U.S. 496 (1900).

[8] *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 667 (1945).

[9] Id., 664.

[10] *Canton R. Co.* v. *Rogan*, 340 U.S. 511 (1951).

[11] *Brown* v. *Maryland*, 12 Wheat. (25 U.S.) 419, 447 (1827).

[12] *Anglo-Chilean Corp.* v. *Alabama*, 288 U.S. 218 (1933).

[13] *Low* v. *Austin*, 13 Wall. (80 U.S.) 29, 33 (1872).

[14] *Cook* v. *Pennsylvania*, 97 U.S. 566, 573 (1878).

[15] *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292 (1917).

[16] *Cooley* v. *Port Wardens*, 12 How. (53 U.S.) 299, 313 (1851).

[17] *Waring* v. *The Mayor*, 8 Wall. (75 U.S.) 110, 122 (1869). *See also Pervear* v. *Massachusetts*. 5 Wall. (72 U.S.) 475, 478 (1867); *Schollenberger* v. *Pennsylvania*, 171 U.S. 1, 24 (1898).

[18] *Gulf Fisheries Co.* v. *MacInerney*, 276 U.S. 124 (1928).

on persons engaged in buying and selling foreign bills of exchange,[19] and a tax upon the right of an alien to receive property as heir, legatee, or donee of a deceased person [20] have been held not to be duties on imports or exports.

***Property Taxes.***—Overruling a line of prior decisions which it thought misinterpreted the language of *Brown* v. *Maryland*, the Court now holds that the clause does not prevent a State from levying a nondiscriminatory, *ad valorem* property tax upon goods that are no longer in import transit.[21] Thus, a company's inventory of imported tires maintained at its whole distribution warehouse could be included in the State's tax upon the entire inventory. The clause does not prohibit every "tax" with some impact upon imports or exports but reaches rather exactions directed only at imports or exports or commercial activity therein as such.[22]

***Inspection Laws.***—Inspection laws "are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption." [23] In *Turner* v. *Maryland*,[24] the Supreme Court listed as recognized elements of inspection laws, the "quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds. . . ." [25] It sustained as an inspection law a charge for storage and inspection imposed upon every hogshead of tobacco grown in the State and intended for export, which the law required to be brought to a state warehouse to be inspected and branded. The Court has cited this section as a recognition of a general right of the States to pass inspection laws, and to bring within their reach articles of interstate, as well as of foreign, commerce.[26] But on the ground that, "it has never been regarded as

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[19] *Nathan* v. *Louisiana*, 8 How. (49 U.S.) 73, 81 (1850).

[20] *Mager* v. *Grima*, 8 How. (49 U.S.) 490 (1850).

[21] *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), overruling *Low* v. *Austin*, 13 Wall. (80 U.S.) 29 (1872), expressly, and, necessarily, *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945), among others. In *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534 (1959), property taxes were sustained on the basis that the materials taxed had lost their character as imports. On exports, *see Selliger* v. *Kentucky*, 213 U.S. 200 (1909) (property tax levied on warehouse receipts for whiskey exported to Germany invalid).

[22] *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 290–294 (1976).

[23] *Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U.S. 465, 488 (1888).

[24] 107 U.S. 38 (1883).

[25] Id., 55.

[26] *Patapsco Guano Co.* v. *North Carolina*, 171 U.S. 345, 361 (1898).

within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse," it held that a state law forbidding the importation of intoxicating liquors into the State could not be sustained as an inspection law.[27]

Clause 3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

**Tonnage Duties**

The prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, whether measured by the tonnage of the vessel or not, which are in effect charges for the privilege of entering, trading in, or lying in a port.[1] But it does not extend to charges made by state authority, even if graduated according to tonnage,[2] for services rendered to the vessel, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, or storage.[3] For the purpose of determining wharfage charges, it is immaterial whether the wharf was built by the State, a municipal corporation, or an individual. Where the wharf was owned by a city, the fact that the city realized a profit beyond the amount expended did not render the toll objectionable.[4] The services of harbor masters for which fees are allowed must be actually rendered, and a law permitting harbor masters or port wardens to impose a fee in all cases is void.[5] A State may not levy a tonnage

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[27] *Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888). The Twenty-first Amendment has had no effect on this principle. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

[1] *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935); *Cannon* v. *City of New Orleans*, 20 Wall. (87 U.S.) 577, 581 (1874); *Transportation Co.* v. *Wheeling*, 99 U.S. 273, 283 (1879).

[2] *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877); *Transportation Co.* v. *Parkersburg*, 107 U.S. 691 (1883); *Ouachita Packet Co.* v. *Aiken*, 121 U.S. 444 (1887).

[3] *Cooley* v. *Port Wardens*, 12 How. (53 U.S.) 299, 314 (1851); *Ex parte McNiel*, 13 Wall. (80 U.S.) 236 (1872); *Inman Steamship Company* v. *Tinker*, 94 U.S. 238, 243 (1877); *Packet Co.* v. *St. Louis*, 100 U.S. 423 (1880); *City of Vicksburg* v. *Tobin*, 100 U.S. 430 (1880); *Packet Co.* v. *Catlettsburg*, 105 U.S. 559 (1882).

[4] *Huse* v. *Glover*, 119 U.S. 543, 549 (1886).

[5] *Steamship Co.* v. *Portwardens*, 6 Wall. (73 U.S.) 31 (1867).

duty to defray the expenses of its quarantine system,[6] but it may exact a fixed fee for examination of all vessels passing quarantine.[7] A state license fee for ferrying on a navigable river is not a tonnage tax but rather is a proper exercise of the police power and the fact that a vessel is enrolled under federal law does not exempt it.[8] In the *State Tonnage Tax Cases*,[9] an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

### Keeping Troops

This provision contemplates the use of the State's military power to put down an armed insurrection too strong to be controlled by civil authority,[10] and the organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause.[11]

### Interstate Compacts

***Background of Clause.***—Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the States to make compacts with each other was not surrendered under the Constitution,[1] "The Compact," as the Supreme Court has put it, "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations." [2] In American history, the compact technique can be traced back to the numerous controversies which arose over the ill-defined boundaries of the original colonies. These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.[3] When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes between two or more States over boundaries or "any cause whatever" [4] and required the approval of Con-

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[6] *Peete* v. *Morgan*, 19 Wall. (86 U.S.) 581 (1874).

[7] *Morgan* v. *Louisiana*, 118 U.S. 455, 462 (1886).

[8] *Wiggins Ferry Co.* v. *City of East St. Louis*, 107 U.S. 365 (1883). *See also Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 212 (1885); *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U.S. 326, 338 (1887); *Osborne* v. *City of Mobile*, 16 Wall. (83 U.S.) 479, 481 (1873).

[9] 12 Wall. (79 U.S.) 204, 217 (1871).

[10] *Luther* v. *Borden*, 7 How. (48 U.S.) 1, 45 (1849).

[11] *Presser* v. *Illinois*, 116 U.S. 252 (1886).

[1] *Poole* v. *Fleeger*, 11 Pet. (36 U.S.) 185, 209 (1837).

[2] *Hinderlider* v. *La Plata Co.*, 304 U.S. 92, 104 (1938).

[3] Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L.J. 685, 691 (1925).

[4] Article IX.

gress for any "treaty confederation or alliance" to which a State should be a party.[5]

The framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against "any treaty, alliance or confederation", and by the third clause they required the consent of Congress for "any agreement or compact." The significance of this distinction was pointed out by Chief Justice Taney in *Holmes* v. *Jennison.*[6] "As these words ('agreement or compact') could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. . . . The word 'agreement,' does not necessarily import and direct any express stipulation; nor is it necessary that it should be in writing.

"If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." [7] But in *Virginia* v. *Tennessee,*[8] decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between States without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contractant States or to encroach upon the just supremacy of the United States. Adhering to this later understanding of the clause, the Court found on enhancement of state power quoad the Federal Government through entry into the Multistate Tax Compact and thus sustained the agreement among participating States without congressional consent.[9]

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[5] Article VI.

[6] 14 Pet. (39 U.S.) 540 (1840).

[7] Id., 570, 571, 572.

[8] 148 U.S. 503, 518 (1893). *See also Stearns* v. *Minnesota,* 179 U.S. 223, 244 (1900).

[9] *United States Steel Corp.* v. *Multistate Tax Comm.,* 434 U.S. 452 (1978). *See also New Hampshire* v. *Maine,* 426 U.S. 363 (1976).

***Subject Matter of Interstate Compacts.***—For many years after the Constitution was adopted, boundary disputes continued to predominate as the subject matter of agreements among the States. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for state cooperation in carrying out affirmative programs for solving common problems.[10] The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means. Another important use of this device was recognized by Congress in the act of June 6, 1934,[11] whereby it consented in advance to agreements for the control of crime. The first response to this stimulus was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which most of the States have given adherence.[12] Subsequently, Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, many States have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments, the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, et cetera, and the framing of uniform state legislation for dealing with some of these.[13]

***Consent of Congress.***—The Constitution makes no provision with regard to the time when the consent of Congress shall be given or the mode or form by which it shall be signified.[14] While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.[15] The required consent is not necessarily an expressed con-

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[10] Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L.J. 685 (1925); F. Zimmerman and M. Wendell, *Interstate Compacts Since 1925* (Chicago: 1951); F. Zimmerman and M. Wendell, *The Law and Use of Interstate Compacts* (Chicago: 1961).

[11] 48 Stat. 909 (1934).

[12] F. Zimmerman and M. Wendell, *Interstate Compacts Since 1925* (Chicago: 1951), 91.

[13] 7 U.S.C. § 515; 15 U.S.C. § 717j; 16 U.S.C. § 552; 33 U.S.C. §§ 11, 567-567b.

[14] *Green* v. *Biddle*, 8 Wheat. (21 U.S.) 1, 85 (1823).

[15] *Virginia* v. *Tennessee*, 148 U.S. 503 (1893).

sent; it may be inferred from circumstances.[16] It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.[17] The consent of Congress may be granted conditionally "upon terms appropriate to the subject and transgressing no constitutional limitations." [18] Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.[19]

***Grants of Franchise to Corporations by Two States.***—It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.[20]

***Legal Effect of Interstate Compacts.***—Whenever, by the agreement of the States concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts become binding upon all citizens of the signatory States and are conclusive as to their rights.[21] Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial determination of existing rights.[22] Valid interstate compacts are within the protection of the obligation of contracts clause,[23] and a "sue and be sued" provi-

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[16] *Virginia* v. *West Virginia*, 11 Wall. (78 U.S.) 39 (1871).

[17] *Wharton* v. *Wise*, 153 U.S. 155, 173 (1894).

[18] *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937). *See also Arizona* v. *California*, 292 U.S. 341, 345 (1934). When it approved the New York-New Jersey Waterfront Compact, 67 Stat. 541, Congress, for the first time, expressly gave its consent to the subsequent adoption of implementing legislation by the participating States. *De Veau* v. *Braisted*, 363 U.S. 144, 145 (1960).

[19] *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. (59 U.S.) 421, 433 (1856).

[20] *St. Louis & San Francisco Railway* v. *James*, 161 U.S. 545, 562 (1896).

[21] *Poole* v. *Fleeger*, 11 Pet. (36 U.S.) 185, 209 (1837); *Rhode Island* v. *Massachusetts*, 12 Pet. (37 U.S.) 657, 725 (1838).

[22] *Hinderlider* v. *La Plata Co.*, 304 U.S. 92, 104, 106 (1938).

[23] *Green* v. *Biddle*, 8 Wheat. (21 U.S.) 1, 13 (1823); *Virginia* v. *West Virginia*, 246 U.S. 565 (1918). *See also Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. (54 U.S.) 518, 566 (1852); *Olin* v. *Kitzmiller*, 259 U.S. 260 (1922).

sion therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment.[24] Congress also has authority to compel compliance with such compacts.[25] Nor may a State read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the State's constitution as interpreted by the highest state court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the state constitution in such a case rests with the Supreme Court.[26]

[24] *Petty* v. *Tennessee-Missouri Comm.*, 359 U.S. 275 (1959).
[25] *Virginia* v. *West Virginia*, 246 U.S. 565, 601 (1918).
[26] *Dyer* v. *Sims*, 341 U.S. 22 (1951).

# ARTICLE II

## EXECUTIVE DEPARTMENT

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# EXECUTIVE DEPARTMENT

## Article II

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years and, together with the Vice President, chosen for the same Term, be elected, as follows:

### NATURE AND SCOPE OF PRESIDENTIAL POWER

#### Creation of the Presidency

Of all the issues confronting the members of the Philadelphia Convention, the nature of the presidency ranks among the most important and the resolution of the question one of the most significant steps taken.[1] The immediate source of Article II was the New York constitution in which the governor was elective by the people and thus independent of the legislature, his term was three years and he was indefinitely re-eligible, his decisions except with regard to appointments and vetoes were unencumbered with a council, he was in charge of the militia, he possessed the pardoning power, and he was charged to take care that the laws were faithfully executed.[2] But when the Convention assembled and almost to its closing days, there was no assurance that the executive department would not be headed by plural administrators, would not be unalterably tied to the legislature, and would not be devoid of many of the powers normally associated with an executive.

Debate in the Convention proceeded against a background of many things, but most certainly uppermost in the delegates' minds was the experience of the States and of the national government under the Articles of Confederation. Reacting to the exercise of powers by the royal governors, the framers of the state constitu-

[1] The background and the action of the Convention is comprehensively examined in C. Thach, *The Creation of the Presidency 1775–1789* (Baltimore: 1923). A review of the Constitution's provisions being put into operation is J. Hart, *The American Presidency in Action 1789* (New York: 1948).

[2] Hamilton observed the similarities and differences between the President and the New York Governor in *The Federalist* No. 69 (Modern Library ed. 1937). On the text, *see* New York Constitution of 1777, Articles XVII-XIX, in 5 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d sess. (Washington: 1909), 2632–2633.



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tions had generally created weak executives and strong legislatures, though not in all instances. The Articles of Confederation vested all powers in a unicameral congress. Experience had demonstrated that harm was to be feared as much from an unfettered legislature as from an uncurbed executive and that many advantages of a reasonably strong executive could not be conferred on the legislative body.[3]

Nonetheless, the Virginia Plan, which formed the basis of discussion, offered in somewhat vague language a weak executive. Selection was to be by the legislature and that body was to determine the major part of executive competency. The executive's salary was, however, to be fixed and not subject to change by the legislative branch during the term of the executive and he was ineligible for re-election so that he need not defer overly to the legislature. A council of revision was provided of which the executive was a part with power to negative national and state legislation. The executive power was said to be the power to "execute the national laws" and to "enjoy the Executive rights vested in Congress by the Confederation." The Plan did not provide for a single or plural executive, leaving that issue open.[4]

When the executive portion of the Plan was taken up on June 1, James Wilson immediately moved that the executive should consist of a single person.[5] In the course of his remarks, Wilson demonstrated his belief in a strong executive, advocating election by the people, which would free the executive of dependence on the national legislature and on the States, proposing indefinite re-eligibility, and preferring an absolute negative though in concurrence with a council of revision.[6] The vote on Wilson's motion was put over until the questions of method of selection, term, mode of removal, and powers to be conferred had been considered; subsequently, the motion carried [7] and the possibility of the development of a strong President was made real.

Only slightly less important was the decision finally arrived at not to provide for an executive council which would participate not only in the executive's exercise of the veto power but also in the exercise of all his executive duties, notably appointments and

[3] C. Thach, *The Creation of the Presidency 1775-1789* (Baltimore: 1923), chs. 1-3.

[4] The plans offered and the debate is reviewed in C. Thach, *The Creation of the Presidency 1775-1789* (Baltimore: 1923), ch. 4. The text of the Virginia Plan may be found in 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 21.

[5] Id., 65.

[6] Id., 65, 66, 68, 69, 70, 71, 73.

[7] Id., 93.

treaty making. Despite strong support for such a council, the Convention ultimately rejected the proposal and adopted language vesting in the Senate the power to "advise and consent" with regard to these matters.[8]

Finally, the designation of the executive as the "President of the United States" was made in a tentative draft reported by the Committee on Detail [9] and accepted by the Convention without discussion.[10] The same clause had provided that the President's title was to be "His Excellency" [11] and while this language was also accepted without discussion,[12] it was subsequently omitted by the Committee on Style and Arrangement [13] with no statement of the reason and no comment in the Convention.

**Executive Power: Theory of the Presidential Office**

The most obvious meaning of the language of Article II, § 1, is to confirm that the executive power is vested in a single person, but almost from the beginning it has been contended that the words mean much more than this simple designation of locus. Indeed, contention with regard to this language reflects the much larger debate about the nature of the Presidency. With Justice Jackson, we "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other." [1] At the least, it is no doubt true that the "loose and general expressions" by which the powers and duties of the executive branch are denominated [2] place the Presi-

[8] The last proposal for a council was voted down on September 7. 2 id., 542.

[9] Id., 185.

[10] Id., 401.

[11] Id., 185.

[12] Id., 401.

[13] Id., 597.

[1] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634-635 (1952) (concurring opinion).

[2] A. Upshur, *A Brief Enquiry into the True Nature and Character of Our Federal Government* (Petersburg, Va.: 1840), 116.

dent in a position in which he, as Professor Woodrow Wilson noted, "has the right, in law and conscience, to be as big a man as he can" and in which "only his capacity will set the limit." [3]

***Hamilton and Madison.***—In Hamilton's defense of President Washington's issuance of a neutrality proclamation upon the outbreak of war between France and Great Britain may be found not only the lines but most of the content of the argument that Article II vests significant powers in the President as possessor of executive powers not enumerated in subsequent sections of Article II.[4] Said Hamilton: "The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America.' The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.* It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties.

"The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, 'All legislative powers herein granted shall be vested in a congress of the United States.' In that which grants the executive power,

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[3] W. Wilson, *Constitutional Government in the United States* (New York: 1908), 202, 205.

[4] 32 *Writings of George Washington*, J. Fitzpatrick ed. (Washington: 1939), 430. *See* C. Thomas, *American Neutrality in 1793: A Study in Cabinet Government* (New York: 1931).

the expressions are, 'The *executive power* shall be vested in a President of the United States.' The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government. The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications,* which are expressed in the instrument." [5]

Madison's reply to Hamilton, in five closely reasoned articles,[6] was almost exclusively directed to Hamilton's development of the contention from the quoted language that the conduct of foreign relations was in its nature an executive function and that the powers vested in Congress which bore on this function, such as the power to declare war, did not diminish the discretion of the President in the exercise of his powers. Madison's principal reliance was on the vesting of the power to declare war in Congress, thus making it a legislative function rather than an executive one, combined with the argument that possession of the exclusive power carried with it the exclusive right to judgment about the obligations to go to war or to stay at peace, negating the power of the President to proclaim the nation's neutrality. Implicit in the argument was the rejection of the view that the first section of Article II bestowed powers not vested in subsequent sections. "Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the executive; or . . . perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative." [7]

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[5] 7 *Works of Alexander Hamilton,* J. C. Hamilton ed. (New York: 1851), 76, 80–81 (emphasis in original).

[6] 1 *Letters and Other Writings of James Madison* (Philadelphia: 1865), 611–654.

[7] Id., 621. In the congressional debates on the President's power to remove executive officeholders, *cf.* C. Thach, *The Creation of the Presidency 1775–1789* (Baltimore: 1923), ch. 6, Madison had urged contentions quite similar to Hamilton's, finding in the first section of Article II and in the obligation to execute the laws a vesting of executive powers sufficient to contain the power solely on his behalf to remove subordinates. 1 *Annals of Congress* 496–497. Madison's language here was to be heavily relied on by Chief Justice Taft on this point in *Myers* v. *United States,*

***The Myers Case.***—However much the two arguments are still subject to dispute, Chief Justice Taft, himself a former President, appears in *Myers* v. *United States* [8] to have carried a majority of the Court with him in establishing the Hamiltonian conception as official doctrine. That case confirmed one reading of the "Decision of 1789" in holding the removal power to be constitutionally vested in the President.[9] But its importance here lies in its interpretation of the first section of Article II. That language was read, with extensive quotation from Hamilton and from Madison on the removal power, as vesting all executive power in the President, the subsequent language was read as merely particularizing some of this power, and consequently the powers vested in Congress were read as exceptions which must be strictly construed in favor of powers retained by the President.[10] *Myers* remains the fountainhead of the latitudinarian constructionists of presidential power, but its dicta, with regard to the removal power, were circumscribed in *Humphrey's Executor* v. *United States,*[11] and, with regard to the President's "inherent" powers, were called into considerable question by *Youngstown Sheet & Tube Co.* v. *Sawyer.*[12]

***The Curtiss-Wright Case.***—Further Court support of the Hamiltonian view was advanced in *United States* v. *Curtiss-Wright Corp.,*[13] in which Justice Sutherland posited the doctrine that the power of the National Government in foreign relations is not one of enumerated but of inherent powers;[14] this doctrine was then combined with Hamilton's contention that control of foreign relations is exclusively an executive function with obvious implications for the power of the President. The case arose as a challenge to the delegation of power from Congress to the President with regard to

272 U.S. 52, 115–126 (1926), but compare, Corwin, "The President's Removal Power Under the Constitution," in 4 *Selected Essays on Constitutional Law* (Chicago: 1938), 1467, 1474–1483, 1485–1486.

[8] 272 U.S. 52 (1926). *See* Corwin, "The President's Removal Power Under the Constitution," in 4 *Selected Essays on Constitutional Law* (Chicago: 1938), 1467.

[9] C. Thach, *The Creation of the Presidency 1775–1789* (Baltimore: 1923), ch. 6.

[10] *Myers* v. *United States,* 272 U.S. 52, 163–164 (1926). Professor Taft had held different views. "The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in its exercise. Such specific grant must be either in the federal constitution or in an act of congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . ." W. Taft, *Our Chief Magistrate and His Powers* (New York: 1916), 139–140.

[11] 295 U.S. 602 (1935).

[12] 343 U.S. 579 (1952).

[13] 299 U.S. 304 (1936).

[14] Id., 315–316, 318.

a foreign relations matter. Justice Sutherland denied that the limitations on delegation in the domestic field were at all relevant in foreign affairs. "The broad statement that the federal government can exercise no powers except those specifically enumerated in the constitution, and such implied powers—as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as were thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states . . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source . . . .

"As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America . . . .

"It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties if they had never been mentioned in the Constitution, would have been vested in the federal government as necessary concomitants of nationality . . . .

"Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . ." [15]

Scholarly criticism of Justice Sutherland's reasoning has demonstrated that his essential postulate, the passing of sovereignty in external affairs directly from the British Crown to the colonies as a collective unit, is in error.[16] Dicta in later cases controvert the con-

[15] Ibid.

[16] Levitan, "The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory," 55 Yale L. J. 467 (1946); Patterson, "In re *United States* v. *Curtiss-Wright Corp.*," 22 Texas L. Rev. 286, 445 (1944).

clusions drawn in Curtiss-Wright about the foreign relations power being inherent rather than subject to the limitations of the delegated powers doctrine.[17] The *Kent* v. *Dulles* [18] holding that delegation to the Executive of discretion in the issuance of passports must be measured by the usual standards applied in domestic delegations appeared to circumscribe, Justice Sutherland's more expansive view, but the subsequent limitation of that decision, though formally reasoned within its analytical framework, coupled with language addressed to the President's authority in foreign affairs, leaves clouded the vitality of that decision.[19] The case nonetheless remains with *Myers* v. *United States* the source and support of those contending for inherent executive powers.

***The Youngstown Case.***—The only recent case in which the "inherent" powers of the President or the issue of what executive powers are vested by the first section of Article II has been extensively considered [20] is *Youngstown Sheet & Tube Co.* v. *Sawyer* [21] and the multiple opinions there produced make difficult an evaluation of the matter. During the Korean War, President Truman seized the steel industry then in the throes of a strike. No statute authorized the seizure and the Solicitor General defended the action as an exercise of the President's executive powers which were conveyed by the first section of Article II, by the obligation to enforce the laws, and by the vesting of the function of commander-

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[17] E.g., *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (Chief Justice Stone); *Reid* v. *Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion, per Justice Black).

[18] 357 U.S. 116, 129 (1958).

[19] *Haig* v. *Agee*, 453 U.S. 280 (1981). For the reliance on *Curtiss-Wright*, see id., 291, 293–294 & n. 24, 307–308. But see *Dames & Moore* v. *Regan*, 453 U.S. 654, 659–662 (1981), qualified by id., 678.

[20] The issue is implicit in several of the opinions of the Justices in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). *See* id., 727, 728–730 (Justice Stewart concurring), 752, 756–759 (Justice Harlan dissenting). Assertions of inherent power to sustain presidential action were made in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), but the Court studiously avoided these arguments in favor of a somewhat facile statutory analysis. Separation of powers analysis informed the Court's decisions in *United States* v. *Nixon*, 418 U.S. 683 (1974), *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), and *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). While perhaps somewhat latitudinarian in some respect of the President's powers, the analysis looks away from inherent powers. *But see Haig* v. *Agee*, 453 U.S. 280 (1981), in which the statutory and congressional ratification analyses is informed with a view of a range of presidential foreign affairs discretion combined with judicial deference according the President *de facto* much of the theoretically-based authority spelled out in *Curtiss-Wright*.

[21] 343 U.S. 579 (1952). See Corwin, "The Steel Seizure Case: A Judicial Brick Without Straw," 53 Colum. L. Rev. 53 (1953). A case similar to *Youngstown* was *AFL-CIO* v. *Kahn*, 618 F.2d 784 (C.A.D.C.) *(en banc)*, *cert. den.*, 443 U.S. 915 (1979), sustaining a presidential order denying government contracts to companies failing to comply with certain voluntary wage and price guidelines on the basis of statutory interpretation of certain congressional delegations.

in-chief. Six-to-three the Court rejected this argument and held the seizure void. But the doctrinal problem is complicated by the fact that Congress had expressly rejected seizure proposals in considering labor legislation and had authorized procedures not followed by the President which did not include seizure. Thus, four of the majority Justices [22] appear to have been decisively influenced by the fact that Congress had denied the power claimed and this in an area in which the Constitution vested the power to decide at least concurrently if not exclusively in Congress. Three and perhaps four Justices [23] appear to have rejected the Government's argument on the merits while three [24] accepted it in large measure. Despite the inconclusiveness of the opinions it seems clear that the result is a substantial retreat from the proclamation of vast presidential powers made in *Myers* and *Curtiss-Wright*.[25]

***The Practice in the Presidential Office.***—However contested the theory of expansive presidential powers, the practice in fact has been one of expansion of those powers, an expansion which a number of "weak" Presidents and the temporary ascendancy of Congress in the wake of the Civil War has not stemmed. Perhaps the point of no return in this area was reached in 1801 when the Jefferson-Madison "strict constructionists" came to power and instead of diminishing executive power and federal power in general acted rather to enlarge both, notably by the latitudinarian construction of implied federal powers to justify the Louisiana Purchase.[1] After a brief lapse into Cabinet government, the executive

[22] 343 U.S. 593, 597–602 (Justice Frankfurter concurring, though he also noted he expressly joined Justice Black's opinion as well), 634, 635–640 (Justice Jackson concurring), 655, 657 (Justice Burton concurring), 660 (Justice Clark concurring).

[23] Id., 582 (Justice Black delivering the opinion of the Court), 629 (Justice Douglas concurring, but note his use of the Fifth Amendment just compensation argument), 634 (Justice Jackson concurring), 655 (Justice Burton concurring).

[24] Id., 667 (Chief Justice Vinson and Justices Reed and Minton dissenting).

[25] *Myers* v. *United States*, 272 U.S. 52 (1926); *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936). Note that in *Dames & Moore* v. *Regan*, 453 U.S. 654, 659–662, 668–669 (1981), the Court turned to *Youngstown* as embodying "much relevant analysis" on an issue of presidential power.

[1] For the debates on the constitutionality of the Purchase, *see* E. Brown, *The Constitutional History of the Louisiana Purchase, 1803–1812* (Berkeley: 1920). The differences and similarities between the Jeffersonians and the Federalists can be seen by comparing L. White, *The Jeffersonians—A Study in Administrative History 1801–1829* (New York: 1951), with L. White, *The Federalists—A Study in Administrative History* (New York: 1948). That the responsibilities of office did *not* turn the Jeffersonians into Hamiltonians may be gleaned from Madison's veto of an internal improvements bill. 2 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 569.

in the hands of Andrew Jackson stamped upon the presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, "the oldest political institution of the race, the elective Kingship." [2] While the modern theory of presidential power was conceived primarily by Alexander Hamilton, the modern conception of the presidential office was the contribution primarily of Andrew Jackson.[3]

## TENURE

Formerly the term of four years during which the President "shall hold office" was reckoned from March 4 of the alternate odd years beginning with 1789. This came about from the circumstance that under the act of September 13, 1788, of "the Old Congress," the first Wednesday in March, which was March 4, 1789, was fixed as the time for commencing proceedings under the Constitution. Although as a matter of fact Washington was not inaugurated until April 30 of that year, by an act approved March 1, 1792, it was provided that the presidential term should be reckoned from the fourth day of March next succeeding the date of election. And so things stood until the adoption of the Twentieth Amendment by which the terms of President and Vice-President end at noon on the 20th of January.[1]

The prevailing sentiment of the Philadelphia Convention favored the indefinite eligibility of the President. It was Jefferson who raised the objection that indefinite eligibility would in fact be for life and degenerate into an inheritance. Prior to 1940 the idea that no President should hold for more than two terms was generally thought to be a fixed tradition, although some quibbles had been raised as to the meaning of the word "term." President Franklin D. Roosevelt's violation of the tradition led to the proposal by Congress on March 24, 1947, of an amendment to the Constitution to rescue the tradition by embodying it in the Constitutional Document. The proposal became a part of the Constitution on February 27, 1951, in consequence of its adoption by the necessary thirty-sixth State, which was Minnesota.[2]

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[2] H. Ford, *The Rise and Growth of American Politics* (New York: 1898), 293.

[3] E. Corwin, *The President—Office and Powers 1787-1957* (New York: 4th ed. 1957), ch. 1.

[1] As to the meaning of "the fourth day of March," *see* Warren, "Political Practice and the Constitution," 89 U. Pa. L. Rev. 1003 (1941).

[2] E. Corwin, *The President: Office and Powers 1787-1957* (New York: 4th ed., 1957), 34-38, 331-339.

Clause 2. Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Clause 3. The Electors shall meet in their respective States and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a majority of the whole Number of Electors appointed: and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of

Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

Clause 4. The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day, shall be the same throughout the United States.

## ELECTORAL COLLEGE

The electoral college was one of the compromises by which the delegates were able to agree on the document finally produced. "This subject," said James Wilson, referring to the issue of the manner in which the President was to be selected, "has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide." [1] Adoption of the electoral college plan came late in the Convention which had previously adopted on four occasions provisions for election of the executive by the Congress and had twice defeated proposals for election by the people directly.[2] Itself the product of compromise, the electoral college probably did not work as any member of the Convention could have foreseen, because the development of political parties and nomination of presidential candidates through them and designation of electors by the parties soon reduced the concept of the elector as an independent force to the vanishing point in practice if not in theory.[3] But the college remains despite numerous efforts to adopt another method, a relic perhaps but still a significant one. Clause 3 has, of course, been superceded by the Twelfth Amendment.[4]

***"Appoint".***—The word "appoint" is used in Clause 2 "as conveying the broadest power of determination." [5] This power has

[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 501.

[2] 1 id., 21, 68-69, 80-81, 175-176, 230, 244; 2 id., 29-32, 57-59, 63-64, 95, 99-106, 108-115, 118-121, 196-197, 401-404, 497, 499-502, 511-515, 522-529.

[3] On the elector as a "free agent," *see infra, pp.* 457-460. The second presidential election, in 1792, saw the first party influence on the electors, with the Federalists and the Jeffersonians organizing to control the selection of the Vice-President. Justice Jackson once noted: "As an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis.*" *Ray* v. *Blair,* 343 U.S. 214, 232 (1952). But of course the electors still do actually elect the President and Vice President.

[4] *Infra, pp.* 1449-1450.

[5] *McPherson* v. *Blacker,* 146 U.S. 1, 27 (1892).

been used. "Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable." [6]

***State Discretion in Choosing Electors.***—Although Clause 2 seemingly vests complete discretion in the States, certain older cases had recognized a federal interest in protecting the integrity of the process. Thus, the Court has upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a presidential elector.[7] Its power to protect the choice of electors from fraud or corruption was sustained.[8] "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." [9]

More recently, substantial curbs on state discretion have been instituted by both the Court and the Congress. In *Williams* v. *Rhodes,*[10] the Court struck down a complex state system which ef-

[6] Id., 28–29.

[7] *Ex parte Yarbrough,* 110 U.S. 651 (1884).

[8] *Burroughs and Cannon* v. *United States,* 290 U.S. 534 (1934).

[9] *Ex parte Yarbrough,* 110 U.S. 651, 657–658 (1884), quoted in *Burroughs and Cannon* v. *United States,* 290 U.S. 534, 546 (1934).

[10] 393 U.S. 23 (1968).

fectively limited access to the ballot to the electors of the two major parties. In the Court's view, the system violated the equal protection clause of the Fourteenth Amendment because it favored some and disfavored others and burdened both the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. For the Court, Justice Black denied that the language of Clause 2 immunized such state practices from judicial scrutiny.[11] Then, in *Oregon* v. *Mitchell*,[12] the Court upheld the power of Congress to reduce the voting age in presidential elections[13] and to set a thirty-day durational residency period as a qualification for voting in presidential elections.[14] Although the Justices were divided on the reasons, the rationale emerging from this case, considered with *Williams* v. *Rhodes*,[15] is that the Fourteenth Amendment limits state discretion in prescribing the manner of selecting electors and that Congress in enforcing the Fourteenth Amendment[16] may override state practices which violate that Amendment and substitute standards of its own.

***Constitutional Status of Electors.***—Dealing with the question of the constitutional status of the electors, the Court said in 1890: "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State legislatures when acting as electors of federal senators,

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[11] "There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution . . . . [It cannot be] thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. [citing the Fifteenth, Nineteenth, and Twenty-fourth Amendments]. . . . Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." Id., 29.

[12] 400 U.S. 112 (1970).

[13] The Court divided five-to-four on this issue. Of the majority, four relied on Congress' power under the Fourteenth Amendment and Justice Black relied on implied and inherent congressional powers to create and maintain a national government. Id., 119–124 (Justice Black announcing opinion of the Court).

[14] The Court divided eight-to-one on this issue. Of the majority, seven relied on Congress' power to enforce the Fourteenth Amendment and Justice Black on implied and inherent powers.

[15] 393 U.S. 23 (1968).

[16] *Cf.* Fourteenth Amendment, § 5.

or the people of the States when acting as electors of representatives in Congress. . . . In accord with the provisions of the Constitution, Congress has determined the times as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them." [17] The truth of the matter is that the electors are not "officers" at all, by the usual tests of office.[18] They have neither tenure nor salary, and having performed their single function they cease to exist as electors.

This function is, moreover, "a federal function," [19] their capacity to perform which results from no power which was originally resident in the States but which springs directly from the Constitution of the United States.[20]

In the face of the proposition that electors are state officers, the Court has upheld the power of Congress to act to protect the integrity of the process by which they are chosen.[21] But in *Ray* v. *Blair*,[22] the Court reasserted the conception of electors as state officers with some significant consequences.

***Electors as Free Agents.***—No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and non-partisan judgment as to the men best qualified for the Nation's highest offices." [23] Writing in 1826, Senator Thomas Hart Benton admitted that the framers had intended electors to be men of "superior discernment, virtue, and information," who would select the President "according to their own will" and without reference to the immediate wishes of the people. "That this invention has failed of its objective in every election is a fact of such universal notoriety, that no one can dispute it. That it ought to have failed is equally uncontestable; for such independence in the elec-

[17] *In re Green*, 134 U.S. 377, 379–380 (1890).

[18] *United States* v. *Hartwell*, 6 Wall. (73 U.S.) 385, 393 (1868).

[19] *Hawke* v. *Smith*, 253 U.S. 221 (1920).

[20] *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 535 (1934).

[21] *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Burroughs and Cannon* v. *United States*, 290 U.S. 534 (1934).

[22] 343 U.S. 214 (1952).

[23] Id., 232 (Justice Jackson dissenting). *See The Federalist* No. 68 (Modern Library ed. 1937), 441 (Hamilton); 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1457.

tors was wholly incompatible with the safety of the people. [It] was, in fact, a chimerical and impractical idea in any community." [24]

Electors constitutionally remain free to cast their ballots for any person they wish and occasionally they have done so.[25] The most recent instance occurred when a 1968 Republican elector in North Carolina chose to cast his vote not for Richard M. Nixon, who had won a plurality in the State, but for George Wallace, the independent candidate who had won the second greatest number of votes. Members of both the House of Representatives and of the Senate objected to counting that vote for Mr. Wallace and insisted that it should be counted for Mr. Nixon, but both bodies decided to count the vote as cast.[1]

The power of either Congress [2] or of the States to enact legislation binding electors to vote for the candidate of the party on the ticket of which they run has been the subject of much argument.[3] It remains unsettled and the Supreme Court has touched on the issue only once and then tangentially. In *Ray* v. *Blair*,[4] the Court upheld, against a challenge of invalidity under the Twelfth Amendment, a rule of the Democratic Party of Alabama, acting under delegated power of the legislature, which required each candidate for the office of presidential elector to take a pledge to support the nominees of the party's convention for President and Vice President. The state court had determined that the Twelfth Amendment, following language of Clause 3, required that electors be absolutely free to vote for anyone of their choice. Said Justice Reed for the Court:

"It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support

[24] S. Rept. No. 22, 19th Congress, 1st sess. (1826), 4.

[25] All but the most recent instance are summarized in N. Peirce, *The People's President—The Electoral College in American History and the Direct-Vote Alternative* (New York: 1968), 122-124.

[1] 115 *Cong. Rec.* 9-11, 145-171, 197-246 (1969).

[2] Congress has so provided in the case of electors of the District of Columbia, 75 Stat. 818 (1961), D.C. Code § 1-1108(g), but the reference in the text is to the power of Congress to bind the electors of the States.

[3] At least thirteen States do have statutes binding their electors but none has been tested in the courts.

[4] 343 U.S. 214 (1952).

the party nominees. Experts in the history of government recognize the longstanding practice. Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another, they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.

"However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Ala. Code, Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice.

"We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge." [5] Justice Jackson, with Justice Douglas, dissented: "It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as 'due process of law,' 'equal protection,' or 'commerce among the states.' But I do

[5] Id., 228–231.

not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions." [6]

Clause 5. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been Fourteen Years a Resident within the United States.

### QUALIFICATIONS

All Presidents since and including Martin Van Buren were born in the United States subsequent to the Declaration of Independence. The only issue with regard to the qualifications set out in this clause which appears to be susceptible of argument is whether a child born abroad of American parents is "a natural born citizen" in the sense of the clause. Such a child is a citizen as a consequence of statute.[1] Whatever the term "natural born" means, it no doubt does not include a person who is "naturalized." Thus, the answer to this issue would seem to turn on the interpretation of the first sentence of the first section of the Fourteenth Amendment, providing that "[a]ll persons born or naturalized in the United States" are citizens. If that language is exclusive, that is, if it describes the only ways persons can become citizens, then, anyone born outside the United States would have to be naturalized in order to be a citizen and a child born abroad of American parents is to be considered "naturalized" by being statutorily made a citizen at birth.[2] Although dictum in certain cases supports this exclusive interpretation of the Fourteenth Amendment,[3] the most recent case in its holding and language rejects it.[4] Whether the Supreme Court would decide the issue should it ever arise in a "case or controversy" as well as how it might decide it can only be speculated about.

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[6] Id., 232-233.

[1] 8 U.S.C. § 1401.

[2] Ibid.

[3] *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702-703 (1898); *cf. Montana* v. *Kennedy*, 366 U.S. 308, 312 (1961).

[4] *Rogers* v. *Bellei*, 401 U.S. 815 (1971). *See supra, pp.* 301-302.

Clause 6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President declaring what Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected.

### PRESIDENTIAL SUCCESSION

When the President is disabled or is removed or has died, to what does the Vice President succeed: to the "powers and duties of the said office," or to the office itself? There appears to be a reasonable amount of evidence from the proceedings of the convention from which to conclude that the Framers intended the Vice President to remain Vice President and to exercise the powers of the President until, in the words of the final clause, "a President shall be elected." [1] Nonetheless, when President Harrison died in 1841, Vice President Tyler, after initial hesitation, took the position that he was automatically President,[2] a precedent which has been followed subsequently and which is now permanently settled by § 1 of the Twenty-fifth Amendment.[3] That Amendment as well settles a numbe. of other pressing questions with regard to presidential inability and succession.[4]

Clause 7. The President shall, at stated Times, receive for his Services, a Compensation which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[1] E. Corwin, *The President—Office and Powers 1787-1957* (New York: 4th ed. 1957), 54, 344 n. 46.
[2] Id., 53-59.
[3] *Infra.*
[4] Ibid.

### COMPENSATION AND EMOLUMENTS

Clause 7 may be advantageously considered in the light of the rulings and learning arising out of parallel provision regarding judicial salaries.[5]

Clause 8. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

### OATH OF OFFICE

What is the time relationship between a President's assumption of office and his taking the oath. Apparently, the former comes first, this answer appearing to be the assumption of the language of the clause. The Second Congress assumed that President Washington took office on March 4, 1789,[1] although he did not take the oath until the following April 30.

That the oath the President is required to take might be considered to add anything to the powers of the President, because of his obligation to "preserve, protect and defend the Constitution", might appear to be rather a fanciful idea. But in President Jackson's message announcing his veto of the act renewing the Bank of the United States there is language which suggests that the President has the right to refuse to enforce both statutes and judicial decisions on his own independent decision that they were unwarranted by the Constitution.[2] The idea next turned up in a message by President Lincoln justifying his suspension of the writ of *habeas corpus* without obtaining congressional authorization.[3] And counsel

[5] *Infra*, pp. 619-620. *Cf.* 13 *Ops. Atty. Gen.* 161 (1869), holding that a specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him which, in the case of the President, would be unconstitutional if the act of Congress levying the tax was passed during his official term.

[1] Act of March 1, 1792, 1 Stat. 239, § 12.

[2] 2 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 576. Chief Justice Taney, who as a member of Jackson's Cabinet had drafted the message, later repudiated this possible reading of the message. 2 C. Warren, *The Supreme Court in United States History* (New York: 1926), 223-224.

[3] 6 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1900), 25.

to President Johnson during his impeachment trial adverted to the theory but only in passing.[4] Beyond these isolated instances, it does not appear to be seriously contended that the oath adds anything to the President's powers.

SECTION 2. Clause 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Office, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

## COMMANDER-IN-CHIEF

### Development of the Concept

Surprisingly little discussion of the Commander-in-Chief clause is found in the Convention or in the ratifying debates. From the evidence available, it appears that the Framers vested the duty in the President because experience in the Continental Congress had disclosed the inexpediency of vesting command in a group and because the lesson of English history was that danger lurked in vesting command in a person separate from the responsible political leaders.[1] But the principal concern here is the nature of the power granted by the clause.

***The Limited View.***—The purely military aspects of the Commander-in-Chiefship were those which were originally stressed. Hamilton said the office "would amount to nothing more than the

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[4] 2 *Trial of Andrew Johnson* (Washington: 1868), 200, 293, 296.

[1] May, "The President Shall Be Commander in Chief," in E. May (ed.), *The Ultimate Decision—The President as Commander in Chief* (New York: 1960), 1. In the Virginia ratifying convention, Madison, replying to Patrick Henry's objection that danger lurked in giving the President control of the military, said: "Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether?" 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington: 1836), 393. In the North Carolina convention, Iredell said: "From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations can only be expected from one person." 4 id., 107.

supreme command and direction of the Military and naval forces, as first general and admiral of the confederacy." [2] Story wrote in his *Commentaries:* "The propriety of admitting the president to be commander in chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents." [3] In 1850, Chief Justice Taney, for the Court, said: "His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

". . . But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question." [4] Even after the Civil War a powerful minority of the Court described the role of President as Commander-in-Chief simply as "the command of the forces and the conduct of campaigns." [5]

***The Prize Cases.***—The basis for a broader conception was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.[6] In his famous

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[2] *The Federalist* No. 69 (Modern Library ed. 1937), 448.

[3] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1486.

[4] *Fleming* v. *Page*, 9 How. (50 U.S.) 603, 615, 618 (1850).

[5] *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 139 (1866).

[6] 1 Stat. 424 (1795); 2 Stat. 443 (1807), now 10 U.S.C. §§ 331–334. *See also Martin* v. *Mott*, 12 Wheat. (25 U.S.) 19, 32–33 (1827), asserting the finality of the President's judgment of the existence of a state of facts requiring his exercise of the powers conferred by the act of 1795.

message to Congress of July 4, 1861,[7] Lincoln advanced the claim that the "war power" was his for the purpose of suppressing rebellion, and in the *Prize Cases* [8] of 1863 a divided Court sustained this theory. The immediate issue was the validity of the blockade which the President, following the attack on Fort Sumter, had proclaimed of the Southern ports.[9] The argument was advanced that a blockade to be valid must be an incident of a "public war" validly declared, and that only Congress could, by virtue of its power "to declare war," constitutionally impart to a military situation this character and scope. Speaking for the majority of the Court, Justice Grier answered: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral.*' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers of the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other.'

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized '*a state of war as existing by the act of the Republic of Mexico.*' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

"This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

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[7] 7 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1900), 3221, 3232.

[8] 2 Bl. (67 U.S.) 635 (1863).

[9] 7 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1900), 3215, 3216, 3481.

". . . Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." [10]

***Impact of the Prize Cases on World Wars I and II.***—In brief, the powers claimable for the President under the Commander-in-Chief clause at a time of wide-spread insurrection were equated with his powers under the clause at a time when the United States is engaged in a formally declared foreign war.[11] And since Lincoln performed various acts especially in the early months of the Civil War which, like increasing the Army and Navy, admittedly fell within the constitutional provinces of Congress, it seems to have been assumed during World War I and II that the Commander-in-Chiefship carried with it the power to exercise like powers practically at discretion, not merely in wartime but even at a time when war became a strong possibility. No attention was given the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly did,[12] with the exception of his suspension of the *habeas corpus* privilege which was regarded by many as attributable to the President in the situation then existing, by virtue of his duty to take care that the laws be faithfully executed.[13] Nor was this the only respect in which war or the approach of war was deemed to operate to enlarge the scope of power claimable by the President as Commander-in-Chief in wartime.[14]

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[10] 2 Bl. (67 U.S.), 668–670.

[11] *See* generally, E. Corwin, *Total War and the Constitution* (New York: 1946).

[12] 12 Stat. 326 (1861).

[13] J. Randall, *Constitutional Problems Under Lincoln* (Urbana: rev. ed. 1951), 118–139.

[14] E.g., Attorney General Biddle's justification of seizure of a plant during World War II: "As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war. . . . In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief

### Presidential Theory of the Commander-in-Chiefship in World War II—And Beyond

In his message of September 7, 1942 to Congress, in which he demanded that Congress forthwith repeal certain provisions of the Emergency Price Control Act of the previous January 30th,[1] President Roosevelt formulated his conception of his powers as "Commander in Chief in wartime" as follows:

"I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos.

"In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.

"At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do.

"The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.

"I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress. . . .

"The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.

"When the war is won, the powers under which I act automatically revert to the people—to whom they belong." [2]

***Presidential War Agencies.***—While congressional compliance with the President's demand rendered unnecessary an effort on his part to amend the Price Control Act, there were other matters as to which he repeatedly took action within the normal field of con-

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Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort." 40 *Ops. Atty. Gen.* 312, 319-320 (1944). Prior to the actual beginning of hostilities, Attorney General Jackson asserted the same justification upon seizure of an aviation plant. E. Corwin, *Total War and the Constitution* (New York: 1946), 47-48.

[1] 56 Stat. 23 (1942).

[2] 88 *Cong. Rec.* 7044 (1942). Congress promptly complied, 56 Stat. 765 (1942), so that the President was not required to act on his own. *But see* E. Corwin, *Total War and the Constitution* (New York: 1946), 65-66.

gressional powers, not only during the war, but in some instances prior to it. Thus, in exercising both the powers which he claimed as Commander-in-Chief and those which Congress conferred upon him to meet the emergency, Mr. Roosevelt employed new emergency agencies, created by himself and responsible directly to him, rather than the established departments or existing independent regulatory agencies.[3]

***Constitutional Status of Presidential Agencies.***—The question of the legal status of the presidential agencies was dealt with judicially but once. This was in the decision of the United States Court of Appeals of the District of Columbia in *Employers Group* v. *National War Labor Board*,[4] which was a suit to annul and enjoin a "directive order" of the War Labor Board. The Court refused the injunction on the ground that at the time when the directive was issued any action of the Board was "informatory," "at most advisory." In support of this view the Court quoted approvingly a statement by the chairman of the Board itself: "These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the nonstrike, no-lock-out agreement and . . . to carry out the directives of the tribunal created under that agreement by the Commander in Chief." [5] Nor, the Court continued, had the later War Labor Disputes Act vested War Labor Boards orders with any greater authority, with the result that they were still judicially unenforceable and unreviewable. Following this theory, the War Labor Board was not an office wielding power, but a purely advisory body, such as Presidents have frequently created in the past without the aid or consent of Congress. Congress itself, nevertheless, both in its appropriation acts and in other legislation, treated the presidential agencies as in all respects offices.[6]

***Evacuation of the West Coast Japanese.***—On February 19, 1942, President Roosevelt issued an executive order, "by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy," providing, as a safeguard against subversion and sabotage, power for his military command-

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[3] For a listing of the agencies and an account of their creation to the close of 1942, *see* Vanderbilt, "War Powers and Their Administration," in *1942 Annual Survey of American Law* (New York Univ.), 106.

[4] 143 F.2d 145 (C.A.D.C. 1944).

[5] Id., 149.

[6] E. Corwin, *The President: Office and Powers 1787–1957* (New York: 4th ed. 1957), 244, 245, 459.

ers to designate areas from which "any person" could be excluded or removed and to set up facilities for such persons elsewhere.[7] Pursuant to this order, more than 112,000 residents of the Western States, all of Japanese descent and more than two out of every three of whom were natural-born citizens, were removed from their homes and herded into temporary camps and later into "relocation centers" in several States.

It was apparently the original intention of the Administration to rest its measures concerning this matter on the general principle of military necessity and the power of the Commander-in-Chief in wartime. But before any action of importance was taken under the order, Congress ratified and adopted it by the Act of March 21, 1942,[8] by which it was made a misdemeanor to knowingly enter, remain in, or leave prescribed military areas contrary to the orders of the Secretary of War or of the commanding officer of the area. The cases which subsequently arose in consequence of the order were decided under the order plus the Act. The question at issue, said Chief Justice Stone for the Court, "is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional . . . [power] to impose the curfew restriction here complained of." [9] This question was answered in the affirmative, as was the similar question later raised by an exclusion order.[10]

***Presidential Government of Labor Regulations.***—The most important segment of the home front regulated by what were in effect presidential edicts was the field of labor relations. Exactly six months before Pearl Harbor, on June 7, 1941, Mr. Roosevelt, citing his proclamation thirteen days earlier of an unlimited national emergency, issued an Executive Order seizing the North American Aviation Plant at Inglewood, California, where, on account of a strike, production was at a standstill.[11] Attorney General Jackson justified the seizure as growing out of the "duty constitutionally and inherently rested upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States a going concern," as well as "to obtain supplies for which Congress has appropriated the money, and which it has directed the President to obtain." [12] Other seizures followed,

[7] E.O. 9066, 7 *Fed. Reg.* 1407 (1942).
[8] 56 Stat. 173 (1942).
[9] *Hirabayashi* v. *United States*, 320 U.S. 81, 91–92 (1943).
[10] *Korematsu* v. *United States*, 323 U.S. 214 (1944).
[11] E.O. 8773, 6 *Fed. Reg.* 2777 (1941).
[12] E. Corwin, *Total War and the Constitution* (New York: 1946), 47–48.

and on January 12, 1942, Mr. Roosevelt, by Executive Order 9017, created the National War Labor Board. "Whereas," the order read in part, "by reason of the state of war declared to exist by joint resolutions of Congress, . . . , the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and Whereas as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for a peaceful adjustment of such disputes. Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered: 1. There is hereby created in the Office for Emergency Management a National War Labor Board, . . . ." [13] In this field, too, Congress intervened by means of the War Labor Disputes Act of June 25, 1943,[14] which, however, still left ample basis for presidential activity of a legislative character.[15]

***Sanctions Implementing Presidential Directives.***—To implement his directives as Commander-in-Chief in wartime, and especially those which he issued in governing labor disputes, President Roosevelt often resorted to "sanctions," which may be described as penalties lacking statutory authorization. Ultimately, the President sought to put sanctions in this field on a systematic basis. The

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[13] 7 *Fed. Reg.* 237 (1942).

[14] 57 Stat. 163 (1943).

[15] "During the course of the year [1945] the President directed the seizure of many of the nation's industries in the course of labor disputes. The total number of facilities taken over is significant: two railroad systems, one public utility, nine industrial companies, the transportation systems of two cities, the motor carriers in one city, a towing company and a butadiene plant. In addition thereto the President on April 10 seized 218 bituminous coal mines belonging to 162 companies and on May 7, 33 more bituminous mines of 24 additional companies. The anthracite coal industry fared no better; on May 3 and May 7 all the mines of 365 companies and operators were taken away from the owners, and on October 6 the President ordered the seizure of 54 plants and pipe lines of 29 petroleum producing companies in addition to four taken over prior thereto.

"During the year disputes between railroad companies and the Brotherhoods resulted in the establishment of twelve Railroad Emergency Boards to investigate disputes and to report to the President. The President also established on October 9 a Railway Express Emergency Board to investigate the dispute between the Railway Express and a union.

"To implement the directives of the National War Labor Board, the Office of Economic Stabilization directed the cancellation of all priority applications, allocation applications and outstanding priorities and allocations in the cases of three clothing companies and one transportation system which refused to comply with orders of the National War Labor Board." Vanderbilt, "War Powers and their Administration," *1945 Annual Survey of American Law* (N.Y. Univ.), 254, 271-273.

order empowered the Director of Economic Stabilization, on receiving a report from the National War Labor Board that someone was not complying with its orders, to issue "directives" to the appropriate department or agency requiring that privileges, benefits, rights, or preferences enjoyed by the noncomplying party be withdrawn.[16]

Sanctions were also occasionally employed by statutory agencies, such as OPA, to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942.[17] In the case of *Stewart & Bro.* v. *Bowles*,[18] the Supreme Court had the opportunity to regularize this type of executive emergency legislation. Here a retail dealer in fuel oil was charged with having violated a rationing order of OPA by obtaining large quantities of oil from its supplier without surrendering ration coupons, by delivering many thousands of gallons of fuel oil without requiring ration coupons, and so on, and was prohibited by the agency from receiving oil for resale or transfer for the ensuing year. The offender conceded the validity of the rationing order in support of which the suspension order was issued but challenged the validity of the latter as imposing a penalty that Congress had not enacted and asked the district court to enjoin it.

The court refused to do so and was sustained by the Supreme Court in its position. Said Justice Douglas, speaking for the Court: "Without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. . . . But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. . . . These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. . . . Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a previous supply of material needed for the manufacture of articles of war. . . . From the point of view of the factory owner from whom the materials were diverted the action would be harsh. . . . But in time of war the national interest cannot wait on individual claims to preference. Yet if the President has the power to

[16] E.O. 9370, 8 *Fed. Reg.* 11463 (1943).
[17] 56 Stat. 23 (1942).
[18] 322 U.S. 398 (1944).

channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil." [19] Sanctions were, therefore, constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power which they supported and were directly conservative of the interests which this power was created to protect and advance. It is certain, however, that sanctions not uncommonly exceeded this pattern.[20]

***The Postwar Period.***—The end of active hostilities did not terminate either the emergency or the federal-governmental response to it. President Truman proclaimed the termination of hostilities on December 31, 1946,[21] and Congress enacted a joint resolution which repealed a great variety of wartime statutes and set termination dates for others in July, 1947.[22] Signing the resolution, the President said that the emergencies declared in 1939 and 1940 continued to exist and that it was "not possible at this time to provide for terminating all war and emergency powers." [23] The hot war was giving way to the Cold War.

Congress thereafter enacted a new Housing and Rent Act to continue the controls begun in 1942 [24] and continued the draft.[25] With the outbreak of the Korean War, legislation was enacted establishing general presidential control over the economy again [1] and by executive order the President created agencies to exercise the power.[2] The Court continued to assume the existence of a state of wartime emergency prior to Korea but with misgivings. In *Woods* v. *Cloyd W. Miller Co.*,[3] the Court held constitutional the new rent control law on the ground that cessation of hostilities did not conclude the Government's powers but that the power continued to remedy the evil arising out of the emergency. Yet for the Court, Justice Douglas noted: "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts

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[19] Id., 404-405.

[20] E. Corwin, *The President: Office and Powers 1787-1957* (New York: 4th ed. 1957), 249-250.

[21] Proc. 2714, 12 *Fed. Reg.* 1 (1947).

[22] S.J. Res. 123, 61 Stat. 449 (1947).

[23] *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 140 n.3 (1948).

[24] 61 Stat. 193 (1947).

[25] 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 451 et seq.

[1] Defense Production Act of 1950, 64 Stat. 798.

[2] E.O. 10161, 15 *Fed. Reg.* 6105 (1950).

[3] 333 U.S. 138 (1948).

on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision." [4] Justice Jackson, while concurring, noted that he found the war power "the most dangerous one to free government in the whole catalogue of powers" and cautioned that its exercise should "be scrutinized with care." [5] And in *Ludecke* v. *Watkins*,[6] four Justices were prepared to hold that the presumption in the statute under review of continued war with Germany was fiction and not to be utilized.

But the postwar was a time of reaction against the wartime exercise of power by President Roosevelt and President Truman was not permitted the same liberties. The Twenty-second Amendment writing into permanent law the two-term custom, the "Great Debate" about our participation in NATO, the attempt to limit the treaty-making power, and other actions, bespoke the reaction.[7] The Supreme Court signalized this reaction when it struck down the President's action in seizing the steel industry while it was struck during the Korean War.[8]

### The Cold War and After: Presidential Power To Use Troops Overseas Without Congressional Authorization

Reaction did not persist, however, soon running its course, and the necessities, real and only perceived as such, of the United States role as world power and chief guarantor of the peace operated to expand the powers of the President and to diminish congressional powers in the foreign relations arena. President Truman did not seek congressional authorization before sending troops to Korea and subsequent Presidents similarly acted on their own in putting troops into Lebanon and the Dominican Republic as well as most notably into Indochina.[1] Eventually, public opposition precipitated another constitutional debate whether the President had the authority to commit troops to foreign combat without the approval of Congress, a debate which went on inconclusively between Congress and Executive [2] and one which the courts were content gen-

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[4] Id., 143–144.

[5] Id., 146–147.

[6] 335 U.S. 160 (1948).

[7] *See* A. Kelly & W. Harbison, *The American Constitution—Its Origins and Development* (New York: 4th ed. 1970), ch. 31.

[8] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

[1] *See* the discussion in the Senate Foreign Relations Committee, *Report on the National Commitments Resolution*, S. Rept. No. 91-129, 91st Congress, 1st sess. (1969); *U.S. Commitments to Foreign Powers*, Hearings before the Senate Committee on Foreign Relations, 90th Congress, 1st sess. (1967), 16–19 (Professor Bartlett).

[2] *Supra*, *pp.* 336–340.

erally to consign to the inclusive consideration of those two bodies.[3] The substance of the debate concerns many facets of the President's powers and responsibilities—from his obligation to protect the lives and property of United States citizens abroad, to execute the treaty obligations of the Nation, to further the national security interests of the Nation, and to deal with aggression and threats of aggression as they confront him. Defying neat summarization, the considerations nevertheless merit at least an historical survey and an attempted categorization of the arguments.

***The Historic Use of Force Abroad.***—In 1912, the Department of State published a memorandum prepared by its Solicitor which set out to justify the "Right to Protect Citizens in Foreign Countries by Landing Forces."[4] In addition to the justification, the memorandum summarized 47 instances in which force had been used, in most of them without any congressional authorization. Twice revised and reissued, the memorandum was joined by a 1928 independent study and a 1945 work by a former government official in supporting conclusions which drifted away from the original justification of the use of United States forces abroad to the use of such forces at the discretion of the President and free from control by Congress.[5]

New lists and revised arguments were published to support the actions of President Truman in sending troops to Korea and Presidents Kennedy and Johnson in sending troops first to Vietnam and then to Indochina generally[6] and new lists have been propound-

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[3] Ibid.

[4] J. Clark, Memorandum by the Solicitor for the Department of State, *Right to Protect Citizens in Foreign Countries by Landing Forces* (Washington: 1912).

[5] Ibid., (Washington: 1929; 1934); M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore: 1928); J. Rogers, *World Policing and the Constitution* (Boston: 1945). The burden of the last cited volume was to establish that the President was empowered to participate in United Nations peacekeeping actions without having to seek congressional authorization on each occasion; it may be said to be one of the earliest, if not the earliest, propoundings of the doctrine of inherent presidential powers to use troops abroad outside the narrow compass traditionally accorded those powers.

[6] E.g., H. Rept. No. 127, 82d Congress, 1st sess. (1951), 55–62; Corwin, "Who Has the Power to Make War?" *New York Times Magazine* (July 31, 1949), 11; "Authority of the President to Repel the Attack in Korea," 23 *Dept. State Bull.* 173 (1950); Department of State, Historical Studies Division, *Armed Actions Taken by the United States Without a Declaration of War, 1789–1967* (Res. Proj. No. 806A (Washington: 1967)). That the compilation of such lists was more than a defense against public criticism can be gleaned from a revealing discussion in Secretary of State Acheson's memoirs detailing why the President did not seek congressional sanction for sending troops to Korea. "There has never, I believe, been any serious doubt—in the sense of non-politically inspired doubt—of the President's constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent was fully set out in the State Department's memorandum of July 3, 1950, extensively

ed.[7] The great majority of the instances cited involved fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts to protect commerce, the dispatch of small bodies of troops to chase bandits across the Mexican border, and the like, and some incidents supposedly without authorization from Congress did in fact have underlying statutory or other legislation authorization. Some instances, President Polk's use of troops to precipitate war with Mexico in 1846, President Grant's attempt to annex the Dominican Republic, President McKinley's dispatch of troops into China during the Boxer Rebellion, involved considerable exercises of presidential power, but in general purposes were limited and congressional authority was sought for the use of troops against a sovereign state or in such a way as to constitute war. The early years of this century saw the expansion in the Caribbean and Latin America both of the use of troops for the furthering of what was perceived to be our national interests and of the power of the President to deploy the military force of the United States without congressional authorization.[8]

The pre-war actions of Presidents Wilson and Franklin Roosevelt advanced in substantial degrees the fact of presidential initiative, although the theory did not begin to catch up with the fact until the "Great Debate" over the commitment of troops by the United States to Europe under the Atlantic Pact. While congressional authorization was obtained, that debate, the debate over the United Nations charter, and the debate over Article 5 of the North Atlantic Treaty of 1949, providing that "armed attack" against one signatory was to be considered as "an attack" against all signatories, provided for the occasion of the formulation of a theory of independent presidential power to use the armed forces in the na-

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published. But the wisdom of the decision not to ask for congressional approval has been doubted. . . ."

After discussing several reasons establishing the wisdom of the decision, the Secretary continued: "The President agreed, moved also, I think, by another passionately held conviction. His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made." D. Acheson, *Present at the Creation* (New York: 1969), 414, 415.

[7] *War Powers Legislation*, Hearings before the Senate Foreign Relations Committee, 92d Congress, 1st sess. (1971), 347, 354-355, 359-379 (Senator Goldwater); Emerson, "War Powers Legislation," 74 W. Va. L. Rev. 53 (1972).

[8] *U.S. Commitments to Foreign Powers*, Hearings before the Senate Foreign Relations Committee, 90th Congress, 1st sess. (1967), 9, 10-11 (Professor Bartlett).

tional interest at his discretion.[9] Thus, Secretary of State Acheson told Congress: "Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution." [10]

***The Theory of Presidential Power.***—The fullest expression of the presidential power proponents has been in defense of the course followed in Indochina. Thus, the Legal Adviser of the State Department, in a widely circulated document, contended: "Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States. . . .

"In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and security of the United States.

"Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet Nam is required, and that military measures against the source of Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures." [11]

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[9] Id., 11-19. For some popular defenses of presidential power during the "Great Debate," *see* Corwin, "Who Has the Power to Make War?" *New York Times Magazine* (July 31, 1949), 11; Commager, "Presidential Power: The Issue Analyzed," *New York Times Magazine* (January 14, 1951), 11. *Cf.* Douglas, "The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion of South Korea," 96 *Cong. Rec.* 9647 (1950).

[10] *Assignment of Ground Forces of the United States to Duty in the European Area,* Hearings before the Senate Foreign Relations and Armed Services Committees, 82d Congress, 1st sess. (1951), 92.

[11] Meeker, "The Legality of United States Participation in the Defense of Viet Nam," 54 *Dept. State Bull.* 474, 484-485 (1966). *See also* Moore, "The National Executive and the Use of the Armed Forces Abroad," 21 Naval War College Rev. 28 (1969); Wright, "The Power of the Executive to Use Military Forces Abroad," 10 Va. J. Int. L. 43 (1969); *Documents Relating to the War Powers of Congress, The Presi-*

Opponents of such expanded presidential powers have contended, however, that the authority to initiate war was not divided between the Executive and Congress but was vested exclusively in Congress. The President had the duty and the power to repeal sudden attacks and act in other emergencies, and in his role as Commander-in-Chief he was empowered to direct the armed forces for any purpose specified by Congress.[12] Though Congress asserted itself in some respects, it never really managed to confront the President's power with any sort of effective limitation, until recently.

***The Power of Congress to Control the President's Discretion.***— Over the President's veto, Congress enacted the War Powers Resolution,[13] designed to redistribute the war powers between the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President's powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set. The Resolution states that the President's power to commit United States troops into hostilities, or into situations of imminent involvement in hostilities, is limited to instances of (1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.[14] In the absence of a declaration of war a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhos-

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*dent's Authority as Commander-in-Chief and the War in Indochina*, Senate Foreign Relations Committee, 91st Congress, 2d sess. (Comm. Print) (1970), 1 (Under Secretary of State Katzenbach), 90 (J. Stevenson, Legal Adviser, Department of State), 120 (Professor Moore), 175 (Assistant Attorney General Rehnquist).

[12] E.g., F. Wormuth, *The Vietnam War: The President Versus the Constitution* (Santa Barbara: 1968); *U.S. Commitments to Foreign Powers*, Hearings before the Senate Foreign Relations Committee, 90th Congress, 1st sess. (1967), 9 (Professor Bartlett); *War Powers Legislation*, Hearings before the Senate Foreign Relations Committee, 92d Cong., 1st sess. (1971), 7 (Professor Commager), 75 (Professor Morris), 251 (Professor Mason).

[13] P.L. 93-148, 87 Stat. 555, 50 U.S.C. §§ 1541-1548. For the congressional intent and explanation, see H. Rept. No. 93-287, S. Rept. No. 93-220, and H. Rept. No. 93-547 (Conference Report), all 93d Congress, 1st sess. (1973). The President's veto message is H. Doc. No. 93-171, 93d Congress, 1st sess. (1973). For a narrative account of passage and an assessment of the disputed compliance to date, from the congressional point of view, see *The War Powers Resolution*, A Special Study of the Committee on Foreign Affairs (Committee Print) (GPO: 1982).

[14] 87 Stat. 554, § 2(c), 50 U.S.C. § 1541(c).

tile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation.[15] The President is required to terminate the use of troops in the reported situation within 60 days of reporting, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President's certification to Congress of unavoidable military necessity respecting the safety of the troops.[16] Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.[17] The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may so empower the President unless it is supplemented by implementing legislation specifically addressed to the issue.[18] What the effect of adoption of the Resolution will be upon the nature of presidential power in this area and whether it will serve its purpose of reorienting the executive-legislative balance are questions which experience will answer.

**The President as Commander of the Armed Forces**

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why he should do so, and he has been known to resolve personally important questions of military policy. Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating McClellan to action; Wilson in 1918 settled the question of an independent American command on the Western Front; Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki.[1] As against an enemy in the field the President possesses all the powers which are accorded by international law to any supreme commander. "He may invade the hostile country, and subject it to the sovereignty and authority of the United States." [2] In the ab-

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[15] Id., § 1543(a).

[16] Id., § 1544(b).

[17] Id., § 1544(c).

[18] Id., § 1547(a).

[1] For a review of how several wartime Presidents have operated in this sphere, *see* E. May (ed.), *The Ultimate Decision—The President as Commander in Chief* (New York: 1960).

[2] *Fleming* v. *Page*, 9 How. (50 U.S.) 603, 615 (1850).

sence of attempts by Congress to limit his power, he may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States, and his authority to do this sometimes survives cessation of hostilities.[3] He may employ secret agents to enter the enemy's lines and obtain information as to its strength, resources, and movements.[4] He may, at least with the assent of Congress, authorize intercourse with the enemy.[5] He may also requisition property and compel services from American citizens and friendly aliens who are situated within the theatre of military operations when necessity requires, thereby incurring for the United States the obligation to render "just compensation."[6] By the same warrant he may bring hostilities to a conclusion by arranging an armistice, stipulating conditions which may determine to a great extent the ensuing peace.[7] He may not, however, affect a permanent acquisition of territory,[8] though he may govern recently acquired territory until Congress sets up a more permanent regime.[9]

He is the ultimate tribunal for the enforcement of the rules and regulations which Congress adopts for the government of the forces, and which are enforced through courts-martial.[10] Indeed, until 1830, courts-martial were convened solely on his authority as Commander-in-Chief.[11] Such rules and regulations are, moreover, it would seem, subject in wartime to his amendment at discretion.[12] Similarly, the power of Congress to "make rules for the gov-

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[3] *Madsen* v. *Kinsella*, 343 U.S. 341, 348 (1952). *See also Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950).

[4] *Totten* v. *United States*, 92 U.S. 105 (1876).

[5] *Hamilton* v. *Dillon*, 21 Wall. (88 U.S.) 73 (1875); *Haver* v. *Yaker*, 9 Wall. (76 U.S.) 32 (1869).

[6] *Mitchell* v. *Harmony*, 13 How. (54 U.S.) 115 (1852); *United States* v. *Russell*, 13 Wall. (80 U.S.) 623 (1871); *Totten* v. *United States*, 92 U.S. 105 (1876); 40 *Ops. Atty. Gen.* 250, 253 (1942).

[7] *Cf.* the Protocol of August 12, 1898, which largely foreshadowed the Peace of Paris, 30 Stat. 1742 and President Wilson's Fourteen Points, which were incorporated in the Armistice of November 11, 1918.

[8] *Fleming* v. *Page*, 9 How. (50 U.S.) 603, 615 (1850).

[9] *Santiago* v. *Nogueras*, 214 U.S. 260 (1909). As to temporarily occupied territory, *see Dooley* v. *United States*, 182 U.S. 222, 230-231 (1901).

[10] *Swaim* v. *United States*, 165 U.S. 553 (1897); and cases there reviewed. *See also Givens* v. *Zerbst*, 255 U.S. 11 (1921).

[11] 15 *Ops. Atty. Gen.* 297, n; *cf.* 1 *Ops. Atty. Gen.* 233, 234, where the contrary view is stated by Attorney General Wirt.

[12] *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942).

ernment and regulation of the land and naval forces" (Art. I, § 8, cl. 14) did not prevent President Lincoln from promulgating in April, 1863, a code of rules to govern the conduct in the field of the armies of the United States which was prepared at his instance by a commission headed by Francis Lieber and which later became the basis of all similar codifications both here and abroad.[13] One important power he lacks, that of choosing his subordinates, whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with the advice and consent of the Senate, though undoubtedly Congress could if it wished vest their appointment in "the President alone."[14] Also, the President's power to dismiss an officer from the service, once unlimited, is today confined by statute in time of peace to dismissal "in pursuance of the sentence of a general court-martial or in mitigation thereof."[15] But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his place."[16] The President's power of dismissal in time of war Congress has never attempted to limit.

***The Commander-in-Chief a Civilian Officer.***—Is the Commander-in-Chiefship a military or civilian office in the contemplation of the Constitution? Unquestionably the latter. An opinion by a New York surrogate deals adequately, though not authoritatively, with the subject: "The President receives his compensation for his services, rendered as Chief Executive of the Nation, not for the individual parts of his duties. No part of his compensation is paid from sums appropriated for the military or naval forces; and it is equally clear under the Constitution that the President's duties as Commander in Chief represents only a part of duties *ex officio* as Chief Executive [Article II, sections 2 and 3 of the Constitution] and that the latter's office is a civil office. [Article II, section 1 of the Constitution; vol. 91, Cong. Rec. 4910–4916; Beard, *The Republic* (1943) pp. 100–103.] The President does not enlist in, and he is not inducted or drafted into, the armed forces. Nor, is he subject to court-martial or other military discipline. On the contrary, Article II, section 4 of the Constitution provides that 'The President, [Vice President] and All Civil Officers of the United States shall be removed from Office

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[13] General Orders, No. 100, Official Records, War Rebellion, ser. III, vol. III; April 24, 1863.

[14] *See*, e.g., *Mimmack* v. *United States*, 97 U.S. 426, 437 (1878); *United States* v. *Corson*, 114 U.S. 619 (1885).

[15] 10 U.S.C. § 804.

[16] *Mullan* v. *United States*, 140 U.S. 240 (1891); *Wallace* v. *United States*, 257 U.S. 541 (1922).

on Impeachment for, and Conviction of Treason, Bribery or other high Crimes and Misdemeanors.' . . . The last two War Presidents, President Wilson and President Roosevelt, both clearly recognized the civilian nature of the President's position as Commander in Chief. President Roosevelt, in his Navy Day Campaign speech at Shibe Park, Philadelphia, on October 27, 1944, pronounced this principle as follows:—'It was due to no accident and no oversight that the framers of our Constitution put the command of our armed forces under civilian authority. It is the duty of the Commander in Chief to appoint the Secretaries of War and Navy and the Chiefs of Staff.' It is also to be noted that the Secretary of War, who is the regularly constituted organ of the President for the administration of the military establishment of the Nation, has been held by the Supreme Court of the United States to be merely a civilian officer, not in military service. (*United States* v. *Burns*, 79 U.S. 246 (1871)). On the general principle of civilian supremacy over the military, by virtue of the Constitution, it has recently been said: 'The supremacy of the civil over the military is one of our great heritages.' *Duncan* v. *Kahanamoku*, 324 U.S. 833 (1945), 14 L.W. 4205 at page 4210." [17]

**Martial Law and Constitutional Limitations**

Two theories of martial law are reflected in decisions of the Supreme Court. The first, which stems from the Petition of Right, 1628, provides that the common law knows no such thing as martial law; [1] that is to say, martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity, leaving the civil courts to be the final judges of necessity.[2] By the second theory, martial law can be validly and constitutionally established by supreme political authority in wartime. In the early years of the Supreme Court, the American judiciary embraced the latter theory as it held in *Luther* v. *Borden* [3] that state declarations of martial law were conclusive

[17] Surrogate's Court, Duchess County, New York, ruling July 25, 1950 that the estate of Franklin D. Roosevelt was not entitled to tax benefits under sections 421 and 939 of the Internal Revenue Code, which extends certain tax benefits to persons dying in the military services of the United States. *New York Times*, July 26, 1950, p. 27, col. 1.

[1] C. Fairman, *The Law of Martial Rule* (Chicago: 1930), 20–22; A. Dicey, *Introduction to the Study of the Law of the Constitution*, (New York: 5th ed. 1923), 283, 290.

[2] Id., 539–544.

[3] 7 How. (48 U.S.) 1 (1849). *See also Martin* v. *Mott*, 12 Wheat. (25 U.S.) 19, 32–33 (1827).

and therefore not subject to judicial review.[4] In this case, the Court found that the Rhode Island legislature had been within its rights in resorting to the rights and usages of war in combating insurrection in that State. The decision in the *Prize Cases*,[5] while not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

The Civil War being safely over, however, a divided Court, in the elaborately argued *Milligan* case,[6] reverting to the older doctrine, pronounced void President Lincoln's action, following his suspension of the writ of *habeas corpus* in September, 1863, in ordering the trial by military commission of persons held in custody as "spies" and "abettors of the enemy." The salient passage of the Court's opinion bearing on this point is the following: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." [7] Four Justices, speaking by Chief Justice Chase, while holding Milligan's trial to have been void because violative of the Act of March 3, 1863, governing the custody and trial of persons who had been deprived of the *habeas corpus* privilege, declared their belief that Congress could have authorized Milligan's trial. Said the Chief Justice: "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President and Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must

[4] 7 How. (48 U.S.), 45.
[5] 2 Bl. (67 U.S.) 635 (1863).
[6] *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866).
[7] Id., 127.

be determined by their nature, and by the principles of our institutions.

". . . We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety." [8] In short, only Congress can authorize the substitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

At the turn of the century, however, the Court appears to have retreated from its stand in *Milligan* insofar as it held in *Moyer* v. *Peabody* [9] that "the Governor's declaration that a state of insurrection existed is conclusive of that fact. . . . The plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. . . . So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." [10] The "good faith" test of *Moyer*, however, was superseded by the "direct relation" test of *Sterling* v. *Constantin*, [11] where the Court made it very clear that "[i]t does not follow . . . that every sort of action the Governor may take, no matter how justified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. . . . What are the allowable

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[8] Id., 139-140. In *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243 (1864), the Court had held while war was still flagrant that it had no power to review by certiorari the proceedings of a military commission ordered by a general officer of the Army, commanding a military department.

[9] 212 U.S. 78 (1909).

[10] Id., 83-85.

[11] 287 U.S. 378 (1932). "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace" Id., 399-400.

limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." [12]

***Martial Law in Hawaii.***—The question of the constitutional status of martial law was raised again in World War II by the proclamation of Governor Poindexter of Hawaii, on December 7, 1941, suspending the writ of *habeas corpus* and conferring on the local commanding General of the Army all his own powers as governor and also "all of the powers normally exercised by the judicial officers . . . of this territory . . . during the present emergency and until the danger of invasion is removed." Two days later the Governor's action was approved by President Roosevelt. The regime which the proclamation set up continued with certain abatements until October 24, 1944.

By section 67 of the Organic Act of April 30, 1900,[13] the Territorial Governor was authorized "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of *habeas corpus*, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." By section 5 of the Organic Act, "the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States." In a brace of cases which reached it in February 1945 but which it contrived to postpone deciding till February 1946,[14] the Court, speaking by Justice Black, held that the term "martial law" as employed in the Organic Act, "while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals." [15]

The Court relied on the majority opinion in *Ex parte Milligan*. Chief Justice Stone concurred in the result. "I assume also," he said, "that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts",[16] but added that

[12] Id., 400–401. This holding has been ignored by States on numerous occasions, e.g., *Allen* v. *Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (1935); *Hearon* v. *Calus*, 178 S.C. 381, 183 S.E. 13 (1935); and *Joyner* v. *Browning*, 30 F. Supp. 512 (D.C.W.D. Tenn. 1939).

[13] 31 Stat. 141, 153 (1900).

[14] *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946).

[15] Id., 324.

[16] Id., 336.

the military authorities themselves had failed to show justifying facts in this instance. Justice Burton, speaking for himself and Justice Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion. He warned that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight." [17]

***Articles of War: The Nazi Saboteurs.***[18]—The saboteurs were eight youths, seven Germans and one an American, who, following a course of training in sabotage in Berlin, were brought to this country in June 1942 aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status. In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring *habeas corpus* proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the land and naval forces; and (3) that the tribunal trying them had not been constituted in accordance with the requirements of the Articles of War.

The first argument the Court met as follows: The act of Congress in providing for the trial before military tribunals of offenses against the law of war is sufficiently definite, although Congress has not undertaken to codify or mark the precise boundaries of the law of war, or to enumerate or define by statute all the acts which that law condemns. ". . . [T]hose who during time of war pass surreptitiously from enemy territory into . . . [that of the United States], discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission." [19] The second argument it disposed of by showing that

[17] Id., 343.
[18] *Ex parte Quirin*, 317 U.S. 1 (1942).
[19] Id., 29–30, 35.

petitioners' case was of a kind that was never deemed to be within the terms of the Fifth and Sixth Amendments, citing in confirmation of this position the trial of Major Andre.[20] The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises,[21] thereby, in effect, attributing to the latter the right to amend the Articles of War in a case of the kind before the Court *ad libitum*.

The decision might well have rested on the ground that the Constitution is without restrictive force in wartime in a situation of this sort. The saboteurs were invaders; their penetration of the boundary of the country, projected from units of a hostile fleet, was essentially a military operation, their capture was a continuation of that operation. Punishment of the saboteurs was therefore within the President's purely martial powers as Commander-in-Chief. Moreover, seven of the petitioners were enemy aliens, and so, strictly speaking, without constitutional status. Even had they been civilians properly domiciled in the United States at the outbreak of the war they would have been subject under the statutes to restraint and other disciplinary action by the President without appeals to the courts.[22]

***Articles of War: World War II Crimes.***—As a matter of fact, in General Yamashita's case,[23] which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice Rutledge's dissenting opinion in this case: "The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply." [24] And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under international law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as Su-

[20] Id., 41-42.
[21] Id., 28-29.
[22] 50 U.S.C. § 21.
[23] *In re Yamashita*, 327 U.S. 1 (1946).
[24] Id., 81.

preme Commander bound by the prohibition in the Constitution of *ex post facto* laws, nor does international law forbid *ex post facto* laws.[25]

***Martial Law and Domestic Disorder.***—President Washington himself took command of state militia called into federal service to quell the Whiskey Rebellion, but there were not too many occasions subsequently in which federal troops or state militia called into federal service were required.[1] Since World War II, however, the President, by virtue of his own powers and the authority vested in him by Congress,[2] has utilized federal troops on nine occasions, five of them involving resistance to desegregation decrees in the South.[3] In 1957 Governor Faubus employed the Arkansas National Guard to resist court-ordered desegregation in Little Rock and President Eisenhower dispatched federal soldiers and brought the Guard under federal authority.[4] In 1962, President Kennedy dispatched federal troops to Oxford, Mississippi when upon the admission of a Negro student to the University of Mississippi rioting broke out, with which federal marshals originally assigned could not cope.[5] In June and September of 1964, President Johnson sent troops into Alabama to enforce court decrees opening schools to blacks.[6] And in 1965, the President used federal troops and federalized local Guardsmen to protect participants in a civil rights march.[7] The President justified his action on the ground that there

[25] *See* Gross, "The Criminality of Aggressive War," 41 Am. Pol. Sci. Rev. 205 (1947).

[1] United States Adjutant-General, *Federal Aid in Domestic Disturbances 1787-1903*, S. Doc. No. 209, 57th Congress, 2d sess. (1903); Pollitt, "Presidential Use of Troops to Enforce Federal Laws: A Brief History," 36 N.C. L. Rev. 117 (1958). United States Marshals were also used on approximately 30 occasions. United States Commission on Civil Rights, *Law Enforcement—A Report on Equal Protection in the South* (Washington: 1965), 155–159.

[2] 10 U.S.C. §§ 331-334, 3500, 8500, deriving from laws of 1795, 1 Stat. 424 1861, 12 Stat. 281, and 1871 17 Stat. 14. *Infra*, *pp.* 583–585.

[3] The other instances were in domestic disturbances at the request of state Governors.

[4] Proc. No. 3204, 22 *Fed. Reg.* 7628 (1957); E.O. 10730, 22 *Fed. Reg.* 7628. *See* 41 *Ops. Atty. Gen.* 313 (1957); *see also*, *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Aaron* v. *McKinley*, 173 F.Supp. 944 (D.C.E.D. Ark. 1959), *aff'd. sub nom. Faubus* v. *Aaron*, 361 U.S. 197 (1959); *Faubus* v. *United States*, 254 F.2d 797 (C.A. 8, 1958), *cert. den.* 358 U.S. 829 (1958).

[5] Proc. No. 3497, 27 *Fed. Reg.* 9681 (1962); E.O. 11053, 27 *Fed. Reg.* 9693 (1962). *See United States* v. *Barnett*, 346 F.2d 99 (C.A. 5, 1965).

[6] Proc. 3542, 28 *Fed. Reg.* 5707 (1963); E.O. 11111, 28 *Fed. Reg.* 5709 (1963); Proc. No. 3554, 28 *Fed. Reg.* 9861; E.O. 11118, 28 *Fed. Reg.* 9863 (1963). *See Alabama* v. *United States*, 373 U.S. 545 (1963).

[7] Proc. No. 3645, 30 *Fed. Reg.* 3739 (1965); E.O. 11207, 30 *Fed. Reg.* 2743 (1965). *See Williams* v. *Wallace*, 240 F.Supp. 100 (D.C.M.D. Ala. 1965).

was a substantial likelihood of domestic violence because state authorities were refusing the marchers protection.[8]

## PRESIDENTIAL ADVISERS

### The Cabinet

The above provisions are the meager residue from a persistent effort in the Federal Convention to impose a council on the President.[1] The idea ultimately failed, partly because of the diversity of ideas concerning the council's make-up. One member wished it to consist of "members of the two houses," another wished it to comprise two representatives from each of three sections, "with a rotation and duration of office similar to those of the Senate." The proposal which had the strongest backing was that it should consist of the head of departments and the Chief Justice of the Supreme Court, who should preside when the President was absent. Of this proposal the only part to survive was the above cited provision. The consultative relation here contemplated is an entirely one-sided affair, is to be conducted with each principal officer separately and in writing, and is to relate only to the duties of their respective offices.[2] The *Cabinet,* as we know it today, that is to say, the Cabinet *meeting,* was brought about solely on the initiative of the first President,[3] and may be dispensed with on presidential initiative at any time, being totally unknown to the Constitution. Several Presidents have in fact reduced the Cabinet meeting to little more than a ceremony with social trimmings.[4]

## PARDONS AND REPRIEVES

### The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles re-

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[8] Ibid.

[1] 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 70, 97, 110; 2 id., 285, 328, 335-337, 367, 537-542. Debate on the issue in the Convention is reviewed in C. Thach, *The Creation of the Presidency 1775-1789* (Baltimore: 1923), 82, 83, 84, 85, 109, 126.

[2] E. Corwin, *The President—Office and Powers 1787-1957* (New York: 4th ed. 1957), 82.

[3] L. White, *The Federalists—A Study in Administrative History* (New York: 1948), ch. 4.

[4] E. Corwin, *The President—Office and Powers 1787-1957* (New York: 4th ed. 1957), 19, 61, 79-85, 211, 295-299, 312, 320-323, 490-493.

specting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." Marshall continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.[1]

In the case of *Burdick* v. *United States*,[2] Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States" which he might have committed or participated in in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon," remarked Justice McKenna sententiously, "may be only a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, . . . ." [3] Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.[4] In 1927, however, in

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[1] *United States* v. *Wilson*, 7 Pet. (32 U.S.) 150, 160–161 (1833).

[2] 236 U.S. 79, 86 (1915).

[3] Id., 90–91.

[4] *Armstrong* v. *United States*, 13 Wall. (80 U.S.), 154, 156 (1872). In *Brown* v. *Walker*, 161 U.S. 591 (1896), the Court had said: "It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed." Id., 599, citing British cases.

sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." [5] Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful.[6] They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty.[7]

**Scope of the Power**

The power embraces all "offences against the United States," except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered into the Treasury or paid an informer,[1] the power to pardon absolutely or conditionally, and the power to commute sentences, which, as seen above, is effective without the convict's consent.[2] It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the presidential prerogative, amounting as it does to a condonation of the offense.[3] It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in

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[5] *Biddle* v. *Perovich*, 274 U.S. 480, 486 (1927).

[6] *Cf.* W. Humbert, *The Pardoning Power of the President* (Washington: 1941), 73.

[7] *Biddle* v. *Perovich*, 274 U.S. 480, 486 (1927). In *Schick* v. *Reed*, 419 U.S. 256 (1976), the Court upheld the presidential commutation of a death sentence to imprisonment for life with no possibility of parole, the foreclosure of parole being contrary to the scheme of the Code of Military Justice. "The conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute." Id., 264.

[1] 23 *Ops. Atty. Gen.* 360, 363 (1901); *Illinois Central Railroad* v. *Bosworth*, 133 U.S. 92 (1890).

[2] *Ex parte William Wells*, 18 How. (59 U.S.) 307 (1856). For the contrary view, *see* some early opinions of the Attorney General, 1 *Ops. Atty. Gen.* 341 (1820); 2 *Ops. Atty. Gen.* 275 (1829); 5 *Ops. Atty. Gen.* 687 (1795); *cf.* 4 *Ops. Atty. Gen.* 458 (1845); *United States* v. *Wilson*, 7 Pet. (32 U.S.) 150, 161 (1833).

[3] *Ex parte United States*, 242 U.S. 27 (1916). Amendment of sentence, however, within the same term of court, by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. *United States* v. *Benz*, 282 U.S. 304 (1931).

1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by the first Roosevelt—to Aguinaldo's followers—in 1902.[4] Not, however, till after the Civil War was the point adjudicated, when it was decided in favor of presidential prerogative.[5]

***Offenses Against the United States; Contempt of Court.***—In the first place, such offenses are not offenses against the United States. In the second place, they are completed offenses.[6] The President cannot pardon by anticipation, otherwise he would be invested with the power to dispense with the laws, his claim to which was the principal cause of James II's forced abdication.[7] Lastly, the term has been held to include criminal contempts of court. Such was the holding in *Ex parte Grossman*,[8] where Chief Justice Taft, speaking for the Court, resorted once more to English conceptions as being authoritative in construing this clause of the Constitution. Said he: "The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt insofar as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays

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[4] *See* 1 J. Richardson, *Messages and Papers of the Presidents*, (Washington: 1897), 173, 293; 2 id., 543; 7 id., 3414, 3508; 8 id., 3853; 14 id., 6690.

[5] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 147 (1872). *See also United States* v. *Padelford*, 9 Wall. (76 U.S.) 531 (1870).

[6] *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1867).

[7] F. Maitland, *Constitutional History of England* (London: 1920), 302-306; 1 *Ops. Atty. Gen.* 342 (1820). That is, the pardon may not be in anticipation of the commission of the offense. A pardon may precede the indictment or other beginning of the criminal proceeding, *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1867), as indeed President Ford's pardon of former President Nixon preceded institution of any action. On the Nixon pardon controversy, see *Pardon of Richard M. Nixon and Related Matters*, Hearings before the House Judiciary Subcommittee on Criminal Justice, 93d Congress 2d sess. (1974).

[8] 267 U.S. 87 (1925).

referred to as the difference between civil and criminal contempts, is still maintained in English law." [9] Nor was any new or special danger to be apprehended from this view of the pardoning power. "If," said the Chief Justice, "we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?" Indeed, he queried further, in view of the peculiarities of procedure in contempt cases, "may it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?" [10]

***Effects of a Pardon: Ex parte Garland.***—The great leading case is *Ex parte Garland,*[11] which was decided shortly after the Civil War. By an act passed in 1865 Congress had prescribed that before any person should be permitted to practice in a federal court he must take oath asserting that he had never voluntarily borne arms against the United States, had never given aid or comfort to enemies of the United States, and so on. Garland, who had been a Confederate sympathizer and so was unable to take the oath, had however received from President Johnson the same year "a full pardon 'for all offences by him committed, arising from participation, direct or implied, in the Rebellion,' . . ." The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Said Justice Field for a divided Court: "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching [thereto]; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." [12]

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[9] Id., 110–111.

[10] Id., 121, 122.

[11] 4 Wall. (71 U.S.) 333, 381 (1867).

[12] Id., 380.

Justice Miller speaking for the minority protested that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice law. "The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the executive pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar." [13] Justice Field's language must today be regarded as much too sweeping in light of a decision rendered in 1914 in the case of *Carlesi* v. *New York*.[14] Carlesi had been convicted several years before of committing a federal offense. In the instant case the prisoner was being tried for a subsequent offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent state offense. This conviction and sentence were upheld by the Supreme Court. While this case involved offenses against different sovereignties, the Court declared by way of dictum that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted." [15]

***Limits to the Efficacy of a Pardon.***—But Justice Field's latitudinarian view of the effect of a pardon undoubtedly still applies ordinarily where the pardon is issued *before conviction*. He is also correct in saying that a full pardon restores a *convict* to his "civil rights," and this is so even though simple completion of the convict's sentence would not have had that effect. One such right is the right to testify in court, and in *Boyd* v. *United States* the Court held that the disability to testify being a consequence, according to principles of the common law, of the judgment of conviction, the pardon obliterated that effect.[16] But a pardon cannot "make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to

[13] Id., 396-397.
[14] 233 U.S. 51 (1914).
[15] Id., 59.
[16] 142 U.S. 450 (1892).

give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law." [17]

**Congress and Amnesty**

Congress cannot limit the effects of a presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the Government during the Civil War, notwithstanding any executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Said Chief Justice Chase for the majority: "[T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end." [18] On the other hand, Congress itself, under the necessary and proper clause, may enact amnesty laws remitting penalties incurred under the national statutes.[19]

Clause 2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of

[17] *Knote* v. *United States*, 95 U.S. 149, 153–154 (1877).
[18] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 143, 148 (1872).
[19] *The Laura*, 114 U.S. 411 (1885).

the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

## THE TREATY-MAKING POWER

### President and Senate

The plan which the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court." [1] Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in these powers.[2] The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay, writing in *The Federalist*, foresaw that the initiative must often be seized by the President without benefit of senatorial counsel.[3] Yet so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: "In these concerns the Senate are the Constitutional and the only responsible counsellors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient." [4]

[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 183.

[2] Id., 538–539.

[3] No. 64 (Modern Library ed. 1937), 419–420.

[4] 31 *Annals of Congress* 106 (1818).

***Negotiation, a Presidential Monopoly.***—Actually, the negotiation of treaties had long since been taken over by the President; the Senate's role in relation to treaties is today essentially legislative in character.[5] "He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it," declared Justice Sutherland for the Court in 1936.[6] The Senate must, moreover, content itself with such information as the President chooses to furnish it.[7] In performing the function that remains to it, however, it has several options. It may consent unconditionally to a proposed treaty, or it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty or of reservations to the act of ratification, the difference between the two being that, whereas amendments, if accepted by the President and the other party or parties to the treaty,[8] change it for all parties, reservations limit only the obligations of the United States thereunder. The act of ratification for the United States is the President's act, but may not be forthcoming unless the Senate has consented to it by the required two-thirds of the Senators present, which signifies two-thirds of a quorum, otherwise the consent rendered would not be that of the Senate as organized under the Constitution to do business.[9] Conversely, the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiation, which he is entirely free to do.[10]

**Treaties as Law of the Land**

Treaty commitments of the United States are of two kinds. In the language of Chief Justice Marshall in 1829: "A treaty is, in its

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[5] Washington sought to use the Senate as a council, but the effort proved futile, principally because the Senate balked. For the details *see* E. Corwin, *The President—Office and Powers, 1787–1957* (New York: 4th ed. 1957), 207–217.

[6] *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936).

[7] E. Corwin, *The President—Office and Powers, 1787–1957* (New York: 4th ed. 1957), 428–429.

[8] "Obviously the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratifications conditional upon the adoption of amendments to the treaty." *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 183 (1901).

[9] *Cf.* Art. I, § 5, cl. 1; *see also Missouri Pac. Ry. Co.* v. *Kansas*, 248 U.S. 276, 283–284 (1919).

[10] For instance, *see* S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), § 53.

nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is intraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court." [1] To the same effect, but more accurate, is Justice Miller's language for the Court a half century later, in the *Head Money Cases:* "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." [2]

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[1] *Foster* v. *Neilson,* 2 Pet. (27 U.S.) 253, 314 (1829). "Though several writers on the subject of government place that [the treaty-making] power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose, or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are *contracts* with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive." *The Federalist* No. 75 (Modern Library ed. 1937), 486.

[2] 112 U.S. 580, 598 (1884). For treaty provisions operative as "law of the land" (self-executing), *see* S. Crandall, *Treaties Their Making and Enforcement* (Washington: 2d ed. 1916), 36–42, 49–62, 151, 153–163, 179, 238–239, 286, 321, 338, 345–346. For treaty provisions of an "executory" character, *see* id., 162–163, 232, 236, 238, 493, 497, 532, 570, 589.

***Origin of the Conception.***—How did this distinctive feature of the Constitution come about, by virtue of which the treaty-making authority is enabled to stamp upon its promises the quality of municipal law, thereby rendering them enforceable by the courts without further action? The short answer is that Article VI, paragraph 2, makes treaties the supreme law of the land on the same footing with acts of Congress.[3] The clause was a direct result of one of the major weaknesses of the Articles of Confederation. Although the Articles entrusted the treaty-making power to Congress, fulfillment of Congress' promises was dependent on the state legislatures.[4] Particularly with regard to provisions of the Treaty of Peace of 1783 [5] in which Congress stipulated to protect the property rights of British creditors of American citizens and of the former Loyalists,[6] the promises were not only ignored but were deliberately flouted by many legislatures.[7] Upon repeated British protests, John Jay, the Secretary for Foreign Affairs, suggested to Congress that it request state legislatures to repeal all legislation repugnant to the Treaty of Peace and to authorize their courts to carry the treaty into effect.[8] Although seven States did comply to some extent, the impotency of Congress to effectuate its treaty guarantees was obvious to the Framers who devised Article VI, paragraph 2, to take care of the situation.[9]

***Treaties and the States.***—As it so happened, the first case in which the Supreme Court dealt with the question of the effect of treaties on state laws involved the same issue which had prompted the drafting of Article VI, paragraph 2. During the Revolutionary

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[3] *Infra, p.* 915.

[4] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), ch. 3.

[5] Id., 30-32. For the text of the Treaty, *see* 1 W. Malloy (ed.), *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers (1776-1909)*, S. Doc. No. 357, 61st Congress, 2d sess. (1910), 586.

[6] Id., 588.

[7] R. Morris, *John Jay, The Nation, and the Court* (Boston: 1967), 73-84.

[8] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 36-40.

[9] The Convention at first leaned toward giving Congress a negative over state laws which were contrary to federal statutes or treaties, 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 47, 54, and then adopted the Paterson Plan which made treaties the supreme law of the land, binding on state judges, and authorized the Executive to use force to compel observance when such treaties were resisted. Id., 245, 316, 2 id., 27-29. In the draft reported by the Committee on Detail, the language thus adopted was close to the present supremacy clause; the draft omitted the authorization of force from the clause, id., 183, but in another clause the legislative branch was authorized to call out the militia to, *inter alia*, "enforce treaties". Id., 182. The two words were struck subsequently "as being superfluous" in view of the supremacy clause. Id., 389-390.

War, the Virginia legislature provided that the Commonwealth's paper money, which was depreciating rapidly, was to be legal currency for the payment of debts and to confound creditors who would not accept the currency provided that Virginia citizens could pay into the state treasury debts owed by them to subjects of Great Britain, which money was to be used to prosecute the war, and that the auditor would give the debtor a certificate of payment which would discharge the debtor of all future obligations to the creditor.[10] The Virginia scheme directly contradicted the assurances in the peace treaty that no bars to collection by British creditors would be raised, and in *Ware* v. *Hylton* [11] the Court struck down the state law as violative of the treaty which Article VI, paragraph 2, made superior. Said Justice Chase: "A treaty cannot be the *Supreme law* of the land, that is of all the *United States*, if any act of a *State Legislature* can stand in its way. If the constitution of a State . . . must give way to a treaty, and fall before it; can it be questioned, whether the *less* power, an act of the state legislature, must not be prostrate? It is the declared will of *the people* of the *United States* that every treaty made, by the authority of the *United States* shall be superior to the *Constitution* and *laws* of *any individual State;* and their will alone is to decide." [12]

In *Hopkirk* v. *Bell* [13] the Court further held that this same treaty provision prevented the operation of a Virginia statute of limitation to bar collection of antecedent debts. In numerous subsequent cases the Court invariably ruled that treaty provisions superseded inconsistent state laws governing the right of aliens to inher-

[10] 9 W. Hening, *Statutes of Virginia* (Richmond: 1821), 377–380.

[11] 3 Dall. (3 U.S.) 199 (1796).

[12] Id., 236–237 (emphasis by Court).

[13] 3 Cr. (7 U.S.) 454 (1806).

it real estate.[14] Such a case was *Hauenstein* v. *Lynham*,[15] in which the Court upheld the right of a citizen of the Swiss Republic, under the treaty of 1850 with that country, to recover the estate of a relative dying intestate in Virginia, to sell the same, and to export the proceeds of the sale.[16]

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[14] "In *Chirac* v. *Chirac* (2 Wheat. 259 (1817)), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal* v. *Banks* [10 Wheat. 181 (1825)] and with respect to the British treaty of 1794, in *Hughes* v. *Edwards* [9 Wheat. 489 (1824)]. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr* v. *Hodgson* [4 Wheat. 453 (1819)]. By the British treaty of 1794, all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. *Fairfax's Devisee* v. *Hunter's Lessee* [7 Cr. 603, 627 (1813)]: *see Ware* v. *Hylton* [3 Dall. 199, 242 (1796)] [8 *Ops. Atty. Gen.* 411, 417 (1857)]. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject matter, what it may, fall within the treaty-making power and maye be adjusted by it. Treat. on the Const. and Gov. of the U.S. 204.

"If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const., Art. I, sect. 10.

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national policy." *Hauenstein* v. *Lynham*, 100 U.S. 483, 489–490 (1880).

[15] 100 U.S. 483 (1880). In *Kolovrat* v. *Oregon*, 366 U.S. 187, 197–198 (1961), the International Monetary Fund (Bretton Woods) Agreement of 1945, to which the United States and Yugoslavia are parties, and an Agreement of 1948 between these two nations, coupled with continued American observance of an 1881 treaty granting reciprocal rights of inheritance to Yugoslavian and American nations, were held to preclude Oregon from denying Yugoslavian aliens their treaty rights because of a fear that Yugoslavian currency laws implementing such Agreements prevent American nations from withdrawing the proceeds from the sale of property inherited in the latter country.

[16] *See also Geofroy* v. *Riggs*, 133 U.S. 258 (1890); *Sullivan* v. *Kidd*, 254 U.S. 433 (1921); *Nielsen* v. *Johnson*, 279 U.S. 47 (1929); *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961). But a right under treaty to acquire and dispose of property does not except aliens from the operation of a state statute prohibiting conveyances of homestead property by any instrument not executed by both husband and wife. *Todok* v. *Union State Bank*, 281 U.S. 449 (1930). Nor was a treaty stipulation guaranteeing to the citizens of each country, in the territory of the other, equality with the natives of rights and privileges in respect to protection and security of person and property, violated by a state statute which denied to a non-resident alien *wife* of a person killed within the State, the right to sue for wrongful death. Such right was afforded to native resident *relatives*. *Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268 (1909). The treaty in question having been amended in view of this decision, the question arose whether the new provision covered the case of death without fault or negligence in which, by the Pennsylvania Workmen's Compensation Act, compensation was expressly limited to resident parents; the Supreme Court held that it did not. *Liberato* v. *Royer*, 270 U.S. 535 (1926).

Certain more recent cases stem from California legislation, most of it directed against Japanese immigrants. A statute which excluded aliens ineligible to American citizenship from owning real estate was upheld in 1923 on the ground that the treaty in question did not secure the rights claimed.[17] But in *Oyama* v. *California*,[18] a majority of the Court indicated a strongly held opinion that this legislation conflicted with the equal protection clause of the Fourteenth Amendment, a view which has since received the endorsement of the California Supreme Court by a narrow majority.[19] Meantime, California was informed that the rights of German nationals, under the Treaty of December 8, 1923 between the United States and the Reich, to whom real property in the United States had descended or been devised, to dispose of it, had survived the recent war and certain war legislation, and accordingly prevailed over conflicting state legislation.[20]

***Treaties and Congress.***—In the Convention, a proposal to require the adoption of treaties through enactment of a law before they should be binding was rejected.[21] But the years since have seen numerous controversies with regard to the duties and obligations of Congress, the necessity for congressional action, and the effects of statutes, in connection with the treaty power. For purposes of this section, the question is whether entry into and ratification of a treaty is sufficient in all cases to make the treaty provisions the "law of the land" or whether there are some types of treaty provisions which only a subsequent act of Congress can put into effect? The language quoted above[22] from *Foster* v. *Neilson*[23]

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[17] *Terrace* v. *Thompson*, 263 U.S. 197 (1923).

[18] 332 U.S. 633 (1948). *See also Takahashi* v. *Fish Comm.*, 334 U.S. 410 (1948), in which a California statute prohibiting the issuance of fishing licenses to persons ineligible to citizenship was disallowed, both on the basis of the Fourteenth Amendment and on the ground that the statute invaded a field of power reserved to the National Government, namely, the determination of the conditions on which aliens may be admitted, naturalized, and permitted to reside in the United States. For the latter proposition *Hines* v. *Davidowitz*, 312 U.S. 52, 66 (1941), was relied upon.

[19] This occurred in the much advertised case of *Sei Fujii* v. *State*, 38 Cal 2d 718, 242 P. 2d 617 (1952). A lower California court had held that the legislation involved was void under the United Nations Charter, but the California Supreme Court was unanimous in rejecting this view. The Charter provisions invoked in this connection [Arts. 1, 55 and 56], said Chief Justice Gibson, "[W]e are satisfied . . . were not intended to supersede domestic legislation."

[20] *Clark* v. *Allen*, 331 U.S. 503 (1947). *See also Kolovrat* v. *Oregon*, 366 U.S. 187 (1961).

[21] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 392–394.

[22] *Supra*, *pp.* 496–497.

[23] 2 Pet. (27 U.S.) 253, 314 (1829).

early established that not all treaties are self-executing, for as Marshall there said, a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." [24]

Leaving aside the question when a treaty is and is not self-executing,[25] the issue of the necessity of congressional implementation and the obligation to implement has frequently roiled congressional debates. The matter arose initially in 1796 in connection with the Jay Treaty,[1] certain provisions of which required appropriations to carry them into effect. In view of the third clause of Article I, § 9, which says that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . .", it seems to have been universally conceded that Congress must be applied to if the treaty provisions were to be executed.[2] A bill was introduced into the House to appropriate the needed funds and its supporters, within and without Congress, offered the contention that inasmuch as the treaty was now the law of the land the legislative branch was bound to enact the bill without further ado; opponents led by Madison and Gallatin contended that the House had complete discretion whether or not to carry into effect treaty provisions.[3] At the conclusion of the debate the House voted not only the money but a resolution offered by Madison stating that it did not claim any agency in the treaty-making process, "but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency

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[24] *Cf. Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888): "When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, . . . . If the treaty contains stipulations which are self-executing that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment."; S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), chs. 11–15.

[25] *See infra, pp.* 506–507.

[1] 8 Stat. 116 (1794).

[2] The story is told in numerous sources. E.g., S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 165–171. For Washington's message refusing to submit papers relating to the treaty to the House, *see* J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 123.

[3] Debate in the House ran for more than a month. It was excerpted from the *Annals* and separately published as *Debates in the House of Representatives of the United States, During the First Session of the Fourth Congress Upon the Constitutional Powers of the House with Respect to Treaties* (Philadelphia: 1796). A source of much valuable information on the views of the Framers and those who came after them on the treaty power, the debates are analyzed in detail in E. Byrd, *Treaties and Executive Agreements in the United States* (The Hague: 1960), 35–59.

or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good." [4] This early precedent with regard to appropriations has apparently been uniformly adhered to.[5]

Similarly, with regard to treaties which modify and change commercial tariff arrangements, the practice has been that the House always insisted on and the Senate acquiesced in legislation to carry into effect the provisions of such treaties.[6] The earliest congressional dispute came over an 1815 Convention with Great Britain [7] which provided for reciprocal reduction of duties. President Madison thereupon recommended to Congress such legislation as the convention might require for effectuation. The Senate and some members of the House were of the view that no implementing legislation was necessary because of a statute which already permitted the President to reduce duties on goods of nations which did not discriminate against United States goods; the House majority felt otherwise and compromise legislation was finally enacted acceptable to both points of view.[8] But subsequent cases have seen legislation enacted,[9] the Senate once refused ratification of a treaty which purported to reduce statutorily-determined duties,[10] and congressional enactment of authority for the President to negotiate reciprocal trade agreements all seem to point to the necessity of some form of congressional implementation.

What other treaty provisions need congressional implementation is subject to argument. In a 1907 memorandum approved by the Secretary of State, it is said, in summary of the practice and reasoning from the text of the Constitution, that the limitation on the treaty power which necessitate legislative implementation may "be found in the provisions of the Constitution which expressly confide in Congress or in other branches of the Federal Govern-

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[4] 5 *Annals of Congress* 771, 782 (1796). A resolution similar in language was adopted by the House in 1871. *Cong. Globe*, 42d Congress, 1st sess. (1871), 835.

[5] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 171–182; 1 W. Willoughby, *The Constitutional law of the United States* (New York: 2d ed. 1929), 549–552. *See also* H. Rept. 4177, 49th Congress, 2d sess. (1887). *Cf. De Lima* v. *Bidwell*, 182 U.S. 1, 198 (1901).

[6] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 183–199.

[7] 8 Stat. 228 (1815).

[8] 3 Stat. 255 (1816). *See* S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 184–188.

[9] Id., 188–195; 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 555–560.

[10] S. Crandall, *Treaties, Their Making and Ratification* (Washington: 2d ed. 1916), 189–190.

ment the exercise of certain of the delegated powers. . . ." [11] The same thought has been expressed in Congress [12] and by commentators.[13] Resolution of the issue seems particularly one for the attention of the legislative and executive branches rather than for the courts.

***Congressional Repeal of Treaties.***—It is in respect to his contention that when it is asked to carry a treaty into effect Congress has the constitutional right, and indeed the duty, to determine the matter according to its own ideas of what is expedient, that Madison has been most completely vindicated by developments. This is seen in the answer which the Court has returned to the question, what happens when a treaty provision and an act of Congress conflict. The answer is, that neither has any intrinsic superiority over the other and that therefore the one of later date will prevail *leges posteriores priores contrarias abrogant.* In short, the treaty commitments of the United States do not diminish Congress' constitutional powers. To be sure, legislative repeal of a treaty as law of the land may amount to a violation of it as an international contract in the judgment of the other party to it. In such case, as the Court has said: "Its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress." [14]

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[11] Anderson, "The Extent and Limitations of the Treaty-Making Power," 1 Amer. J. Int. L. 636, 641 (1907).

[12] At the conclusion of the 1815 debate, the Senate conferees noted in their report that some treaties might need legislative implementation, which Congress was bound to provide, but did not indicate what in their opinion made some treaties self-executing and others not. 29 *Annals of Congress* 160 (1816). The House conferees observed that they thought, and that in their opinion the Senate conferees agreed, that legislative implementation was necessary to carry into effect all treaties which contained "stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory. . . ." Id., 1019. Much the same language was included in a later report. H. Rept. No. 37, 40th Congress, 2d sess. (1868). Controversy with respect to the sufficiency of Senate ratification of the Panama Canal treaties to dispose of United States property therein to Panama was extensive. A divided Court of Appeals for the District of Columbia reached the question and held that Senate approval of the treaty alone was sufficient. *Edwards* v. *Carter* 580 F.2d 1055 (C.A.D.C.), *cert. den.*, 436 U. S. 907 (1978).

[13] T. Cooley, *General Principles of Constitutional Law* (New York: 3d ed. 1898), 175; Q. Wright, *The Control of American Foreign Relations* (New York: 1922), 353–356.

[14] *Head Money Cases*, 112 U.S. 580, 598–599 (1884). The repealability of treaties by act of Congress was first asserted in an opinion of the Attorney General in 1854. 6 *Ops. Atty. Gen.* 291. The year following the doctrine was adopted judicially in a lengthy and cogently argued opinion of Justice Curtis, speaking for a United States circuit court in *Taylor* v. *Morton*, 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass 1855).

***Treaties Versus Prior Acts of Congress.***—The cases are numerous in which the Court has enforced statutory provisions which were recognized by it as superseding prior treaty engagements. Chief Justice Marshall early asserted that the converse would be true as well,[15] that a treaty which is self-executing is the law of the land and prevails over an earlier inconsistent statute, a proposition repeated many times in dicta.[16] But there is dispute whether in fact a treaty has ever been held to have repealed or superseded an inconsistent statute. Willoughby, for example, says: "In fact, however, there have been few (the writer is not certain that there has been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject." [17]

The one instance which may be an exception [18] is *Cook* v. *United States*.[19] There, a divided Court held that a 1924 treaty

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*See also The Cherokee Tobacco*, 11 Wall. (78 U.S.) 616 (1871); *United States* v. *Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496 (1883); *Botiller* v. *Dominguez*, 130 U.S. 238 (1889); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 721 (1893). "Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate." *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 460 (1899). *Cf. Reichert* v. *Felps*, 6 Wall. (73 U.S.) 160, 165–166 (1868), wherein it is stated *obiter* that "Congress is bound to regard the public treaties, and it had no power . . . to nullify [Indian] titles confirmed many years before. . . ."

[15] *Foster* v. *Neilson*, 2 Pet. (27 U.S.) 253, 314–315 (1829). In a later case, it was determined in a different situation that by its terms the treaty in issue, which had been assumed to be executory in the earlier case, was self-executing. *United States* v. *Percheman*, 7 Pet. (32 U.S.) 51 (1833).

[16] E.g., *United States* v. *Lee Yen Tai*, 185 U.S. 213, 220–221 (1902); *The Cherokee Tobacco*, 11 Wall. (78 U.S.) 616, 621 (1871); *Johnson* v. *Browne*, 205 U.S. 309, 320–321 (1907); *Whitney* v. *Roberston*, 124 U.S. 190, 194 (1888).

[17] 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 555.

[18] Other cases which are cited in some sources appear distinguishable. *United States* v. *Schooner Peggy*, 1 Cr. (5 U.S.) 103 (1801), applied a treaty entered into subsequent to enactment of a statute abrogating all treaties then in effect between the United States and France, so that it is inaccurate to refer to the treaty as superseding a prior statute. In *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), the treaty with an Indian tribe in which the tribe ceded certain territory, later included in a State, provided that a federal law restricting the sale of liquor on the reservation would continue in effect in the territory ceded; the Court found the stipulation an appropriate subject for settlement by treaty and the provision binding. And *see Charlton* v. *Kelly*, 229 U.S. 447 (1913).

[19] 288 U.S. 102 (1933).

with Great Britain, allowing the inspection of English vessels for contraband liquor and seizure if any was found only if such vessels were within the distance from the coast which could be traversed in one hour by the vessel suspecting of endeavoring to violate the prohibition laws, had superseded the authority conferred by a section of the Tariff Act of 1922 [20] for Coast Guard officers to inspect and seize any vessel within four leagues—12 miles—of the coast under like circumstances. The difficulty with the case is that the Tariff Act provision had been reenacted in 1930,[21] so that a simple application of the rule of the later governing should have caused a different result. It may be suspected that the low estate to which Prohibition had fallen and a desire to avoid a diplomatic controversy should the seizure at issue have been upheld were more than slightly influential in the Court's decision.

***When Is a Treaty Self-Executing.***—Several references have been made above to a distinction between treaties as self-executing and as merely executory. But what is it about a treaty that makes it the law of the land and which gives a private citizen the right to rely on it in a court of law? As early as 1801, the Supreme Court took notice of a treaty and finding it applicable to the situation before gave judgment for the petitioner based on it.[22] In *Foster* v. *Neilson,*[23] Chief Justice Marshall explained that a treaty is to be regarded in courts "as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." It appears thus that the Court has had in mind two characteristics of treaties which keep them from being self-executing. First, "when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court." [24] In other words, the treaty itself may by its terms require implementation, as by an express stipulation for legislative execution.[25]

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[20] 42 Stat. 858, 979, § 581.

[21] 46 Stat. 590, 747, § 581.

[22] *United States* v. *Schooner Peggy,* 1 Cr. (5 U.S.) 103 (1801).

[23] 2 Pet. (27 U.S.) 253, 314-315 (1829).

[24] Ibid.

[25] Generally, the qualifications may have been inserted in treaties out of a belief in their constitutional necessity or because of some policy reason. In regard to the former, it has always apparently been the practice to insert in treaties affecting the revenue laws of the United States a proviso that they should not be deemed effective until the necessary laws to carry them into operation should be enacted by Congress. 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 558. Perhaps of the same nature was a qualification that cession of certain property in the Canal Zone should be dependent upon action by Congress in-

Second, the nature of the stipulation may require legislative execution. That is, with regard to the issue discussed above, whether the delegated powers of Congress imposes any limitation on the treaty power,[1] it may be that a treaty provision will be incapable of execution without legislative action. As one authority says: "Practically this distinction depends upon whether or not the courts and the executive are able to enforce the provision without enabling legislation. Fundamentally it depends upon whether the obligation is imposed on private individuals or on public authorities . . . .

"Treaty provisions which define the rights and obligations of private individuals and lay down general principles for the guidance of military, naval or administrative officials in relation thereto are usually considered self-executing. Thus treaty provisions assuring aliens equal civil rights with citizens, defining the limits of national jurisdiction, and prescribing rules of prize, war and neutrality, have been so considered . . . .

"On the other hand certain treaty obligations are addressed solely to public authorities, of which may be mentioned those requiring the payment of money, the cession of territory, the guarantee of territory or independence, the conclusion of subsequent treaties on described subjects, the participation in international organizations, the collection and supplying of information, and direction of postal, telegraphic or other services, the construction of buildings, bridges, lighthouses, etc." [2] It may well be that these two characteristics merge with each other at many points and the language of the Court is not always helpful in distinguishing them.[3]

***Treaties and the Necessary and Proper Clause.***—What power, or powers, does Congress exercise when it enacts legislation for the purpose of carrying treaties of the United States into effect? When the subject matter of the treaty falls within the ambit of Congress' enumerated powers then it is these powers which it exercises in carrying such treaty into effect. But if the treaty deals with a subject which falls within the national jurisdiction because of its inter-

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serted in Article V of the 1955 Treaty with Panama. TIAS 3297, 6 U.S.T. 2273, 2278. In regard to the latter it may be noted that Article V of the Webster-Ashburton Treaty, 8 Stat. 572, 575 (1842), providing for the transfer to Canada of land in Maine and Massachusetts was conditioned upon assent by the two States and payment to them of compensation. S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 222–224.

[1] *Supra, pp.* 501–504.

[2] Q. Wright, *The Control of American Foreign Relations* (New York: 1922), 207–208.

[3] Thus, compare *Foster* v. *Neilson*, 2 Pet. (27 U.S.) 253, 314–315 (1829), with *Cook* v. *United States*, 288 U.S. 102, 118–119 (1933).

national character, then recourse is had to the necessary and proper clause. Thus, of itself, Congress would have no power to confer judicial powers upon foreign consuls in the United States but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation.[4] Congress could not confer judicial power upon American consuls abroad to be there exercised over American citizens but the treaty-power can and has, and Congress has passed legislation perfecting such agreements and such legislation has been upheld.[5]

Again, Congress of itself could not provide for the extradition of fugitives from justice but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.[6] And Congress could not ordinarily penalize private acts of violence within a State, but it can punish such acts if they deprive aliens of their rights under a treaty.[7] Referring to such legislation the Court has said: "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power." [8] In a word, the treaty-power cannot

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[4] Acts of March 2, 1829, 4 Stat. 359 and of February 24, 1855, 10 Stat. 614.

[5] *In re Ross*, 140 U.S. 453 (1891), where the treaty provisions involved are given. The supplementary legislation, later reenacted at Rev. Stat. §§ 4083–4091, was repealed by the Joint Res. of August 1, 1956, 70 Stat. 774. The validity of the *Ross* case has been questioned recently. *See Reid* v. *Covert*, 354 U.S. 1, 12, 64, 75 (1957).

[6] 18 U.S.C. §§ 3181–3195.

[7] *Baldwin* v. *Franks*, 120 U.S. 678, 683 (1887).

[8] *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901). A different theory is offered by Justice Story in his opinion for the court in *Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539 (1842), in the following words: "Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfill all the obligations of treaties." Id., 619. Story was here in quest of arguments to prove that Congress had power to enact a fugitive slave law, which he based on its power "to carry into effect rights expressly given and duties expressly enjoined" by the Constitution. Id., 618–619. But the treaty-making power is neither a right nor a duty, but one of the powers "vested by this Constitution in the Government of the United States." Art. I, § 8, cl 18.

purport to amend the Constitution by adding to the list of Congress' enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass; the only question that can be raised as to such measures will be whether they are "necessary and proper" measures for the carrying of the treaty in question into operation.

The foremost example of this interpretation is *Missouri* v. *Holland.*[9] There, the United States and Great Britain had entered into a treaty for the protection of migratory birds [10] and Congress had enacted legislation pursuant to the treaty to effectuate it.[11] The State objected that such regulation was reserved to the States by the Tenth Amendment and that the statute infringed on this reservation, pointing to lower court decisions voiding an earlier act not based on a treaty.[12] Noting that treaties "are declared the supreme law of the land", Justice Holmes for the Court said: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." [13] "It is obvious," he continued, "that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." [14] Since the treaty and thus the statute dealt with a matter of national and international concern, the treaty was proper and the statute was one "necessary and proper" to effectuate the treaty.

### Constitutional Limitations on the Treaty Power

A question growing out of the discussion above is whether the treaty power is bounded by constitutional limitations. By the supremacy clause, both statutes and treaties "are declared . . . to be

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[9] 252 U.S. 416 (1920).

[10] 39 Stat. 1702 (1916).

[11] 40 Stat. 755 (1918).

[12] *United States* v. *Shauver*, 214 F. 154 (D.C.E.D.Ark. 1914); *United States* v. *McCullagh*, 221 F. 288 (D.C.D.Kan. 1915). The Court did not purport to decide whether those cases were correctly decided. *Missouri* v. *Holland*, 252 U.S. 416, 433 (1920). Today, there seems no doubt that Congress' power under the commerce clause would be deemed more than adequate but at that time a majority of the Court had a very restrictive view of the commerce power. *Cf. Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).

[13] *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920).

[14] Id., 433. The internal quotation is from *Andrews* v. *Andrews*, 188 U.S. 14, 33 (1903).

the supreme law of the land, and no superior efficacy is given to either over the other." [1] As statutes may be held void because they contravene the Constitution, it should follow that treaties may be held void, the Constitution being superior to both. And indeed the Court has numerous times so stated.[2] It does not appear that the Court has ever held a treaty unconstitutional,[3] although there are examples in which decision was seemingly based on a reading compelled by constitutional considerations.[4] In fact, there would be little argument with regard to the general point were it not for certain dicta in Justice Holmes' opinion in *Missouri* v. *Holland.*[5] "Acts of Congress," he said, "are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." Although he immediately followed this passage with a cautionary "[w]e do not mean to imply that there are no qualifications to the treaty-making power . . .",[6] the Justice's language and the holding by which it appeared that the reserved rights of the States could be invaded through the treaty power led in the 1950's to an abortive effort to amend the Constitution to restrict the treaty power.[7]

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[1] *Whitney* v. *Robertson,* 124 U.S. 190, 194 (1888).

[2] "The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States." *Doe* v. *Braden,* 16 How. (57 U.S.) 635, 656 (1853). "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco,* 11 Wall. (78 U.S.), 616, 620 (1871). *See also Geofroy* v. *Riggs,* 133 U.S. 258, 267 (1890); *United States* v. *Wong Kim Ark,* 169 U.S. 649, 700 (1898); *Asakura* v. *City of Seattle,* 265 U.S. 332, 341 (1924).

[3] 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 561. In *Power Authority of New York* v. *FPC,* 247 F. 2d 538 (C.A. 2, 1957), a reservation attached by the Senate to a 1950 treaty with Canada was held invalid. The court observed that the reservation was properly not a part of the treaty but that if it were it would still be void as an attempt to circumvent constitutional procedures for enacting amendments to existing federal laws. The Supreme Court vacated the judgment on mootness grounds. 355 U.S. 64 (1957). In *United States* v. *Guy W. Capps, Inc.,* 204 F.2d 655 (C.A. 4, 1953), an executive agreement with Canada was held void as conflicting with existing legislation. The Supreme Court affirmed on nonconstitutional grounds. 348 U.S. 296 (1955).

[4] *Cf. City of New Orleans* v. *United States,* 10 Pet. (35 U.S.) 662 (1836); *Rocca* v. *Thompson,* 223 U.S. 317 (1912).

[5] 252 U.S. 416 (1920).

[6] Id., 433. Subsequently, he also observed: "The treaty in question does not contravene any prohibitory words to be found in the Constitution." Ibid.

[7] The attempt, the so-called "Bricker Amendment", was aimed at the expansion into reserved state powers through treaties as well as at executive agreements. The key provision read: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." S.J.

Controversy over the Holmes language apparently led Justice Black in *Reid* v. *Covert* [8] to deny that the difference in language of the supremacy clause with regard to statutes and with regard to treaties was relevant to the status of treaties as inferior to the Constitution. "There is nothing in this language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V." [9]

Establishment of the general principle, however, is but the beginning; there is no readily agreed-upon standard for determining what the limitations are. The most persistently urged proposition in limitation has been that the treaty power must not invade the reserved powers of the States. In view of the sweeping language of the supremacy clause, it is hardly surprising that this argument has not prevailed.[10] Nevertheless, the issue, in the context of Con-

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Res. 43, 82d Congress, 1st sess. (1953), § 2. *See also* S.J. Res. 1, 84th Congress, 1st sess. (1955), § 2. Extensive hearings developed the issues thoroughly but not always clearly. Hearings on S.J. Res. 130 Before a Subcommittee of the Senate Judiciary Committee, 82d Congress, 2d sess. (1952). Hearings on S.J. Res. 1 & 43 Before a Subcommittee of the Senate Judiciary Committee, 83d Congress, 1st sess. (1953); Hearings on S.J. Res. 1 Before a Subcommittee of the Senate Judiciary Committee, 84th Congress, 1st sess. (1955).

[8] 354 U.S. 1 (1957) (plurality opinion).

[9] Id., 16–17.

[10] *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199 (1796); *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cr. (11 U.S.) 603 (1813); *Chirac* v. *Chirac*, 2 Wheat. (15 U.S.) 259 (1817); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1880). Jefferson, in his list of exceptions to the treaty power, thought the Constitution "must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way." *Jefferson's Manual of Parliamentry Practice*, § 52, reprinted in *Senate Manual*, S. Doc. 91–1, 91st Congress, 1st sess. (1969), 487. But this view has always been the minority one. Q. Wright, *The Control of American Foreign Relations* (New York: 1922), 92 n.

gress' power under the necessary and proper clause to effectuate a treaty dealing with a subject arguably within the domain of the States, was presented as recently as 1920, when the Court upheld a treaty and implementing statute providing for the protection of migratory birds.[11] "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." [12] The gist of the holding followed. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed." [13]

The doctrine which seems deducible from this case and others is "that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded." [14] It is not, in other words, the treaty power which enlarges either the federal power or the congressional power but the international character of the interest concerned which might be acted upon.

Dicta in some of the cases lend support to the argument that the treaty power is limited by the delegation of powers among the branches of the National Government [15] and especially by the dele-

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97. The nearest the Court ever came to supporting this argument appears to be *Frederickson* v. *Louisiana*, 23 How. (64 U.S.) 445, 448 (1860).

[11] *Missouri* v. *Holland*, 252 U.S. 416 (1920).

[12] Id., 433.

[13] Id., 435.

[14] 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 569. And *see* Henkin, "The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations," 107 U. Pa. L. Rev. 903 (1959).

[15] E.g., *Geofroy* v. *Riggs*, 133 U.S. 258, 266–267 (1890); *Holden* v. *Joy*, 17 Wall. (84 U.S.) 211, 243 (1872). Jefferson listed as an exception from the treaty power "those subjects of legislation in which [the Constitution] gave a participation to the House of Representatives" although he admitted "that it would leave very little matter for the treaty power to work on." *Jefferson's Manual of Parliamentary Practice*, § 52, reprinted in *Senate Manual*, S. Doc. No. 91-1, 91st Congress, 1st sess. (1969), 487.

gated powers of Congress, although it is not clear what the limitation means. If it is meant that no international agreement could be constitutionally entered into by the United States within the sphere of such powers, the practice from the beginning has been to the contrary; [16] if it is meant that treaty provisions dealing with matters delegated to Congress must, in order to become the law of the land, receive the assent of Congress through implementing legislation, it states not a limitation on the power of making treaties as international conventions but rather a necessary procedure before certain conventions are cognizable by the courts in the enforcement of rights under them.[17]

It has also been suggested that the prohibitions against governmental action contained in the Constitution—the Bill of Rights particularly—limit the exercise of the treaty power. No doubt this is true, though again there are no cases which so hold.[18]

One other limitation of sorts may be contained in the language of certain court decisions which seem to say that only matters of "international concern" may be the subject of treaty negotiations.[19] While this may appear to be a limitation, it does not take account of the elasticity of the concept of "international concern" by which the subject matter of treaties has constantly expanded over the years.[20] At best, any attempted resolution of the issue of limitations must be an uneasy one.[21]

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[16] Q. Wright, *The Control of American Foreign Relations* (New York: 1922), 101-103.

[17] *Supra, pp.* 501-504.

[18] Cf. *Reid* v. *Covert*, 354 U.S. 1 (1957).

[19] "[I]t must be assumed that the framers of the Constitution intended that [the treaty power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty. . . ." *Holden* v. *Joy* 17 Wall. (84 U.S.) 211, 243 (1872). With the exceptions noted, "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890). "The treatymaking power of the United States . . . does extend to all proper subjects of negotiation between our government and other nations." *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924).

[20] *Cf.* Henkin, "The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations," 107 U. Pa. L. Rev. 903, 910-913 (1959).

[21] Other reservations which have been expressed may be briefly noted. It has been contended that the territory of a State could not be ceded without such State's consent. *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890), citing *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 541 (1885). *Cf.* the Webster-Ashburton Treaty, Article V, 8 Stat. 572, 575. *But see* S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 220-229; 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 572-576.

A further contention is that while foreign territory can be annexed to the United States by the treaty power, it could not be incorporated with the United States except with the consent of Congress. *Downes* v. *Bidwell*, 182 U.S. 244, 310-344

In brief, the fact that all the foreign relations power is vested in the National Government and that no formal restriction is imposed on the treaty-making power in the international context [22] leaves little room for the notion of a limited treaty-making power with regard to the reserved rights of the States or in regard to the choice of matters concerning which the Federal Government may treat with other nations; protected individual rights appear to be sheltered by specific constitutional guarantees from the domestic effects of treaties and the separation of powers at the federal level may require legislative action to give municipal effect to international agreements.

### Interpretation and Termination of Treaties as International Compacts

The repeal by Congress of the "self-executing" clauses of a treaty as "law of the land" does not of itself terminate the treaty as an international contract, although it may very well provoke the other party to the treaty to do so. Hence the questions arise where the Constitution lodges this power and where it lodges the power to interpret the contractual provisions of treaties. The first case of outright abrogation of a treaty by the United States occurred in 1798, when Congress by the Act of July 7 of that year, pronounced the United States freed and exonerated from the stipulations of the Treaties of 1778 with France.[1] This act was followed two days later by one authorizing limited hostilities against the same country; in the case of *Bas* v. *Tingy* [2] the Supreme Court treated the act of abrogation as simply one of a bundle of acts declaring "public war" upon the French Republic.

***Termination of Treaties by Notice.***—Typically, a treaty provides for its termination by notice of one of the parties, usually after a prescribed time from the date of notice. Of course, treaties may also be terminated by agreement of the parties, or by breach by one of the parties, or by some other means. But it is in the instance

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(1901) (four Justices dissenting). This argument appears to be a variation of the one in regard to the correct procedure to give domestic effect to treaties.

Another argument grew out the XII Hague Convention of 1907 proposing an International Prize Court with appellate jurisdiction from national courts in prize cases. President Taft objected that no treaty could transfer to a tribunal not known to the Constitution any part of the judicial power of the United States and a compromise was arranged. Q. Wright, *The Control of American Foreign Relations* (New York: 1922), 117–118; H. Rept. No. 1569, 68th Congress, 2d sess. (1925).

[22] *Cf. United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936); *Holmes* v. *Jenison*, 14 Pet. (39 U.S.) 540, 575–576 (1840).

[1] 1 Stat. 578 (1798).

[2] 4 Dall. (4 U. S.) 37 (1800). *See also Gray* v. *United States*, 21 Ct. Cl. 340 (1886), with respect to claims arising out of this situation.

of termination by notice that the issue has frequently been raised: where in the Government of the United States does the Constitution lodge the power to unmake treaties? [3] Reasonable arguments may be made locating the power in the President alone, in the President-and-Senate, or in the Congress. Presidents generally have asserted the foreign relations power reposed in them under Article II and the inherent powers argument made in *Curtiss-Wright*. Because the Constitution requires the consent of the Senate for making a treaty, one can logically argue that its consent is as well required for terminating it. Finally, because treaties are, like statutes, the supreme law of the land, it may well be argued that, again like statutes, they may be undone only through law-making by the entire Congress; additionally, since Congress may be required to implement treaties and may displace them through legislation, this argument is reenforced.[4]

Definitive resolution of this argument appears remotely possible. Historical practice provides support for all three arguments and the judicial branch seems unlikely to essay any answer.

While abrogation of the French treaty, mentioned above, is apparently the only example of termination by Congress through a public law, many instances may be cited of terminations by notice of the President, either pursuant to some congressional action or at his own discretion. The initial precedent in the instance of termination by notice pursuant to congressional action appears to have occurred in 1846,[5] when by joint resolution Congress authorized the President at his discretion to notify the British government of the abrogation of the Convention of August 6, 1827, relative to the joint occupation of the Oregon Territory. As the President himself had requested the resolution, the episode is often cited to support the theory that international conventions to which the United States is a party, even those terminable on notice, are terminable only through action of Congress.[6] Subsequently, Congress has often

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[3] The matter was most extensively canvassed in the debate with respect to President Carter's termination of the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan). See, e.g., the various views argued in *Treaty Termination*, Hearings before the Senate Committee on Foreign Relations, 96th Congress, 1st sess. (1979).

[4] *See*, e.g., L. Henkin, *Foreign Affairs and the Constitution* (New York: 1972), 167–171.

[5] Compare the different views of the 1846 action in *Treaty Termination*, Hearings before the Senate Committee on Foreign Relations, 96th Congress, 1st sess. (1979), 160–162 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), and in *Taiwan*, Hearings before the Senate Committee on Foreign Relations, 96th Congress, 1st sess. (1979), 300 (memorandum of Senator Goldwater).

[6] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 458–459.

passed resolutions denouncing treaties or treaty provisions, which by their own terms were terminable on notice, and Presidents have usually, though not invariably, carried out such resolutions.[7] By the La Follette-Furuseth Seaman's Act,[8] President Wilson was directed, "within ninety days after the passage of the act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expiration of the periods of notice provided for in such treaties," and the required notice was given.[9] When, however, by section 34 of the Jones Merchant Marine Act of 1920, the same President was authorized and directed within ninety days to give notice to the other parties to certain treaties, with which the Act was not in conflict but which might restrict Congress in the future from enacting discriminatory tonnage duties, President Wilson refused to comply, asserting that he "did not deem the direction contained in section 34 . . . an exercise of any constitutional power possessed by Congress." [10] The same attitude toward section 34 was continued by Presidents Harding and Coolidge.[11]

Very few precedents exist in which the President terminated a treaty after obtaining the approval of the Senate alone. The first occurred in 1854–1855, when President Pierce requested and received Senate approval to terminate a treaty with Denmark.[12] When the validity of this action was questioned in the Senate, the Committee on Foreign Relations reported that the procedure was correct, that prior full-Congress actions were incorrect, and that

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[7] Id., 459–462; Q. Wright, *The Control of American Foreign Relations* (New York: 1922), 258.

[8] 38 Stat. 1164 (1915).

[9] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 460. *See Van der Weyde* v. *Ocean Transp. Co.*, 297 U. S. 114 (1936).

[10] 41 Stat. 1007. See Reeves, "The Jones Act and the Denunciation of Treaties," 15 Am. J. Int'l. L. 33 (1921). In 1879, Congress passed a resolution requiring the President to abrogate a treaty with China, but President Hayes vetoed it, partly on the ground that Congress as an entity had no role to play in ending treaties, only the President with the advice and consent of the Senate. 9 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 4466, 4470–4471. For the views of President Taft on the matter in context, see W. Taft, *The Presidency, Its Duties, Its Powers, Its Opportunities and Its Limitations* (New York: 1916), 112–113.

[11] Since this time, very few instances appear in which Congress has requested or directed termination by notice, but they have resulted in compliance. E.g., 65 Stat. 72 (1951) (directing termination of most-favored-nation provisions with certain Communist countries in commercial treaties); 70 Stat. 773 (1956) (requesting renunciation of treaty rights of extraterritoriality in Morroco).

[12] 5 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 279, 334.

the right to terminate resides in the treaty-making authorities, the President and the Senate.[13]

Examples of treaty terminations in which the President acted alone are much disputed with respect both to facts and to the underlying legal circumstances.[14] Apparently, President Lincoln was the first to give notice of termination in the absence of prior congressional authorization or direction, and Congress shortly thereafter by joint resolution ratified his action.[15] The first such action by the President, with no such subsequent congressional action, appears to be that of President McKinley in 1899, in terminating an 1850 treaty with Switzerland, but the action may be explainable as the treaty being inconsistent with a subsequently enacted law.[16] Other such renunciations by the President acting on his own have been similarly explained and similarly the explanations have been controverted. While the Department of State, in setting forth legal justification for President Carter's notice of termination of the treaty with Taiwan, cited many examples of the President acting alone, many of these are ambiguous and may be explained away by, i.e., conflicts with later statutes, changed circumstances, or the like.[17]

No such ambiguity accompanied President Carter's action on the Taiwan treaty and a somewhat lengthy Senate debate was provoked. In the end, the Senate on a preliminary vote approved a "sense of the Senate" resolution claiming for itself a consenting role in the termination of treaties, but no final vote was ever taken and the Senate thus did not place itself in conflict with the President.[18] However, several Members of Congress went to court to

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[13] S. Rept. No. 97, 34th Congress, 1st sess. (1856), 6-7. The other instance was President Wilson's request, which the Senate endorsed, for termination of the International Sanitary Convention of 1903. See 61 Cong. Rec. 1793-1794 (1921).

[14] *Compare*, e.g., *Treaty Termination*, Hearings before the Senate Committee on Foreign Relations, 96th Congress, 1st sess. (1979), 156-191 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), with *Taiwan*, Hearings before the Senate Committee on Foreign Relations, 96th Congress, 1st sess. (1979), 300-307 (memorandum of Senator Goldwater).

[15] 13 Stat. 568 (1865).

[16] The treaty, *see* 11 C. Bevans, *Treaties and Other International Agreements of the United States of America* (Washington: 1970), 894, was probably at odds with the Tariff Act of 1897. 30 Stat. 151.

[17] *Compare* the views expressed in the Hansell and Goldwater memoranda, *op. cit.*, n. 14. For expressions of views preceding the immediate controversy, *e.g.*, Riesenfeld, "The Power of Congress and the President in International Relations," 25 Calif. L. Rev. 643, 658-665 (1937); Nelson, "The Termination of Treaties and Executive Agreements by the United States," 42 Minn. L. Rev. 879 (1958).

[18] Originally, S. Res. 15 had disapproved presidential action alone, but it was amended and reported by the Foreign Relations Committee to recognize at least 14 bases of presidential termination. S. Rept. No. 119, 96th Congress, 1st sess. (1979). In

contest the termination, apparently the first time a judicial resolution of the question had been sought. A divided Court of Appeals, on the merits, held that presidential action was sufficient by itself to terminate treaties, but the Supreme Court, no majority agreeing on a common ground, vacated that decision and instructed the trial court to dismiss the suit.[19] While no opinion of the Court bars future litigation, it appears that the political question doctrine or some other rule of judicial restraint will leave such disputes to the contending forces of the political branches.[20]

***Determination Whether a Treaty Has Lapsed.***—At the same time, there is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in *Charlton* v. *Kelly* [21] is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. . . . That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition." [22] So also it is primarily for the political departments to determine whether certain provisions of a treaty have survived a war in which the other contracting state ceased to exist as a member of the international community.[23]

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turn, this resolution was amended to state the described sense of the Senate view but the matter was never brought to final action. See 125 Cong. Rec. 13672, 13696, 13711, 15209, 15859 (1979).

[19] *Goldwater* v. *Carter*, 617 F.2d 697 (C.A.D.C.) *(en banc), vacated and remanded*, 444 U.S. 996 (1979). Four Justices found the case nonjusticiable because of the political question doctrine, id., 1002, but one other Justice in the majority and one in dissent rejected this analysis. Id., 998 (Justice Powell), 1006 (Justice Brennan). The remaining three Justices were silent on the doctrine.

[20] *Cf. Baker* v. *Carr*, 369 U.S. 186, 211–213, 217 (1962).

[21] 229 U.S. 447 (1913).

[22] Id., 473–476.

[23] *Clark* v. *Allen*, 331 U.S. 503 (1947).

***Status of a Treaty a Political Question.***—At any rate, it is clear that many questions which arise concerning a treaty are of a political nature and will not be decided by the courts. In the words of Justice Curtis in *Taylor* v. *Morton:* [24] It is not "a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise. . . . These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws and it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our system of government." Chief Justice Marshall's language in *Foster* v. *Neilson* [25] is to the same effect.

**Indian Treaties**

In the early cases of *Cherokee Nation* v. *Georgia* [1] and *Worcester* v. *Georgia* [2] the Court, speaking by Chief Justice Marshall, held, first, that the Cherokee Nation was not a sovereign state within the meaning of that clause of the Constitution which extends the judicial power of the United States to controversies "between a State or the citizens thereof and foreign states, citizens or subjects." Second, it held: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, had adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." [3]

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[24] 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass. 1855).

[25] 2 Pet. (27 U.S.) 253, 309 (1829). *Baker* v. *Carr*, 369 U.S. 186 (1962), qualifies this certainty considerably, and *Goldwater* v. *Carter*, 444 U.S. 996 (1979), prolongs the uncertainty.

[1] 5 Pet. (30 U.S.) 1 (1831).

[2] 6 Pet. (31 U.S.) 515 (1832).

[3] Id., 558.

Later cases established that the power to make treaties with the Indian tribes was coextensive with the power to make treaties with foreign nations,[4] that the States were incompetent to interfere with rights created by such treaties,[5] that as long as the United States recognized the national character of a tribe, its members were under the protection of treaties and of the laws of Congress and their property immune from taxation by a State,[6] that a stipulation in an Indian treaty that laws forbidding the introduction, of liquors into Indian territory was operative without legislation, and binding on the courts although the territory was within an organized county of a State,[7] and that an act of Congress contrary to a prior Indian treaty repealed it.[8]

***Present Status of Indian Treaties.***—Today the subject of Indian treaties is a closed account in the constitutional law ledger. By a rider inserted in the Indian Appropriation Act of March 3, 1871, it was provided "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further,* that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." [9] Subsequently, the power of Congress to withdraw or modify tribal rights previously granted by treaty has been invariably upheld. Thus the admission of Wyoming as a State was found to abrogate, *pro tanto,* a treaty guaranteeing certain Indians the right to hunt on unoccupied lands of the United States so long as game may be found thereon and to bring hunting by the Indians within the police power of the State.[10] Similarly, statutes modifying rights of members in tribal lands,[11] granting a right of way for a railroad through lands ceded by treaty to an Indian tribe,[12] or extending the application of revenue

[4] *Holden* v. *Joy,* 17 Wall. (84 U.S.) 211, 242 (1872); *United States* v. *Forty-Three Gallons of Whiskey,* 93 U.S. 188, 192 (1876); *Dick* v. *United States,* 208 U.S. 340, 355–356 (1908).

[5] *The New York Indians,* 5 Wall. (72 U.S.) 761 (1867).

[6] *The Kansas Indians,* 5 Wall. (72 U.S.) 737, 757 (1867).

[7] *United States* v. *Forty-Three Gallons of Whiskey,* 93 U.S. 188, 196 (1876).

[8] *The Cherokee Tobacco,* 11 Wall. (78 U.S.) 616 (1871). *See also Ward* v. *Race Horse,* 163 U.S. 504, 511 (1896); *Thomas* v. *Gay,* 169 U.S. 264, 270 (1898).

[9] 16 Stat. 566; Rev. Stat. § 2079, now contained in 25 U.S.C. § 71.

[10] *Ward* v. *Race Horse,* 163 U.S. 504 (1896).

[11] *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903).

[12] *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U.S. 641 (1890).

laws respecting liquor and tobacco over Indian territories, despite an earlier treaty exemption,[13] have been sustained.

When, on the other hand, definite property rights have been conferred upon individual Indians, whether by treaty or under an act of Congress, they are protected by the Constitution to the same extent and in the same way as the private rights of other residents or citizens of the United States. Hence it was held that certain Indian allottees under an agreement according to which, in part consideration of their relinquishment of all their claim to tribal property, they were to receive in severalty allotments of lands which were to be nontaxable for a specified period, acquired vested rights of exemption from State taxation which were protected by the Fifth Amendment against abrogation by Congress.[14]

A regular staple of each Term's docket of the Court is one or two cases calling for an interpretation of the rights of Indians under some treaty arrangement vis-a-vis the Federal Government or the States.[15] Thus, though no treaties have been negotiated for decades and none presumably ever will again, litigation concerning old treaties seemingly will go on.

## INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The capacity of the United States to enter into agreements with other nations is not exhausted in the treaty-making power. The Constitution recognizes a distinction between "treaties" and "agreements" or "compacts" but does not indicate what the difference is.[1] The differences which once may have been clearer have been seriously blurred in practice within recent decades. Once a stepchild in the family in which treaties were the preferred offspring, the executive agreement has surpassed in number and perhaps in international influence the treaty formally signed, submitted for ratification to the Senate, and proclaimed upon ratification. During the first half-century of its independence, the United States was party to sixty treaties but to only twenty-seven published executive agreements. By the beginning of World War II, there had been concluded approximately 800 treaties and 1,200 executive

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[13] *The Cherokee Tobacco*, 11 Wall. (78 U.S.) 616, 621 (1871).

[14] *Choate* v. *Trapp*, 224 U.S. 665, 677–678 (1912); *Jones* v. *Meehan*, 175 U.S. 1 (1899).

[15] E.g., *United States* v. *Southern Ute Tribe*, 402 U.S. 159 (1971); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970); *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Puyallup Tribe* v. *Dept. of Game of Washington*, 391 U.S. 392 (1968); *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968).

[1] *Compare* Article II, § 2, cl. 2, and Article VI, cl. 2, with Article I, § 10, cls. 1 and 3. *Cf. Holmes* v. *Jennison*, 14 Pet. (39 U.S.) 540, 570–572 (1840).

agreements. In the period 1940–1955, the Nation entered into 139 treaties and into nearly 1,950 published executive agreements. From a ratio of one and one-half to one prior to World War II, the executive agreement attained a 14 to one ratio to treaties in the next fifteen years and in the next twelve years a ratio of 17 to one.[2]

One must, of course, interpret the raw figures carefully. Only a very small minority of all the executive agreements entered into were based solely on the powers of the President as Commander-in-Chief and organ of foreign relations; the remainder were authorized in advance by Congress by statute or by treaty provisions ratified by the Senate.[3] Thus, consideration of the constitutional significance of executive agreements must begin with a differentiation among the kinds of agreements which are classed under this single heading.[4]

### Executive Agreements by Authorization of Congress

Congress early authorized the entry into negotiation and agreement of officers of the executive branch with foreign governments, authorizing the borrowing of money from foreign countries [1] and appropriating money to pay off the government of Algiers to prevent pirate attacks on United States shipping.[2] Perhaps the first formal authorization in advance of an executive agreement was enactment of a statute which permitted the Postmaster General to "make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and

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[2] W. McClure, *International Executive Agreements* (New York: 1941), 4; E. Byrd, *Treaties and Executive Agreements in the United States* (The Hague: 1960), vi; Hopson, *"The Executive Agreement in United States Practice,"* 12 AF JAG L. Rev. 252, 253 (1970). Not all such agreements, of course, are published, either because of national security secrecy considerations or because the subject matter is trivial. In a 1953 hearing exchange, Secretary of State Dulles estimated that about 10,000 executive agreements had been entered into in connection with the NATO treaty. "Every time we open a new privy, we have to have an executive agreement." Hearing on S.J. Res. 1 and S.J. Res. 43 Before a Subcommittee of the Senate Judiciary Committee, 83d Congress, 1st sess. (1953), 877.

[3] One authority concluded that of the executive agreements entered into between 1938 and 1957, only 5.9 percent were based exclusively on the President's constitutional authority. McLaughlin, "The Scope of the Treaty Power in the United States—II," 43 Minn. L. Rev. 651, 721 (1959).

[4] "[T]he distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." Harvard Research in International Law, "Draft Convention on the Law of Treaties," 29 Amer. J. Int. L. 697 (Supp.) (1935). *See* E. Byrd, *Treaties and Executive Agreements in the United States* (The Hague: 1960), 148–151.

[1] 1 Stat. 138 (1790). *See* E. Byrd, *Treaties and Executive Agreements in the United States* (The Hague: 1960), 53 n. 146.

[2] W. McClure, *International Executive Agreements* (New York: 1941), 41.

packets, through the post offices." [3] Congress has also approved, usually by resolution, other executive agreements, such as the annexing of Texas and Hawaii and the acquisition of Samoa.[4] A prolific source of executive agreements has been the authorization of reciprocal arrangements between the United States and other countries for the securing of protection for patents, copyrights, and trademarks.[5]

***Reciprocal Trade Agreements.***—But the most copious source of executive agreements has been legislation which provided authority for the entering into of reciprocal trade agreements with other nations.[6] Such agreements in the form of treaties providing for the reciprocal reduction of duties subject to implementation by Congress were frequently entered into,[7] but beginning with the Tariff Act of 1890 [8] Congress began to insert provisions authorizing the Executive to bargain over reciprocity with no necessity of subsequent legislative action. The authority was widened in successive acts.[9] Then, in the Reciprocal Trade Agreements Act of 1934, [10] Congress authorized the President to enter into agreements with other nations for reductions of tariffs and other impediments to international trade and to put the reductions into effect through proclamation.

***The Constitutionality of Trade Agreements.***—In *Field* v. *Clark*, [11] this type of legislation was sustained against the objection that it attempted an unconstitutional delegation "of both legislative and treaty-making powers." The Court met the first objection with an extensive review of similar legislation from the inauguration of government under the Constitution. The second objection it met with a curt rejection: "What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The Court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President." [12] Although two Justices disagreed, the question

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[3] Id., 38–40. The statute was 1 Stat. 232, 239, § 26 (1792).

[4] Id., 62–70.

[5] Id., 78–81; S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 127–131.

[6] Id., 121–127; W. McClure, *International Executive Agreements* (New York: 1941), 83–92, 173–189.

[7] Id., 8, 59–60.

[8] § 3, 26 Stat. 567, 612.

[9] Tariff Act of 1897, § 3, 30 Stat. 15, 203; Tariff Act of 1909, 36 Stat. 11, 82.

[10] 48 Stat. 943, 19 U.S.C. §§ 1351–1354.

[11] 143 U.S. 649 (1892).

[12] Id., 694. *See also Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), in which the Court sustained a series of implementing actions by the President pursuant to exec-

has never been revived. However, in *Altman & Co.* v. *United States,*[13] decided twenty years later, a collateral question was passed upon. This was whether an act of Congress which gave the federal circuit courts of appeal jurisdiction of cases in which "the validity or construction of any treaty . . . was drawn in question" embraced a case involving a trade agreement which had been made under the sanction of Tariff Act of 1897. Said the Court: "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court." [14]

***The Lend-Lease Act.***—The most extensive delegation of authority ever made by Congress to the President to enter into executive agreements occurred within the field of the cognate powers of the two departments, the field of foreign relations, and took place at a time when war appeared to be in the offing and was in fact only a few months away. The legislation referred to is the Lend-Lease Act of March 11, 1941 [15] by which the President was empowered for something over two years—and subsequently for additional periods whenever he deemed it in the interest of the national defense to do so—to authorize "the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government," to manufacture in the government arsenals, factories, and shipyards, or "otherwise procure," to the extent that available funds made possible, "defense article"—later amended to include foodstuffs and industrial products—and "sell, transfer title to, exchange, lease, lend, or otherwise dispose of," the same to the "gov-

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utive agreements with Iran in order to settle the hostage crisis. The Court found that Congress had delegated to the President certain economic powers underlying the agreements and that his suspension of claims powers had been implicitly ratified over time by Congress' failure to set aside the asserted power.

[13] 224 U.S. 583 (1912).

[14] Id., 601.

[15] 55 Stat. 31.

ernment of any country whose defense the President deems vital to the defense of the United States," and on any terms that he "deems satisfactory." Under this authorization the United States entered into Mutual Aid Agreements whereby the Government furnished its allies in World War II forty billions of dollars worth of munitions of war and other supplies.

***International Organizations.***—Overlapping of the treaty-making power through congressional-executive cooperation in international agreements is also demonstrated by the use of resolutions approving the United States joining of international organizations [16] and participating in international conventions.[17]

**Executive Agreements Authorized by Treaties**

***Arbitration Agreements.***—In 1904–1905 Secretary of State John Hay negotiated a series of treaties providing for the general arbitration of international disputes. Article II of the treaty with Great Britain, for example, provided as follows: "In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute and the scope of the powers of the Arbitrators, and fixing the periods for the formation of the Arbitral Tribunal and the several stages of the procedure." [1] The Senate approved the British treaty by the constitutional majority having, however, first amended it by substituting the word "treaty" for "agreement." President Theodore Roosevelt, characterizing the "ratification" as equivalent to rejection, sent the treaties to repose in the archives. "As a matter of historical practice," Dr. McClure comments, "the *compromis* under which disputes have been arbitrated include both treaties and executive agreements in goodly numbers," [2] a statement supported by both Willoughby and Moore.[3]

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[16] E.g., 48 Stat. 1182 (1934), authorizing the President to accept membership for the United States in the International Labor Organization.

[17] *See* E. Corwin, *The President: Office and Powers*, 1787–1957 (New York: 4th ed. 1957), 216.

[1] W. McClure, *International Executive Agreements* (New York: 1941), 13–14.

[2] Id., 14.

[3] "There have been numerous instances in which the Senate has approved treaties providing for the submission of specific matters to arbitration, leaving it to the President to determine exactly the form and scope of the matter to be arbitrated and to appoint the arbitrators. Professor J. B. Moore enumerates thirty-nine instances in which provision has thus been made for the settlement of pecuniary claims. Twenty of these were claims against foreign governments; fourteen were claims against both governments, and five against the United States alone." 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 543.

***Agreements Under the United Nations Charter.***—Article 43 of the United Nations Charter provides: "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." [4] This time the Senate did not boggle over the word "agreement."

The United Nations Participation Act of December 20, 1945, implements these provisions as follows: "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: *Provided*, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements." [5]

***Status of Forces Agreements.***—Negotiated pursuant to authorizations contained in treaties between the United States and foreign nations in the territory of which American troops and their de-

[4] *A Decade of American Foreign Policy*, S. Doc. No. 123, 81st Cong., 1st Sess., 126 (1950).

[5] Id., 158.

pendents are stationed, these Agreements afford the United States a qualified privilege, which may be waived, of trying by court martial soldiers and their dependents charged with commission of offenses normally within the exclusive, criminal jurisdiction of the foreign signatory power. When the United States, in conformity with the waiver clause in such an Agreement, consented to the trial in a Japanese court of a soldier charged with causing the death of a Japanese woman on a firing range in that country, the Court could "find no constitutional barrier" to such action.[6] However, at least five of the Supreme Court Justices were persuaded to reject at length the contention that such Agreements could sustain, as necessary and proper for their effectuation, implementing legislation subsequently found by the Court to contravene constitutional guaranties set forth in the Bill of Rights.[7]

**Executive Agreements on the Sole Constitutional Authority of the President**

Many types of executive agreements comprise the ordinary daily grist of the diplomatic mill. Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story's words, "the mere private rights of sovereignty." [1] Crandall lists scores of such agreements entered into with other governments by the authorization of the President.[2] Such agreements were ordinarily directed to particular and comparatively trivial disputes and by the settlement they effect of these cease *ipso facto* to be operative. Also there are such time-honored diplomatic devices as the "protocol" which marks a stage in the negotiation of a treaty, and the *modus vivendi,* which is designed to serve as a temporary substitute for one. Executive agreements become of constitutional significance when they constitute a determinative factor of future foreign policy and hence of the country's destiny. In consequence particularly of our participation in World War II and our immersion in the conditions of international tension which have prevailed both before and after the war, Presidents have entered into agreements with other governments some of which have approximated tempo-

[6] *Wilson* v. *Girard,* 354 U.S. 524 (1957).

[7] *Reid* v. *Covert,* 354 U.S. 1, 16-17 (1957) (plurality opinion); id., 66 (Justice Harlan concurring).

[1] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1397.

[2] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), ch. 8; *see also* W. McClure, *International Executive Agreements* (New York: 1941), chs. 1, 2.

rary alliances. It cannot be just said, however, that in so doing they have acted without considerable support from precedent.

An early instance of executive treaty-making was the agreement by which President Monroe in 1817 brought about a delimitation of armaments on the Great Lakes. The arrangement was effected by an exchange of notes, which nearly a year later was laid before the Senate with a query as to whether it was within the President's power, or whether advice and consent of the Senate were required. The Senate approved the agreement by the required two-thirds vote, and it was forthwith proclaimed by the President without there having been a formal exchange of ratifications.[3] Of a kindred type, and owing much to the President's capacity as Commander-in-Chief, was a series of agreements entered into with Mexico between 1882 and 1896 according each country the right to pursue marauding Indians across the common border.[4] Commenting on such an agreement, the Court remarked, a bit uncertainly: "While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters [from foreign vessels] in the absence of positive legislation to that effect." [5] Justice Gray and three other Justices were of the opinion that such action by the President must rest upon express treaty or statute.[6]

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[3] Id., 49-50.

[4] Id., 81-82.

[5] *Tucker* v. *Alexandroff*, 183 U.S. 424, 435 (1902).

[6] Id., 467. The first of these conventions, signed July 29, 1882, had asserted its constitutionality in very positive terms. "The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and adheres where the executive power is vested. Such conventions are not treaties within the meaning of the Constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts. They are not a casting of the national will into the firm and permanent condition of law, and yet in some sort they are for the occasion an expression of the will of the people through their political organ, touching the matters affected; and to avoid unhappy collision between the political and judicial branches of the government, both which are in theory inseparably all one, such an expression to a reasonable limit should be followed by the courts and not opposed, though extending to the temporary restraint or modification of the operation of existing statutes. Just as here, we think, this particular convention respecting San Juan should be allowed to modify for the time being the operation of the organic act of this Territory [Washington] so far forth as to exclude to the extent demanded by the political branch of the government of the United States, in the interest of peace, all territorial interference for the government of that island." Q.

Notable expansion of Presidential power in this field first became manifest in the administration of President McKinley. At the outset of war with Spain, the President proclaimed that the United States would consider itself bound for the duration by the last three principles of the Declaration of Paris, a course which, as Professor Wright observes, "would doubtless go far toward establishing these three principles as international law obligatory upon the United States in future wars." [7] Hostilities with Spain were brought to an end in August, 1898, by an armistice the conditions of which largely determined the succeeding treaty of peace,[8] just as did the Armistice of November 11, 1918, determine in great measure the conditions of the final peace with Germany in 1918. It was also President McKinley who in 1900, relying on his own sole authority as Commander-in-Chief, contributed a land force of 5,000 men and a naval force to cooperate with similar contingents from other Powers to rescue the legations in Peking from the Boxers; a year later, again without consulting either Congress or the Senate, he accepted for the United States the Boxer Indemnity Protocol between China and the intervening Powers.[9] Commenting on the Peking protocol Willoughby quotes with approval the following remark: "This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character . . . purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot." [10]

It was during this period, too, that John Hay, as McKinley's Secretary of State, initiated his "Open Door" policy, by notes to Great Britain, Germany, and Russia, which were soon followed by similar notes to France, Italy and Japan. These in substance asked the recipients to declare formally that they would not seek to en-

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Wright, *The Control of American Foreign Relations* (New York: 1922), 239, quoting *Watts* v. *United States*, 1 Wash. Terr. 288, 294 (1870).

[7] Id., 245.

[8] S. Crandall, *Treaties, Their Making and Enforcement* (Washington: 2d ed. 1916), 103-104.

[9] Id., 104.

[10] 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 539

large their respective interests in China at the expense of any of the others; and all responded favorably.[11] Then in 1905 the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War Taft, then in the Far East, and Count Katsura, amounting to a secret treaty, by which the Roosevelt administration assented to the establishment by Japan of a military protectorate in Korea.[12] Three years later Secretary of State Root and the Japanese ambassador at Washington entered into the Root-Takahira Agreement to uphold the *status quo* in the Pacific and maintain the principle of equal opportunity for commerce and industry in China.[13] Meantime, in 1907, by a "Gentleman's Agreement," the Mikado's government had agreed to curb the emigration of Japanese subjects to the United States, thereby relieving the Washington government from the necessity of taking action that would have cost Japan loss of face. The final result of this series of executive agreements touching American relations in and with the Far East was the product of President Wilson's diplomacy. This was the Lansing-Ishii Agreement, embodied in an exchange of letters dated November 2, 1917, by which the United States recognized Japan's "special interests" in China, and Japan assented to the principle of the Open Door in that country.[14]

***The Litvinov Agreement.***—The executive agreement attained its modern development as an instrument of foreign policy under President Franklin D. Roosevelt, at times threatening to replace the treaty-making power, not formally but in effect, as a determinative element in the field of foreign policy. The President's first important utilization of the executive agreement device took the form of an exchange of notes on November 16, 1933, with Maxim M. Litvinov, the USSR Commissar for Foreign Affairs, whereby American recognition was extended to the Soviet Union and certain pledges made by each official.[15]

***The Hull-Lothian Agreement.***—With the fall of France in June, 1940, President Roosevelt entered that summer into two executive agreements the total effect of which was to transform the role of the United States from one of strict neutrality toward the European war to one of semi-belligerency. The first agreement was with Canada and provided for the creation of a Permanent Joint Board

[11] W. McClure, *International Executive Agreement* (New York: 1941), 98.
[12] Id., 96-97.
[13] Id., 98-99.
[14] Id., 99-100.
[15] Id., 140-144.

on Defense which would "consider in the broad sense the defense of the north half of the Western Hemisphere." [16] Second and more important than the first was the Hull-Lothian Agreement of September 2, 1940, under which, in return for the lease for ninety-nine years of certain sites for naval bases in the British West Atlantic, the United States handed over to the British Government fifty over-age destroyers which had been reconditioned and recommissioned.[17] And on April 9, 1941, the State Department, in consideration of the just-completed German occupation of Denmark, entered into an executive agreement with the Danish minister in Washington, whereby the United States acquired the right to occupy Greenland for purposes of defense.[18]

***The Post-War Years.***—Post-war diplomacy of the United States was greatly influenced by the executive agreements entered into at Cairo, Teheran, Yalta, and Potsdam.[19] For a period, the formal treaty—the signing of the United Nations Charter and the entry into the multinational defense pacts, like NATO, SEATO, CENTRO, and the like—reestablished itself, but soon the executive agreement, as an adjunct of treaty arrangement or solely through presidential initiative, again became the principal instrument of United States foreign policy, so that it became apparent in the 1960's that the Nation was committed in one way or another to assisting over half the countries of the world protect themselves.[20] Congressional disquietitude did not result in anything more substantial than passage of a "sense of the Senate" resolution expressing a desire that "national commitments" be made more solemnly in the future than in the past.[21]

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[16] Id., 391.

[17] Id., 391–393. Attorney General Jackson's defense of the presidential power to enter into the arrangement placed great reliance on the President's "inherent" powers under the Commander-in-Chief clause and as sole organ of foreign relations but ultimately found adequate statutory authority to take the steps deemed desirable. 39 *Ops. Atty. Gen.* 484 (1940).

[18] 4 *Dept. State Bull.* 443 (1941).

[19] *See A Decade of American Foreign Policy, Basic Documents 1941–1949*, S. Doc. No. 123, 81st Congress, 1st sess. (1950), pt. 1.

[20] For a congressional attempt to evaluate the extent of such commitments, *see* United States Security Agreements and Commitments Abroad, Hearings Before a Subcommittee of the Senate Foreign Relations Committee, 91st Congress, 1st sess. (1969), 10 pts.; *see also U.S. Commitments to Foreign Powers*, Hearings Before the Senate Foreign Relations Committee on S. Res. 151, 90th Congress, 1st sess. (1967).

[21] The "National Commitments Resolution," S. Res. 85, 91st Congress, 1st sess., passed by the Senate June 25, 1969, stated:

"Whereas accurate definition of the term 'national commitment' in recent years has become obscured: Now, therefore, be it

"Resolved, That (1) a national commitment for the purpose of this resolution means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the Armed

### The Domestic Obligation of Executive Agreements

When the President enters into an executive agreement, what sort of obligation is thereby imposed upon the United States? That international obligations of potentially serious consequences may be imposed is obvious and that such obligations may linger for long periods of time is equally obvious.[1] But the question is more directly pointed to the domestic obligations imposed by such agreements; are treaties and executive agreements interchangeable insofar as domestic effect is concerned?[2] Executive agreements entered into pursuant to congressional authorization and probably through treaty obligations present little doctrinal problem; those arrangements which the President purports to bind the Nation with solely on the basis of his constitutional powers, however, do raise serious questions.

Until recently, it was the view of most judges and scholars that this type of executive agreement did not become the "law of the land" pursuant to the supremacy clause because the treaty format was to adhered to.[3] A different view seemed to underlay the Supreme Court decision in *Altman & Co.* v. *United States,*[4] in which it was concluded that a jurisdictional statute reference to "treaty" encompassed an executive agreement. The idea flowered in *United States* v. *Belmont,*[5] where the Court, in an opinion by Justice Suth-

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Forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both House of Congress specifically providing for such commitment."

*See also* S. Rept. No. 797, 90th Congress, 1st sess. (1967).

[1] In 1918 Secretary of State Lansing assured the Senate Foreign Relations Committee that the Lansing-Ishii Agreement had no binding force on the United States, that it was simply a declaration of American policy so long as the President and State Department might choose to continue it. 1 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 547. In fact, it took the Washington Conference of 1921, two formal treaties, and an exchange of notes to eradicate it, while the "Gentlemen's Agreement" was finally ended after 17 years only by an act of Congress. W. McClure, *International Executive Agreements* (New York: 1941), 97, 100.

[2] *See* E. Byrd, *Treaties and Executive Agreements in the United States* (The Hague: 1960), 151-157.

[3] E.g., *United States* v. *One Bag of Paradise Feathers,* 256 F. 301, 306 (C.A. 2, 1919); 1 W. Willoughby, *The Constitutional History of the United States* (New York: 2d ed. 1929), 589. The State Department held the same view. 5 G. Hackworth, *Digest of International Law* (Washington: 1944), 426.

[4] 224 U.S. 583 (1912).

[5] 301 U.S. 324 (1937).

erland, following on his *Curtiss-Wright* [6] opinion, gave domestic effect to the Litvinov Agreement. At issue was whether a district court of the United States was correct in dismissing an action by the United States, as assignee of the Soviet Union, for certain moneys which had once been the property of a Russian metal corporation the assets of which had been appropriated by the Soviet government. The lower court had erred, the Court ruled. The President's act in recognizing the Soviet government, and the accompanying agreements, constituted, said the Justice, an international compact which the President, "as the sole organ" of international relations for the United States, was authorized to enter upon without consulting the Senate. Nor did state laws and policies make any difference in such a situation, for while the supremacy of treaties is established by the Constitution in express terms, yet the same rule holds "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States." [7]

In *United States* v. *Pink*,[8] decided five years later, the same course of reasoning was reiterated with added emphasis. The question here involved was whether the United States was entitled under the Executive Agreement of 1933 to recover the assets of the New York branch of a Russian insurance company. The company argued that the decrees of confiscation of the Soviet Government did not apply to its property in New York, and could not consistently with the Constitution of the United States and that of New York. The Court, speaking by Justice Douglas, brushed these arguments aside. An official declaration of the Russian government itself settled the question of the extraterritorial operation of the Russian decree of nationalization and was binding on American courts. The power to remove such obstacles to full recognition as settlement of claims of our nationals was "a modest implied power of the President who is the 'sole organ of the Federal Government in the field of international relations'. . . . It was the judgment of the political department that full recognition of the Soviet Government required the settlement of outstanding problems including the claims of our nationals. . . . We would usurp the executive

[6] *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936). *See supra*, pp. 448–450.

[7] Id., 330–332.

[8] 315 U.S. 203 (1942).

function if we held that the decision was not final and conclusive on the courts.

"It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. . . . But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. . . . Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. . . .

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would 'imperial the amicable relations between governments and vex the peace of nations.' . . . It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government has diligently endeavored to establish. . . .

"No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." [9]

No Supreme Court decision subsequent to *Belmont* and *Pink* is available for consideration. Whether the cases in fact turned on the particular fact that the executive agreement in question was incidental to the President's right to recognize a foreign state, despite the language which equates treaties and executive agreements for purposes of domestic law, cannot be known. Certainly, executive agreements entered into solely on the authority of the President's constitutional powers are not the law of the land because of the language of the supremacy clause and the absence of any congressional participation denies them the political requirements they may well need to attain this position. Nonetheless, so long as *Bel*

[9] Id., 229–234. Chief Justice Stone and Justice Roberts dissented.

*mont* and *Pink* remain unqualified, it must be considered that executive agreements do have a significant status in domestic law.[10] This status was another element in the movement for a constitutional amendment in the 1960's to limit the President's powers in this field, a movement which ultimately failed.[11]

## THE EXECUTIVE ESTABLISHMENT

### Office

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." [1]

***Ambassadors and Other Public Ministers.***—The term "ambassadors and other public ministers," comprehends "all officers having diplomatic functions, whatever their title or designation." [2] It was originally assumed that such offices were established by the Constitution itself, by reference to the Law of Nations, with the consequence that appointments might be made to them whenever the appointing authority—the President and Senate—deemed desirable.[3] During the first sixty-five years of the Government, Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation, even of ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provi-

[10] *But see United States* v. *Guy W. Capps, Inc.*, 204 F. 2d 655 (C.A. 4, 1953), wherein Chief Judge Parker held that an executive agreement entered into by the President without congressional authorization or ratification could not displace domestic law inconsistent with such agreement. The Supreme Court affirmed on other grounds and declined to consider this matter. 348 U.S. 296 (1955).

[11] *Supra*, pp. 510–511. There were numerous variations in language, but typical was § 3 of S.J. Res. 1, as reported by the Senate Judiciary Committee, 83d Congress, 1st sess. (1953), which provided: "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article." The limitation relevant on this point was in § 2 which provided: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

[1] *United States* v. *Hartwell*, 6 Wall. 73 U.S. 385, 393 (1868).

[2] 7 *Ops. Atty. Gen.* 168 (1855).

[3] It was so assumed by Senator William Maclay. *The Journal of William Maclay*, E. Maclay ed. (New York, 1890), 109–110.

sions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents.

In 1814, however, when President Madison appointed, during a recess of the Senate, the Commissioners who negotiated the Treaty of Ghent the theory on which the above legislation was based was drawn into question. Inasmuch, it was argued, as these offices had never been established by law, no vacancy existed to which the President could constitutionally make a recess appointment. To this argument it was answered that the Constitution recognizes "two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first descriptions organize the Government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive." [4]

By the opening section of the act of March 1, 1855, it was provided that "from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary," with a specified annual compensation for each, "to the following countries, . . ." In the body of the act was also this provision: "The President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the Government at the time of their appointment, . . ." [5] The question of the interpretation of the act having been referred to Attorney General Cushing, he ruled that its total effect, aside from its salary provisions, was recommendatory only. It was "to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister pleni-

[4] 26 *Annals of Congress* 694–722 (1814) (quotation appearing at 699); 4 *Letter and Other Writings of James Madison* (Philadelphia: 1865), 350–353.

[5] 10 Stat. 619, 623.

potentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more." [6]

This line of reasoning is only partially descriptive of the facts. The Foreign Service Act of 1946,[7] pertaining to the organization of the foreign service, diplomatic as well as consular, contains detailed provisions as to grades, salaries, promotions, and, in part, as to duties. Under the terms thereof the President, by and with the advice and consent of the Senate, appoints ambassadors, ministers, foreign service officers, and consuls, but in practice the vast proportion of the selections are made in conformance to recommendations of a Board of the Foreign Service.[8]

**Presidential Diplomatic Agents**

What the President may have lost in consequence of the intervention of Congress in this field, he has made good through his early conceded right to employ, in the discharge of his diplomatic function, so-called "special," "personal," or "secret" agents without consulting the Senate. When President Jackson's right to resort to this practice was challenged in the Senate in 1831, it was defended by Edward Livingston, Senator from Louisiana, to such good purpose that Jackson made him Secretary of State. "The practice of appointing secret agents," said Livingston, "is coeval with our existence as a nation, and goes beyond our acknowledgement as such by other powers. All those great men who have figured in the history of our diplomacy, began their career, and performed some of their most important services in the capacity of secret agents, with full powers. Franklin, Adams, Lee, were only commissioners; and in negotiating a treaty with the Emperor of Morocco, the selection of the secret agent was left to the Ministers appointed to make the treaty; and, accordingly, in the year 1785, Mr. Adams and Mr. Jefferson appointed Thomas Barclay, who went to Morocco and made a treaty, which was ratified by the Ministers at Paris.

"These instances show that, even prior to the establishment of the Federal Government, secret plenipotentiaries were known, as well in the practice of our own country as in the general law of nations: and that these secret agents were not on a level with messengers, letter carriers, or spies, to whom it has been found necessary in argument to assimilate them. On the 30th March, 1795, in the recess of the Senate, by letters patent under the great broad seal of the United States, and the signature of their President,

[6] 7 *Ops. Atty. Gen.* 186, 220 (1855).
[7] 60 Stat. 999, 22 U.S.C. § 801 *et seq.*
[8] 22 U.S.C. §§ 821, 826, 827, 901, 902, 906, 938.

(that President being George Washington,) countersigned by the Secretary of State, David Humphreys was appointed commissioner plenipotentiary for negotiating a treaty of peace with Algiers. By instructions from the President, he was afterwards authorized to employ Joseph Donaldson as agent in that business. In May, of the same year, he did appoint Donaldson, who went to Algiers, and in September of the same year concluded a treaty with the Dey and Divan, which was confirmed by Humphreys, at Lisbon, on the 28th November in the same year, and afterwards ratified by the Senate, and an act passed both Houses on 6th May, 1796, appropriating a large sum, twenty-five thousand dollars annually, for carrying it into effect." [9]

The precedent afforded by Humphreys' appointment without reference to the Senate has since been multiplied many times,[10] as witness the mission of A. Dudley Mann to Hanover and other German states in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, of J. H. Blount to Hawaii in 1893. The last named case is perhaps the most extreme of all. Blount, who was appointed while the Senate was in session but without its advice and consent, was given "paramount authority" over the American resident minister at Hawaii and was further empowered to employ the military and naval forces of the United States, if necessary to protect American lives and interests. His mission raised a vigorous storm of protest in the Senate, but the majority report of the committee which was created to investigate the constitutional question vindicated the President in the following terms: "A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions, without dissent on the part of Congress or the people of the United States. . . . These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, . . . ." [11] The continued vitality of

[9] 11 T. Benton, *Abridgement of the Debates of Congress* (Washington: 1860), 221.

[10] S. Misc. Doc. 109, 50th Congress, 1st Sess. (1888), 104.

[11] S. Rept. No. 227, 53d Congress, 2d Sess. (1894), 25. At the outset of our entrance into World War I President Wilson dispatched a mission to "Petrograd," as it was then called, without nominating the Members of it to the Senate. It was headed by Mr. Elihu Root, with "the rank of ambassador," while some of his associates bore "the rank of envoy extraordinary."

the practice is attested by such names as Colonel House, the late Norman H. Davis, who filled the role of "ambassador at large" for a succession of administrations of both parties, Professor Philip Jessup, Mr. Averell Harriman, and other "ambassadors at large" of the Truman Administration, and Professor Henry Kissinger of the Nixon Administration.

How is the practice to be squared with the express words of the Constitution? Apparently, by stressing the fact that such appointments or designations are ordinarily merely temporary and for special tasks, and hence do not fulfill the tests of "office" in the strict sense. In the same way the not infrequent practice of Presidents of appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments may be regularized, notwithstanding the provision of Article I, § 6, clause 2 of the Constitution, which provides that "no Senator or Representative shall . . . be appointed to any civil Office under the Authority of the United States, which shall have been created," during his term; and no officer of the United States, "shall be a Member of either House during his Continuance in Office." [12] The Treaty of Peace with Spain, the treaty to settle the Bering Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotated by commissions containing Senators and Representatives.

**Congressional Regulation of Offices**

That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is *by law* and takes place by virtue of Congress' power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers. As an incident to the establishment of an office Congress has also the power to determine the qualifications of the officer and in so doing necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representative of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by

[12] *See* 2 G. Hoar, *Autobiography of Seventy Years* (New York, 1903), 48–51.

others.[1] Indeed, it has contrived at times to designate a definite eligibility, thereby virtually usurping the appointing power.[2]

But when Congress provided for selection of the members of the Federal Election Commission, two by the President, two by the Senate, and two by the House, with confirmation of all six members vested in both the House and the Senate, the Court unanimously held the scheme to violate the appointments clause and the principles of separation of powers. The term "officers of the United States" is a substantive one requiring that any appointee exercising significant authority pursuant to the laws of the United States be appointed in the manner prescribed by the appointments clause.[3] The Court did hold, however, that the Commission so appointed and confirmed could be delegated the powers Congress itself could exercise, that is, those investigative and informative functions that congressional committees carry out were properly vested in this body.

***Congressional Regulation of Conduct in Office.***—Furthermore, Congress has very broad powers in regulating the conduct in office of officers and employees of the United States, especially regarding their political activities. By an act passed in 1876 it prohibited "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, . . . from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes." [4] The validity of this measure

[1] Justice Brandeis, dissenting in *Myers* v. *United States*, 272 U.S. 52, 264–274 (1926).

[2] *See* data in E. Corwin, *The President: Office and Powers 1787–1957* (New York: 4th ed. 1957), 363–365. Congress has repeatedly designated individuals, sometimes by name, more frequently by reference to a particular office, for the performance of specified acts or for posts of a nongovernmental character; e.g., to paint a picture (Johnathan Trumbull), to lay out a town, to act as Regents of Smithsonian Institution, to be managers of Howard Institute, to select a site for a post office or a prison, to restore the manuscript of the Declaration of Independence, to erect a monument at Yorktown, to erect a statue of Hamilton, and so on and so forth. Note, "Power of Appointment to Public Office under the Federal Constitution," 42 Harv. L. Rev. 426, 430–431 (1929). In his message of April 13, 1822, President Monroe stated the thesis that, "as a general principle, . . . Congress have no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow-citizens." 2 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 698, 701. The statement is ambiguous, but its apparent intention is to claim for the President unrestricted power in determining who are proper persons to fill newly created offices.

[3] *Buckley* v. *Valeo*, 424 U.S. 1, 109–143 (1976). The Court took pains to observe that the clause was violated not only by the appointing process but by the confirming process, inclusion of the House of Representatives, as well. Id., 137.

[4] 19 Stat. 143, 169 (1876).

having been sustained,[5] the substance of it, with some elaborations, was incorporated in the Civil Service Act of 1883.[6] By the Hatch Act [7] all persons in the executive branch of the Government, or any department or agency thereof, except the President and Vice President and certain "policy determining" officers, are forbidden to "take an active part in political management or political campaigns," although they are still permitted to "express their opinions on all political subjects and candidates." In *United Public Workers* v. *Mitchell* [8] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments.

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[5] In *Ex parte Curtis*, 106 U.S. 371 (1882), Chief Justice Waite reviews early congressional legislation regulative of conduct in office. "The act now in question is one regulating in some particulars the conduct of certain officers and employes of the United States. It rests on the same principle as that originally passed in 1789 at the first session of the first Congress, which makes it unlawful for certain officers of the Treasury Department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a State, or of the United States (Rev. Stat., sect. 243); and that passed in 1791, which makes it an offence for a clerk in the same department to carry on trade or business in the funds or debts of the States or of the United States, or in any kind of public property (id., sect. 244); and that passed in 1812, which makes it unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (id., sect. 713); and that passed in 1853, which prohibits every officer of the United States or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives, from acting as an agent or attorney for the prosecution of any claim against the United States (id., sect. 5498); and that passed in 1863, prohibiting members of Congress from practicing in the Court of Claims (id., sect. 1058); and that passed in 1867, punishing, by dismissal from service, an officer or employee of the government who requires or requests any workingman in a navy-yard to contribute or pay any money for political purposes (id., sect. 1456); and that passed in 1868, prohibiting members of Congress from being interested in contracts with the United States (id., sect. 3739); and another, passed in 1870, which provides that no officer, clerk, or employe in the government of the United States shall solicit contributions from other officers, clerks, or employes for a gift to those in a superior official position, and that no officials or clerical superiors shall receive any gift or present as a contribution to them from persons in government employ getting a less salary than themselves, and that no officer or clerk shall make a donation as a gift or present to any official superior (id., sect. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the Legislative Department of the Government from its organization, and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination." Id., 372–373.

[6] 22 Stat. 403, as amended, 5 U.S.C. § 1101 *et seq.*

[7] 54 Stat. 767 (1940), 5 U.S.C. § 1501 *et seq.*, § 7324 *et seq.*

[8] 330 U.S. 75 (1947). *See also Civil Service Comm.* v. *National Assn. of Letter Carriers*, 413 U.S. 548 (1973), in which the constitutional attack was renewed and was again rejected.

***The Loyalty Issue.***—By section 9A of the Hatch Act of 1939, it is made "unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." [9] The 79th Congress followed up this provision with a rider to its appropriation acts forbidding the use of any appropriated funds to pay the salary of any person who advocated, or belonged to an organization which advocated, the overthrow of the Government by force, or of any person who engaged in a strike or who belonged to an organization which asserted the right to strike against the Government.[10] These provisos ultimately wound up in permanent law requiring all government employees to take oaths disclaiming either disloyalty or strikes as a device for dealing with the Government as an employer.[11] Along with the loyalty-security programs initiated by President Truman [12] and carried forward by President Eisenhower,[13] these measures reflected the Cold War era and the fear of subversion and espionage following the disclosures of several such instances here and abroad.[14]

***Legislation Increasing Duties of an Officer.***—Finally, Congress may devolve upon one already in office additional duties which are germane to his office without thereby "rendering it necessary that the incumbent should be again nominated and appointed." Such legislation does not constitute an attempt by Congress to seize the appointing power.[15]

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[9] 53 Stat. 1147, 5 U.S.C. § 7311.

[10] *See Report of the Special Committee on The Federal Loyalty-Security Program*, The Association of the Bar of the City of New York (New York: 1956), 60.

[11] 5 U.S.C. § 3333. The loyalty disclaimer oath was declared unconstitutional in *Stewart* v. *Washington*, 301 F. Supp. 610 (D.C.D.C. 1969), and the Government elected not to appeal. The strike disclaimer oath was voided in *National Association of Letter Carriers* v. *Blount*, 305 F. Supp, 546 (D.C.D.C. 1969); after noting probable jurisdiction, 397 U.S. 1062 (1970), the Court dismissed the appeal on the Government's motion. 400 U.S. 801 (1970). The actual prohibition on strikes, however, has been sustained. *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.C.D.C. 1971), *aff'd per curiam*, 404 U.S. 802 (1971).

[12] E.O. 9835, 12 *Fed. Reg.* 1935 (1947).

[13] E.O. 10450, 18 *Fed. Reg.* 2489 (1953).

[14] *See* generally, *Report of the Special Committee on The Federal Loyalty-Security Program*, The Association of the Bar of the City of New York (New York: 1956). The cases arising out of this program are discussed *infra, pp.* 1288–1290.

[15] *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

***Inferior Officers: Employees.***—Excepting the President and Vice President, all persons in the civil service of the National Government are appointive, and fall into one of three categories, those who are appointed by the President, "by and with the advice and consent of the Senate", inferior officers, whose appointment Congress has vested by law "in the President alone, in the courts of law, or in the heads of departments", and employees, a term which is here used in a peculiar sense. Ordinarily it denotes one who stands in a contractual relationship to his employer, but here it signifies all subordinate officials of the National Government receiving their appointments at the hands of officials who are not specifically recognized by the Constitution as capable of being vested by Congress with the appointing power.[16] Inferior officers are usually officers intended to be subordinate to those in whom their appointment is vested,[17] but the requirement is by no means absolute.[18]

**Stages of Appointment Process**

***Nomination.***—The Constitution appears to distinguish three stages in appointments by the President with the advice and consent of the Senate. The first is the "nomination" of the candidate by the President alone; the second is the assent of the Senate to the candidate's "appointment"; and the third is the final appointment and commissioning of the appointee, by the President.[1]

***Senate Approval.***—The fact that the power of nomination belongs to the President alone prevents the Senate from attaching conditions to its approval of an appointment, such as it may do to its approval of a treaty. In the words of an early opinion of the At-

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[16] *United States* v. *Germaine*, 99 U.S. 508 (1879) is the leading case. For further citations *see Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890). The Court will, nevertheless, be astute to ascribe to a head of department an appointment made by an inferior of such head. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 663 (1892).

[17] *Matter of Hennen*, 13 Pet. (38 U.S.) 230, 257–258 (1839); *United States* v. *Germaine*, 99 U.S. 508, 509 (1879). The statement on the point is in both instances *obiter*.

[18] *Ex parte Siebold*, 100 U.S. 371, 397 (1880).

[1] "They [the clauses of the Constitution] seem to contemplate three distinct operations: 1st. The nomination. This is the sole act of the President, and is completely voluntary. 2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. 3d. The commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.' " *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137, 155–156 (1803). Marshall's statement that the appointment "is the act of the President," conflicts with the more generally held and sensible view that when an appointment is made with its consent, the Senate shares the appointing power. 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1525; *Matter of Hennen*, 13 Pet. (38 U.S.) 230, 259 (1839).

torney General: "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration." [2] This view is borne out by early opinion [3] as well as by the record of practice under the Constitution.

***When Senate Consent Is Complete.***—Early in January, 1931, the Senate requested President Hoover to return its resolution notifying him that it advised and consented to certain nominations to the Federal Power Commission. In support of its action the Senate invoked a long-standing rule permitting a motion to reconsider a resolution confirming a nomination within "the next two days of actual executive session of the Senate" and the recall of the notification to the President of the confirmation. The nominees involved having meantime taken the oath of office and entered upon the discharge of their duties, the President responded with a refusal, saying: "I cannot admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." The Senate thereupon voted to reconsider the nominations in question, again approving two of the nominees, but rejecting the third, against whom it instructed the District Attorney of the District of Columbia to institute *quo warranto* proceedings in the Supreme Court of the District. In *United States* v. *Smith* [4] the Supreme Court overruled the proceedings on the ground that the Senate had never before attempted to apply its rule in the case of an appointee who had already been installed in office on the faith of the Senate's initial consent and notification to the President. In 1939 the late President Roosevelt rejected a similar demand by the Senate, an action was challenged.[5]

SECTION 3. The President * * * shall Commission all the Officers of the United States.

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[2] 3 *Ops. Atty. Gen.* 188 (1837).

[3] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 1525–1526; 5 *Works of Thomas Jefferson*, P. Ford ed., (New York: 1904), 161–162; 9 *Writings of James Madison*, G. Hunt ed. (New York: 1910), 111–113.

[4] 286 U.S. 6 (1932).

[5] E. Corwin, *The President: Office and Powers 1787–1957* (New York: 4th ed. 1957), 77.

***Commissioning the Officer.***—This, as applied in practice, does not mean that he is under constitutional obligation to commission those whose appointments have reached that stage but merely that it is he and no one else who has the power to commission them, which he may do at his discretion. The sealing and delivery of the commission is, on the other hand, by the doctrine of *Marbury* v. *Madison*, in the case both of appointee by the President and Senate and by the President alone, a purely ministerial act which has been lodged by statute with the Secretary of State and the performance of which may be compelled by mandamus unless the appointee has been in the meantime validly removed.[1] By an opinion of the Attorney General many years later, however, the President, even after he has signed a commission, still has a *locus poenitentiae* and may withhold it; nor is the appointee in office till he has this commission.[2] This is probably the correct doctrine.[3]

Clause 3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

**Recess Appointments**

Setting out from the proposition that the very nature of the executive power requires that it shall always be "in capacity for action," Attorneys General early came to interpret "happen" to mean "happen to exist," and long continued practice securely establishes this construction. It results that whenever a vacancy may have occurred in the first instance, or for whatever reason, if it still continues after the Senate has ceased to sit and so cannot be consulted, the President may fill it in the way described.[4] But a

[1] *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137, 157-158, 173 (1803).

[2] 12 *Ops. Atty. Gen.* 306 (1867).

[3] It should be remembered that, for various reasons, Marbury got neither commission nor office. The case assumes, in fact, the necessity of possession of his commission by the appointee.

[4] *See* the following *Ops. Atty. Gen.*: 1:631 (1823); 2:525 (1832); 3:673 (1841); 4:523 (1846); 10:356 (1862); 11:179 (1865); 12:32 (1866); 12:455 (1868); 14:563 (1875); 15:207 (1877); 16:523 (1880); 18:28 (1884); 19:261 (1889); 26:234 (1907); 30:314 (1914); 33:20 (1921). In 4 *Ops. Atty. Gen.* 361, 363 (1845), the general doctrine was held not to apply to a yet unfilled office which was created during the previous session of Congress, but this distinction was rejected in the following *Ops. Atty. Gen.*: 12:455 (1868); 18:28 (1884); and 19:261 (1889). In harmony with the opinions is *United States* v. *Allocco*, 305 F.2d 704 (C.A. 2, 1962). For the early practice with reference to recess appointments, *see* 2 G. Haynes, *The Senate of the United States*, (Boston: 1938), 772-778.

Senate "recess" does not include holidays, or very brief temporary adjournments,[5] while by an act of Congress, if the vacancy existed when the Senate was in session, the *ad interim* appointee, subject to certain exemptions, may receive no salary until he has been confirmed by the Senate.[6]

***Ad Interim Designations.***—To be distinguished from the power to make recess appointments is the power of the President to make temporary or *ad interim* designations of officials to perform the duties of other absent officials. Usually such a situation is provided for in advance by a statute which designates the inferior officer who is to act in place of his immediate superior. But in the lack of such provision both theory and practice concede the President the power to make the designation.[7]

**The Removal Power**

***The Myers Case.***—Save for the provision which it makes for a power of impeachment of "civil officers of the United States," the Constitution contains no reference to a power to remove from office, and until its decision in *Myers* v. *United States*,[1] October 25, 1926, the Supreme Court had contrived to side-step every occasion for a decisive pronouncement regarding the removal power, its extent, and location. The point immediately at issue in the *Myers* case was the effectiveness of an order of the Postmaster General, acting by direction of the President, to remove from office a first-class postmaster, in the face of the following provision of an act of Congress passed in 1876: "Postmasters of the first, second, and

[5] 23 *Ops. Atty. Gen.* 599 (1901); 22 *Ops. Atty. Gen.* 82 (1898). A "recess," however, may be merely "constructive," as when a regular session succeeds immediately upon a special session. It was this kind of situation that gave rise to the once famous *Crum* incident. *See* 3 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 1508–1509.

[6] 5 U.S.C. § 56. In an opinion issued on July 14, 1960 (41 *Ops. Atty. Gen.* 463), the Attorney General ruled (1) that when the Senate adjourns temporarily, as, for example, from July 3 to August 8, 1960, during the second session of the 86th Congress, the President may grant recess appointments to persons whose nominations to vacancies existing at the time the Senate was in session had been submitted to, but not acted upon by the Senate; and (2) that the commission of the officers thus appointed would continue until the end of the session of the Senate which follows the final adjournment *sine die* of the second session of the 86th Congress, probably the end of the first session of the 87th Congress. Although the reconvening of the Senate on August 8 was not the "next session" within the meaning of the Constitution, the President, consistently with 5 U.S.C. § 56, was obligated to submit to the Senate within 40 days after August 8, the names of the recess appointees; but the salaries of the latter would be payable for the duration of their constitutional term or until the Senate had voted not to confirm.

[7] *See* the following *Ops. Atty. Gen.*: 6:358 (1854); 12:32, 41 (1866); 25:258 (1904); 28:95 (1909); 38:298 (1935).

[1] 272 U.S. 52 (1926).

third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." [2]

A divided Court, speaking through Chief Justice Taft, held the order of removal valid, and the statutory provision just quoted void. The Chief Justice's main reliance was on the so-called "decision of 1789," the reference being to Congress' course that year in inserting in the act establishing the Department of State a proviso which was meant to imply recognition that the Secretary would be removable by the President at will. The proviso was especially urged by Madison, who invoked in support of it the opening words of Article II and the President's duty to "take care that the laws be faithfully executed." Succeeding passages of the Chief Justice's opinion erect on this basis a highly selective account of doctrine and practice regarding the removal power down to the Civil War which was held to yield the following results: "That article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed." [3]

[2] 19 Stat. 78, 80.
[3] 272 U.S., 163–164.

The holding in the *Myers* case boils down to the proposition that the Constitution endows the President with an illimitable power to remove all officers in whose appointment he has participated with the exception of judges of the United States. The motivation of the holding was not, it may be assumed, any ambition on the Chief Justice's part to set history aright—or awry.[4] Rather it was the concern which he voiced in the following passage in his opinion: "There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him." [5] Thus spoke the former President Taft, and the result of his prepossession was a rule which, as was immediately pointed out, exposed the so-called "independent agencies," the Interstate Commerce Commission, the Federal Trade Commission, and the like, to presidential domination.

[4] The reticence of the Constitution respecting removal left room for four possibilities, *first*, the one suggested by the common law doctrine of "estate in office," from which the conclusion followed that the impeachment power was the only power of removal intended by the Constitution; *second*, that the power of removal was an incident of the power of appointment and hence belonged, at any rate in the absence of legal or other provision to the contrary, to the appointing authority; *third*, that Congress could, by virtue of its power "to make all laws which shall be necessary and proper," etc., determine the location of the removal power; *fourth*, that the President by virtue of his "executive power" and his duty "to take care that the laws be faithfully executed," possesses the power of removal over all officers of the United States except judges. In the course of the debate on the act to establish a Department of Foreign Affairs (later changed to Department of State) all of these views were put forward, with the final result that a clause was incorporated in the measure which implied, as pointed out above, that the head of the department would be removable by the President at his discretion. Contemporaneously, and indeed until after the Civil War, this action by Congress, in other words "the decision of 1789," was interpreted as establishing "a practical construction of the Constitution" with respect to executive officers appointed without stated terms. However, in the dominant opinion of those best authorized to speak on the subject, the "correct interpretation" of the Constitution was that the power of removal was always an incident of the power of appointment, and that therefore in the case of officers appointed by the President with the advice and consent of the Senate the removal power was exercisable by the President only with the advice and consent of the Senate. For an extensive review of the issue at the time of *Myers*, *see* Corwin "The President's Removal Power Under the Constitution," in 4 *Selected Essays on Constitutional Law* (Chicago: 1938), 1467.

[5] 272 U.S., 134. Note the parallelism of the arguments from separation of powers and the President's ability to enforce the laws in the decision rendered on Congress' effort to obtain a role in the actual appointment of executive officers in *Buckley* v. *Valeo*, 424 U.S. 1, 109–143 (1976).

Unfortunately, the Chief Justice, while professing to follow Madison's leadership, had omitted to weigh properly the very important observation which the latter had made at the time regarding the office of Comptroller of the Treasury. "The Committee," said Madison, "has gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office. I think it is a point worthy of consideration, and shall, therefore, submit a few observations upon it. It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are of a judiciary quality as well as the executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government." [6] In *Humphrey's Executor* v. *United States*,[7] the Court seized upon "the nature of the office" concept and applied it as a much needed corrective to the *Myers* holding.

***The Humphrey Case.***—The material element of this case was that Humphrey, a member of the Federal Trade Commission, was on October 7, 1933, notified by President Roosevelt that he was "removed" from office, the reason being their divergent views of public policy. In due course Humphrey sued for salary. Distinguishing the *Myers* case, Justice Sutherland, speaking for the unanimous Court, said: "A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an office is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is. . . . It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute. . . . Such a body cannot in any proper sense be

[6] *Annals of Congress* 611-612 (1789).

[7] 295 U.S. 602 (1935). The case is also styled *Rathbun, Executor* v. *United States*, Humphrey having, like Myers before him, died in the course of his suit for salary.

characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. . . . We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named, [the Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will. . . .

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute." [8]

***The Wiener Case.***—Curtailment of the President's power of removal, so liberally delineated in the *Myers* decision, apparently was not to end with the *Humphrey* case. Unresolved by the latter was the question whether the President, absent a provision expressly delimiting his authority in the statute creating an agency endowed with quasi-judicial functions, remained competent to remove members serving thereon. To this query the Court supplied a negative answer in *Wiener* v. *United States.*[9] Emphasizing therein that the

[8] 295 U.S., 627-629, 631-632. Justice Sutherland's statement, quoted above, that a Federal Trade Commissioner "occupies no place in the executive department" was not necessary to the decision of the case, was altogether out of line with the same Justice's reasoning in *Springer* v. *Philippine Islands*, 277 U.S. 189, 201-202 (1928), and seems later to have caused the author of it much perplexity. *See* R. Cushman, *The Independent Regulatory Commission* (New York: 1941), 447-448. As Professor Cushman adds: "Every officer and agency created by Congress to carry laws into effect is an arm of Congress. . . . The term may be a synonym; it is not an argument." Id., 451.

[9] 357 U.S. 349 (1958).

duties of the War Claims Commission were wholly adjudicatory and its determinations, final and exempt from review by any other official or judicial body, the Court unanimously concluded that inasmuch as the President was unable to supervise its activities, he lacked the power, independently of statutory authorization, to remove a commissioner serving thereon whose term expired with the life of that agency.

***The Watergate Controversy.***—A dispute arose regarding the discharge of the Special Prosecutor appointed to investigate and prosecute violations of law in the Watergate matter. Congress vested in the Attorney General the power to conduct the criminal litigation of the Federal Government,[10] and it further authorized him to appoint subordinate officers to assist him in the discharge of his duties.[11] Pursuant to presidential direction, the Attorney General designated a Watergate Special Prosecutor with broad power to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself and the regulations provided that the Special Prosecutor "will not be removed from his duties except for extraordinary improprieties on his part." [12] On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor [13] and three days later rescinded the regulation establishing the office.[14] In subsequent litigation, it was held that the firing by the Acting Attorney General had violated the regulations which were in force at the time and which had to be followed until they were rescinded.[15] The Supreme Court in *United States* v. *Nixon* [16]

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[10] 28 U.S.C. § 516.

[11] 28 U.S.C. §§ 509, 510, 515, 533.

[12] 38 Fed. Reg. 14688 (1973). The Special Prosecutor's status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. *Nomination of Elliot L. Richardson to be Attorney General,* Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973), 143 passim.

[13] The formal documents effectuating the result are set out in 9 *Weekly Compilation of Presidential Documents* 1271-1272 (1973).

[14] 38 Fed. Reg. 29466 (1973). The Office was shortly recreated and a new Special Prosecutor appointed. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. See *Nomination of William B. Saxbe to be Attorney General,* Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973).

[15] *Nader* v. *Bork,* 366 F. Supp. 104 (D.C.D.C. 1973).

[16] 418 U.S. 683, 692-697 (1974).

seems to have confirmed this analysis by the district court in upholding the authority of the new Special Prosecutor to take the President to court to obtain evidence in the President's possession. Left unsettled were two questions, the power of the President himself to go over the heads of his subordinates and to fire the Special Prosecutor himself, whatever the regulations said, and the power of Congress to enact legislation establishing an Office of Special Prosecutor free from direction and control of the President.[17]

***Other Phases of Presidential Removal Power.***—Congress may "limit and restrict the power of removal as it deems best for the public interests" in the case of inferior officers.[18] But in the absence of specific legislative provision to the contrary, the President may remove at his discretion an inferior officer whose term is limited by statute,[19] or one appointed with the consent of the Senate.[20] He may remove an officer of the army or navy at any time by nominating to the Senate the officer's successor, provided the Senate approves the nomination.[21] In 1940 the President was sustained in removing Dr. E. A. Morgan from the chairmanship of TVA for refusal to produce evidence in substantiation of charges which he had levelled at his fellow directors.[22] Although no such cause of removal by the President is stated in the act creating TVA, the President's action, being reasonably required to promote the smooth functioning of TVA, was within his duty to "take care that the laws be faithfully executed." So interpreted, it did not violate the principle of administrative independence set forth in *Humphrey* v. *United States*.[23]

**The Presidential Aegis: Demands for Papers**

Presidents have more than once had occasion to stand in a protective relation to their subordinates, assuming their defense in litigation brought against them [1] or pressing litigation in their

[17] The first question remained unstated but the second issue was extensively debated in *Special Prosecutor*, Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973); *Special Prosecutor and Watergate Grand Jury Legislation*, Hearings before the House Judiciary Subcommittee on Criminal Justice, 93d Congress, 1st sess. (1973).

[18] *United States* v. *Perkins*, 116 U.S. 483 (1886).

[19] *Parsons* v. *United States*, 167 U.S. 324 (1897).

[20] *Shurtleff* v. *United States*, 189 U.S. 311 (1903).

[21] *Blake* v. *United States*, 103 U.S. 227 (1881); *Quackenbush* v. *United States*, 177 U.S. 20 (1900); *Wallace* v. *United States*, 257 U.S. 541 (1922).

[22] *Morgan* v. *TVA*, 28 F. Supp. 732 (D.C.E.D. Tenn. 1939), *affd.*, 115 F. 2d 990 (C.A. 6, 1940), *cert. den.* 312 U.S. 701 (1941).

[23] *See United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Ex parte Curtis*, 106 U.S. 371 (1882); and 39 *Ops. Atty. Gen.* 145 (1938).

[1] E.g., 6 *Ops. Atty. Gen.* 220 (1853); *In re Neagle*, 135 U.S. 1 (1890).

behalf,[2] refusing a call for papers from one of the Houses of Congress which might be used, in their absence from the seat of government, to their disadvantage,[3] challenging the constitutional validity of legislation which he deemed detrimental to their interests.[4] One of the principal efforts throughout our history has been his efforts to spread his own official immunity to them, by resisting actions of the courts or of congressional committees to require divulgence of confidential communications from or to the President, that is, communications which Presidents choose to regard as confidential. Only recently, however, has the focus of the controversy shifted from protection of presidential or executive interests to protection of the President himself and the locus of the dispute shifted to the courts.

Following years in which claims of executive privilege were resolved one way or another on the basis of the political strengths of the parties, in primarily interbranch disputes, the issue was in finally the subject of the first judicial elaboration of the doctrine to take place in our history; the doctrine of executive privilege was at once recognized as existing and having a constitutional foundation while at the same time it was definitely bounded in its assertion by the principle of judicial review. Because of these cases, because of the intensified congressional-presidential dispute, and especially because of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for.

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may over-balance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meager yet that it is not possible so to state, however.

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[2] *United States* v. *Lovett*, 328 U.S. 303 (1946).

[3] E.g., 2 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 847.

[4] *United States* v. *Lovett*, 328 U.S. 303, 313 (1946).

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions.[5] The current and ongoing litigation involved, of course, the claim of confidentiality of conversations between the President and his aides.

***Private Access to Government Information.***—Private parties may seek to obtain information from the Government either to assist in defense to criminal charges brought by the Government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the Government or between private parties.[6] In criminal

[5] For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, see *Executive Privilege: The Withholding of Information by the Executive*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971), 420–443, (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) information relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. *The Power of the President To Withhold Information from the Congress, Memorandum of the Attorney General*, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d sess. (Comm. Print) (1958), reprinted as Rogers, "Constitutional Law: The Papers of the Executive Branch," 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindeinst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. *Executive Privilege, Secrecy in Government, Freedom of Information*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st sess. (1973), I:18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, see R. Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: 1974). The book, however, precedes the Court decision.

[6] There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In § 522(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. See *EPA* v. *Mink*, 410 U.S. 73 (1973); *Vaughn* v. *Rosen*, 484 F. 2d 820 (C.A.D.C. 1973), *cert. den.*, 415 U.S. 977 (1974).

cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the prosecution.[7] Generally speaking, when the prosecution is confronted with a judicial order to turn over information to a defendant that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure,[8] but that alternative may not always be available; in the Watergate prosecution only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibly have been realized.[9]

The civil type of case is illustrated in *United States* v. *Reynolds*,[10] a tort claim brought against the United States for compensation for the deaths of civilians in the crash of an Air Force plane testing secret electronics equipment. Plaintiffs sought discovery of the Air Force's investigation report on the accident and the Government resisted on a claim of privilege as to the nondisclosure of military secrets. The Court accepted the Government's claim, holding that courts must determine whether under the circumstances the claim of privilege was appropriate without going so far as to force disclosure of the thing the privilege is designed to protect. The showing of necessity of the private litigant for the information should govern in each case how far the trial court should probe; where the necessity is strong, the court should require a strong showing of the appropriateness of the privilege claim but once satisfied of the appropriateness no matter how compelling the need the privilege prevails.[11]

***Prosecutorial and Grand Jury Access to Presidential Documents.***—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President,

[7] See *Brady* v. *Maryland*, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in *United States* v. *Burr*, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.

[8] E.g., *Alderman* v. *United States*, 394 U.S. 165 (1968).

[9] Thus, defendant in *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.C.D.C. 1974), was held entitled to access to material in the custody of the President wherein the President's decision to dismiss the prosecution would probably have been unavailing.

[10] 345 U.S. 1 (1953).

[11] Id., 7–8, 9–10, 11. *See also Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (C.A.D.C. 1960); *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A.D.C. 1963). *And see Totten* v. *United States*, 92 U.S. 105 (1875).

since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for tape recordings of presidential conversations and other documents relating to the commission of criminal actions.[12] While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have "a presumptive privilege." "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." The operation of government is furthered by the protection accorded communications between high government officials and those who advise and assist them in the performance of their duties. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The separation of powers basis derives from the conferral upon each of the branches of the Federal Government of powers to be exercised by each of them in great measure independent of the other branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.[13]

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other branches, but it is the function of the courts to exercise the judicial power, "to say what the law is." The Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly privileged, are to be made available. Thus, while the President's claim of privilege is entitled to deference, the courts

[12] *United States* v. *Nixon*, 418 U.S. 683, 692–697 (1974).

[13] Id., 707–708. Presumably, the opinion recognizes a similar power existent in the federal courts to preserve the confidentiality of judicial deliberations, cf. *New York Times Co. v. United States*, 403 U.S. 713, 752 n. 3 (1971) (Chief Justice Burger dissenting), and in each House of Congress to treat many of its papers and documents privileged. Cf. *Soucie* v. *David*, 448 F. 2d 1067, 1080, 1081–1982 (C.A.D.C. 1971) (Judge Wilkey concurring); *Military Cold War Escalation and Speech Review Policies*, Hearings before the Senate Committee on Armed Services, 87th Congress, 2d sess. (1962), 512 (Senator Stennis). *See Calley* v. *Callaway*, 519 F. 2d 184 (C.A. 5, 1975) (*en banc*), *cert. den.*, 425 U.S. 911 (1976); *United States* v. *Ehrlichman*, 389 F. Supp. 95 (D.C.D.C., 1974).

must when the claim depends solely on a broad, undifferentiated claim of confidentiality balance two sets of interests.

"In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

"On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. . . .

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." [14]

Obviously, this decision leaves much unresolved. It does recognize the constitutional status of executive privilege as a doctrine. It does affirm the power of the courts to resolve disputes over claims of the privilege. But it leaves unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets. It does not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases; nor does it touch upon denial of information to Congress.

Neither does the Court's decision in *Nixon* v. *Administrator of General Services* [15] elucidate any of these or other questions that

[14] 418 U.S. 683, 711-713. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in *Nixon* v. *Sirica*, 487 F. 2d 700 (C.A.D.C. 1973).

[15] 433 U.S. 425, 446-455 (1977). *See* id., 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting). The decision does resolve one outstanding question; assertion of the privilege is not limited to incumbent Presidents. Id., 447-449.

may be raised to any great degree. In upholding the Presidential Recordings and Materials Preservation Act, which directed the Government to take custody of former President Nixon's records to be screened, catalogued, and processed by professional archivists, in GSA, the Court viewed the assertion of privilege as directed only to the facial validity of the requirement of screening by executive branch professionals and not at all to be related to the possible public disclosure of some of the records. The decision does go beyond the first decision's recognition of the overbalancing force of the necessity for disclosure in criminal trials to find "comparable" "adequate justifications" for congressional enactment of the law, including the preservation of the materials for legitimate historical and governmental purposes, the rationalization of preservation and access to public needs as well as each President's wishes, the preservation of the materials as a source for facilitating a full airing of the events leading to the former President's resignation for public and congressional understanding, and preservation for the light shed upon issues in civil or criminal litigation. While interestingly instructive, the decision may be so attuned to the narrow factual circumstances that led to the Act's passage as to leave the case of little value as precedent.

***Congressional Access to Executive Branch Information.***—Presidents and Congresses have engaged in protracted disputes over provision of information from the former to the latter, but the basic thing to know is that most congressional requests for information are complied with. The disputes, however, have been colorful and varied.[16] The basic premise of the concept of executive privilege, as it is applied to resist requests for information from Congress as from private parties with or without the assistance of the courts, is found in the doctrine of separation of powers, the prerogative of each coequal branch to operate within its own sphere independent of control or direction of the other branches. In this context, the President then asserts that phase of the claim of privilege relevant to the moment, such as confidentiality of communications, protection of diplomatic and military secrets, preservation of investigative records. Counterposed against this assertion of presidential

[16] For conflicting accounts of many of the disputes and conflicting conclusions drawn therefrom, compare *Executive Privilege: The Withholding of Information by the Executive*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971), 420 (then-Assistant Attorney General Rehnquist), and *Executive Privilege, Secrecy in Government, Freedom of Information*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st sess. (1973), 18 (then-Attorney General Kleindienst), with R. Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: 1974), 163–208.

privilege is the power of Congress to obtain information upon which to legislate, to oversee the carrying out of its legislation, to check and root out corruption and wrongdoing in the Executive Branch, involving both the legislating and appropriating function of Congress, and in the final analysis to impeach the President, the Vice President, and all civil officers of the Federal Government.

Until quite recently, all disputes between the President and Congress with regard to requests for information were settled in the political arena, with the result that few if any lasting precedents were created and only disputed claims were left to future argument. The Senate Select Committee on Presidential Campaign Activities, however, elected to seek a declaratory judgment in the courts with respect to the President's obligations to obey its subpoenas. The Committee lost its case but the courts based their rulings upon prudential considerations rather than upon questions of basic power, inasmuch as by the time the case was considered impeachment proceedings were pending in the House of Representatives.[17] The House Judiciary Committee subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas.[18] Pending in the 93d and 94th Congresses were bills by which Congress would authorize congressional committees to go to court to enforce their subpoenas; the bills did not purport to define executive privilege, although some indicate a standard by which the federal court is to determine whether the material sought is lawfully being withheld from Congress.[19] The controversy gives little indication at the present time of abating[20] and it may be assumed that whenever

[17] *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 370 F. Supp. 521 (D.C.D.C.), *aff'd.*, 498 F. 2d 725 (C.A.D.C. 1974).

[18] President Nixon's position was set out in a June 9, 1974, letter to the Chairman of the House Judiciary Committee, 10 *Weekly Comp. of Pres. Docs.* 592 (1974). The impeachment article and supporting material are set out in H. Rept. No. 93-1305, 93d Cong., 2d sess. (1974).

[19] See S. 2432, 93d Cong., 1st sess. (1973), and S. Rept. No. 93-612. This bill passed the Senate December 15, 1973. And see H.R. 12462, 93d Cong., 2d sess. (1974), and H. Rept. No. 93-990. See also S. 2170 and *Congressional Right to Information Act*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 94th Cong., 1st sess. (1975).

[20] Most of the disputes continue to be compromised. E.g., Secretary Kissinger's dispute with the House Select Committee on Intelligence, which had subpoenaed a classified memorandum from the State Department. The Secretary's claim of privilege related to the necessity of confidentiality in the formulation of policy. The document was in essence presented to the Committee in a collage of documents on the same subject matter without individual identification. See 73 Dept. of State Bull. 645, 748, 750 (1975), and 121 Cong. Rec. (daily ed.) H 10698 (November 5, 1975).

the Executive and Congress are controlled by different political parties there will be persistent conflicts. One may similarly assume that the alteration of this situation would only reduce but not remove the disagreements.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and * * *

## LEGISLATIVE ROLE OF THE PRESIDENT

This clause, which imposes a duty rather than confers a power, is the formal basis of the President's legislative leadership, which has attained great proportions since 1900. This development, however, represents the play of political and social forces rather than any pronounced change in constitutional interpretation. Especially is it the result of the rise of parties and the accompanying recognition of the President as party leader, of the appearance of the National Nominating Convention and the Party Platform, and of the introduction of the Spoils System, an ever present help to Presidents in times of troubled relations with Congress.[1] It is true that certain pre-Civil War Presidents, mostly of Whig extraction, professed to entertain nice scruples on the score of "usurping" legislative powers,[2] but still earlier ones, Washington, Jefferson, and Jackson among them, took a very different line, albeit less boldly and persistently than their later imitators.[3] Today there is no sub-

[1] N. Small, *Some Presidential Interpretations of the Presidency* (Baltimore: 1932); W. Binkley, *The President and Congress* (New York: 2d ed. 1962); E. Corwin, *The President: Office and Powers, 1787–1957* (New York: 4th ed. 1957), chs. 1, 7.

[2] The first Harrison, Polk, Taylor, and Fillmore all fathered sentiments to this general effect. *See* 4 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 1860, 1864; 6 id., 2513–2519, 2561–2562, 2608, 2615.

[3] *See* sources cited n. 1 supra.

ject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obliged by this clause to impart information which, in his judgment, should in the public interest be withheld.[4] The President has frequently summoned both Houses into "extra" or "special sessions" for legislative purposes, and the Senate alone for the consideration of nominations and treaties. His power to adjourn the Houses has never been exercised.

## THE CONDUCT OF FOREIGN RELATIONS

### The Right of Reception: Scope of the Power

"Ambassadors and other public ministers" embraces not only "all possible diplomatic agents which any foreign power may accredit to the United States," [5] but also, as a practical construction of the Constitution, all foreign consular agents, who therefore may not exercise their functions in the United States without an exequatur from the President.[6] The power to "receive" ambassadors, et cetera, includes, moreover, the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.[7] Furthermore, this power makes the President the sole mouthpiece of the nation in its dealing with other nations.

### The Presidential Monopoly

Wrote Jefferson in 1790: "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." [1] So when Citizen Genet, envoy to the United States from the first French Republic, sought an exequatur for a consul whose commission was addressed to the Congress of the United States, Jefferson informed him that "as the President was the only channel of communication between the United States and foreign nations, it was from him alone 'that foreign nations or their agents are to learn what is or has been the will of the nation'; that whatever he com-

[4] Warren, "Presidential Declarations of Independence," 10 B.U.L. Rev. 1 (1930); 3 W. Willoughby, *Constitutional Law of the United States* (New York: 2d ed. 1929), 1488–1492.

[5] 7 *Ops. Atty. Gen.* 186, 209 (1855).

[6] 5 J. Moore, *International Law Digest* (Washington: 1906), 15–19.

[7] Id., 4:473–548; 5:19–32.

[1] Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions, April 24, 1790; 5 *Writings of Thomas Jefferson*, P. Ford ed. (New York: 1895), 161, 162.

municated as such, they had a right and were bound to consider 'as the expression of the nation'; and that no foreign agent could be 'allowed to question it,' or 'to interpose between him and any other branch of government, under the pretext of either's transgressing their functions.' Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. 'I inform you of the fact,' he said, 'by authority from the President.' Mr. Jefferson returned the consul's commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed." [2]

***The Logan Act.***—When in 1798 a Philadelphia Quaker named Logan went to Paris on his own to undertake a negotiation with the French Government with a view to averting war between France and the United States, his enterprise stimulated Congress to pass "An Act to Prevent Usurpation of Executive Functions," [3] which, "more honored in the breach than the observance," still survives on the statute books.[4] The year following John Marshall, then a Member of the House of Representatives, defended President John Adams for delivering a fugitive from justice to Great Britain under the 27th article of the Jay Treaty, instead of leaving the business to the courts. He said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him." [5] Ninety-nine years later a Senate Foreign Relations Committee took occasion to reiterate Marshall's doctrine with elaboration.[6]

***A Formal or a Formative Power.***—In his attack, instigated by Jefferson, upon Washington's Proclamation of Neutrality in 1793, at the outbreak of war between France and Great Britain, Madison advanced the argument that all large questions of foreign policy fell within the ambit of Congress, by virtue of its power "to declare

[2] 4 J. Moore, *International Law Digest* (Washington, 1906), 680–681.

[3] This measure is now contained in 18 U.S.C. § 953.

[4] *See Memorandum on the History and Scope of the Law Prohibiting Correspondence with a Foreign Government*, S. Doc. No. 696, 64th Congress, 2d Sess. (1917). The author was Mr. Charles Warren, then Assistant Attorney General. Further details concerning the observance of the "Logan Act" are given in E. Corwin, *The President: Office and Powers, 1787–1957* (New York: 4th ed. 1957), 183–184, 430–431.

[5] 10 *Annals of Congress* 596, 613–614 (1800).

[6] S. Doc. No. 56, 54th Congress, 2d Sess. (1897).

war," and in support of this proposition he disparaged the presidential function of reception, in the following words: "I shall not undertake to examine, what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe, in general, and every candid reader will second the observation, that little, if anything, more was intended by the clause, than to provide for a particular mode of communication, *almost* grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the constitution, it would be highly improper to magnify the function into an important prerogative, even when no rights of other departments could be affected by it." [7]

***The President's Diplomatic Role.***—Hamilton, although he had expressed substantially the same view in *The Federalist* regarding the power of reception,[8] adopted a very different conception of it in defense of Washington's proclamation. Writing under the pseudonym, "Pacificus," he said: "The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is *acknowledged*, the treaties between the nations, so far at least as regards *public* rights, are of course suspended. This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there had been a treaty of alliance, offensive and defen-

[7] 1 *Letters and Other Writings of James Madison* (Philadelphia: 1865), 611.

[8] *The Federalist* No. 69 (Modern Library ed. 1937), 451, where he wrote: "The president is also to be authorized to receive ambassadors, and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor."

sive, between the United States and that country, the unqualified acknowledgment of the new government would have put the United States in a condition to become as an associate in the war with France, and would have laid the legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war. This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision. The division of the executive power in the Constitution, creates a *concurrent* authority in the cases to which it relates." [9]

***Jefferson's Real Position.***—Nor did Jefferson himself officially support Madison's point of view, as the following extract from his "minutes of a Conversation," which took place July 10, 1793, between himself and Citizen Genet, show: "He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, Congress are bound to see that the treaties are observed.' I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea." [10]

**The Power of Recognition**

In his endeavor in 1793 to minimize the importance of the President's power of reception, Madison denied that it involved cognizance of the question, whether those exercising the government of the accrediting State had the right along with the possession. He said: "This belongs to the nation, and to the nation alone, on whom the government operates. . . . It is evident, therefore, that if the

[9] "Letter of Pacificus," No. 1, 7 *Works of Alexander Hamilton*, J. Hamilton ed. (New York: 1851), 76, 82–83.

[10] 4 J. Moore, *International Law Digest* (Washington: 1906), 680–681.

executive has a right to reject a public minister, it must be founded on some other consideration than a change in the government, or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right to refuse a public minister. It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors." [1]

Hamilton, with the case of Genet before him, had taken the contrary position, which history has ratified. In consequence of his power to receive and dispatch diplomatic agents, but more especially the former, the President possesses the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states; also, by the same token, the power to decline recognition, and thereby decline diplomatic relations with such new states or governments. The affirmative precedents down to 1906 are succinctly summarized by John Bassett Moore in his famous *Digest*, as follows: "In the preceding review of the recognition, respectively, of the new states, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility." [2]

[1] "Letters of Helvidius," 5 *Writings of James Madison*, G. Hunt ed. (New York: 1905), 133.

[2] 1 J. Moore, *International Law Digest* (Washington: 1906), 243–244. The course of the Monroe Administration in inviting the cooperation of Congress in connection with recognition of the Spanish-American Republics, although it was prompted mainly by the consideration that war with Spain might result, was nonetheless opposed by Secretary of State John Quincy Adams. "Instead," said he, "of admitting

***The Case of Cuba.***—The question of Congress' right also to recognize new states was prominently raised in connection with Cuba's final and successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the President, the Senate Foreign Relations Committee, in 1897, made an elaborate investigation of the whole subject and came to the following conclusions as to this power: "The 'recognition' of independence or belligerency of a foreign power, technically speaking, is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the Government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course. Diplomatic relations with a new power are properly, and customarily inaugurated at the request of that power, expressed through an envoy sent for the purpose. The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take no part in it at all, until the President has sent in a nomination. Then it acts in its executive capacity, and, customarily, in 'executive session.' The legislative branch of the Government can exercise no influence over this step except, very indirectly, by withholding appropriations. . . . Nor can the legislative branch of the Government hold any communications with foreign nations. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties.

"Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legis-

the Senate or House of Representatives to any share in the act of recognition, I would expressly avoid that form of doing it which would require the concurrence of those bodies. It was, I had no doubt, by our Constitution an act of the Executive authority. General Washington had exercised it in recognizing the French Republic by the reception of Mr. Genet. Mr. Madison had exercised it by declining several years to receive, and by finally receiving, Mr. Onis; and in this instance I thought the Executive ought carefully to preserve entire the authority given him by the Constitution, and not weaken it by setting the precedent of making either House of Congress a party to an act which it was his exclusive right and duty to perform. Mr. Crawford said he did not think there was anything in the objection to sending a minister on the score of national dignity, and that there was a difference between the recognition of a change of government in a nation already acknowledged as sovereign, and the recognition of a new nation itself. He did not, however, deny, but admitted, that the recognition was strictly within the powers of the Executive alone, and I did not press the discussion further.' " Id., 244–245.

lation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct . . . [is] shown by the opinions of jurists and statesmen of the past." [3] Congress was able ultimately to bundle a clause recognizing the independence of Cuba, as distinguished from its government, into the declaration of war of April 11, 1898, against Spain. For the most part, the sponsors of the clause defended it by the following line of reasoning. Diplomacy, they said, was now at an end and the President himself had appealed to Congress to provide a solution for the Cuban situation. In response Congress was about to exercise its constitutional power of declaring war, and it has consequently the right to state the purpose of the war which it was about to declare.[4] The recognition of the Union of Soviet Socialist Republics in 1933 was an exclusively presidential act.

***The Power of Nonrecognition.***—The potentialities of nonrecognition were conspicuously illustrated by President Woodrow Wilson when he refused, early in 1913, to recognize Provisional President Huerta as the *de facto* government of Mexico, thereby contributing materially to Huerta's downfall the year following. At the same time Wilson announced a general policy of nonrecognition in the case of any government founded on acts of violence, and while he observed this rule with considerable discretion, he consistently refused to recognize the Union of Soviet Socialist Republics, and his successors prior to President Franklin D. Roosevelt did the same. The refusal of the Hoover administration to recognize the independence of the Japanese puppet state of Manchukuo early in 1932 was based on kindred grounds. Similarly, the nonrecognition of the Chinese Communist Government from the Truman Administration to President Nixon's *de facto* recognition through a visit in 1972—not long after Communist China's admission to the United Nations and the exclusion of Taiwan—proved to be an important part of American foreign policy during the Cold War.[5]

[3] S. Doc. No. 56, 54th Congress, 2d Sess. (1897), 20–22.

[4] Said Senator Nelson of Minnesota: "The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised." 31 *Cong. Rec.* 3984 (1898).

[5] President Carter's termination of the Mutual Defense Treaty with Taiwan, which precipitated a constitutional and political debate, see *supra*, *pp.* 517–518, was perhaps an example of nonrecognition or more appropriately derecognition.

**Congressional Implementation of Presidential Policies**

No President was ever more jealous of his prerogative in the realm of foreign relations than President Woodrow Wilson. When, however, strong pressure was brought to bear upon him by Great Britain respecting his Mexican Policy, he was constrained to go before Congress and ask for a modification of the Panama Tolls Act of 1911, which had also aroused British ire. Addressing Congress, he said, "I ask this of you in support of the foreign policy of the Administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure." [6]

The fact is, of course, that Congress has enormous powers, the support of which is indispensable to any foreign policy. In the long run Congress is the body that lays and collects taxes for the common defense, that creates armies and maintains navies, although it does not direct them, that pledges the public credit, that declares war, that defines offenses against the law of nations, that regulates foreign commerce; and it has the further power "to make all laws which shall be necessary and proper"—that is, which it deems to be such—for carrying into execution not only its own powers but all the powers "of the government of the United States and of any department or officer thereof." Moreover, its laws made "in pursuance" of these powers are "supreme law of the land" and the President is bound constitutionally to "take care that" they "be faithfully executed." In point of fact, congressional legislation has operated to augment presidential powers in the foreign field much more frequently than it has to curtail them. The Lend-Lease Act of March 11, 1941 [7] is the classic example, although it only brought to culmination a whole series of enactments with which Congress had aided and abetted the administration's foreign policy in the years between 1934 and 1941.[8] Disillusionment with presidential policies in the context of the Vietnamese conflict led Congress to legislate restrictions, not only with respect to the discretion of the President to use troops abroad in the absence of a declaration of war, but also limiting his economic and political powers through curbs on his authority to declare national emergencies.[9] The lesson of history,

[6] 1 *Messages and Papers of Woodrow Wilson*, A. Shaw ed. (New York: 1924), 58.

[7] 55 Stat. 31 (1941).

[8] E. Corwin, *The President: Office and Powers*, 1787-1957 (New York: 4th ed. 1957), 184-193, 423-425, 435-436.

[9] Legislation includes the War Powers Resolution, P.L. 93-148, 87 Stat. 555 (1953), 50 U.S.C. §§ 1541-1548; the National Emergencies Act, P.L. 94-412, 90 Stat. 1255 (1976), 50 U.S.C. §§ 1601-1651 (establishing procedures for presidential declaration and continuation of national emergencies and providing for a bicameral con-

however, appears to be that congressional efforts to regain what is deemed to have been lost to the President is intermittent, whereas the presidential exercise of power in today's world is unremitting.[10]

**The Doctrine of Political Questions**

It is not within the province of the courts to inquire into the policy underlying action taken by the "political departments"—Congress and the President—in the exercise of their conceded powers. This commonplace maxim is, however, sometimes given an enlarged application so as to embrace questions as to the existence of facts and even questions of law which the Court would normally regard as falling within its jurisdiction. Such questions are termed "political questions," and are especially common in the field of foreign relations. The leading case is *Foster* v. *Neilson*,[1] where the matter in dispute was the validity of a grant made by the Spanish Government in 1804 of land lying to the east of the Mississippi River, and in which there was also raised the question whether the region between the Perdido and Mississippi Rivers belonged in 1804 to Spain or the United States.

Chief Justice Marshall held that the Court was bound by the action of the political departments, the President and Congress, in claiming the land for the United States. He said: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has

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gressional veto); the International Emergency Economic Powers Act, P.L. 95-223, 91 Stat. 1626 (1977), 50 U.S.C. §§ 1701-1706 (limiting the great economic powers conferred on the President by the Trading with the Enemy Act of 1917, 40 Stat. 415, 50 U.S.C. App. § 5(b), to times of declared war, and providing new and more limited powers, with procedural restraints, for nonwartime emergencies); and see the Foreign Sovereign Immunities Act of 1976, P.L. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602-1611 (removing from executive control decisions concerning the liability of foreign sovereigns to suit).

[10] "We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 654 (1952) (Justice Jackson concurring). However, certain recent Supreme Court decisions interpreting congressional enactments limiting presidential powers seem forcefully to limit Congress' gains. E.g., *Haig* v. *Agee*, 453 U.S. 280 (1981); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

[1] 2 Pet. (27 U. S.) 253 (1829).

been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature." [2] The doctrine thus clearly stated is further exemplified, with particular reference to presidential action, by *Williams* v. *Suffolk Ins. Co.*[3] In this case the underwriters of a vessel which had been confiscated by the Argentine Government for catching seals off the Falkland Islands, contrary to that Government's orders, sought to escape liability by showing that the Argentinian Government was the sovereign over these islands and that, accordingly, the vessel had been condemned for willful disregard of legitimate authority. The Court decided against the company on the ground that the President had taken the position that the Falkland Islands were not a part of Argentina. "[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

"If this were not the rule, cases might often arise, in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one on these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character." [4] Thus, the right to determine the boundaries of the country is a political function,[5] as is also the right to determine what country is sovereign of a particular region,[6] to determine whether a community is entitled under international law to be considered a belligerent or an independent state,[7] to determine whether the other party has duly ratified a treaty,[8] to deter-

[2] Id., 308.
[3] 13 Pet. (38 U.S.) 415 (1839).
[4] Id., 420.
[5] *Foster* v. *Neilson*, 2 Pet. (27 U.S.) 253 (1829).
[6] *Williams* v. *Suffolk Ins. Co.*, 13 Pet. (38 U.S.) 415 (1839).
[7] *United States* v. *Palmer*, 3 Wheat. (16 U.S.) 610 (1818).
[8] *Doe* v. *Braden*, 16 How. (57 U.S.) 635, 657 (1853).

mine who is the *de jure* or *de facto* ruler of a country,[9] to determine whether a particular person is a duly accredited diplomatic agent to the United States,[10] to determine how long a military occupation shall continue in fulfillment of the terms of a treaty,[11] to determine whether a treaty is in effect or not, although doubtless an extinguished treaty could be constitutionally renewed by tacit consent.[12]

***Recent Statements of the Doctrine.***—The assumption underlying the refusal of courts to intervene in such cases is well stated in the case of *Chicago & S. Airlines* v. *Waterman S.S. Corp.*[13] Here the Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation which by the terms of the Civil Aeronautics Act[14] are subject to approval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders.[15] Elaborating on the necessity of judicial abstinence in the conduct of foreign relations, Justice Jackson declared for the Court: "The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." [16]

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[9] *Jones* v. *United States*, 137 U.S. 202 (1890); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918).

[10] *In re Baiz*, 135 U.S. 403 (1890).

[11] *Neely* v. *Henkel*, 180 U.S. 109 (1901).

[12] *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Charlton* v. *Kelly*, 229 U.S. 447 (1913).

[13] 333 U.S. 103 (1948).

[14] 49 U.S.C. § 1461.

[15] 49 U.S.C. § 1489.

[16] *Chicago & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). *See also Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud* v. *American Metal*

To the same effect are the Court's holding and opinion in *Ludecke* v. *Watkins*,[17] where the question at issue was the power of the President to order the deportation under the Alien Enemy Act of 1798 of a German alien enemy after the cessation of hostilities with Germany. Said Justice Frankfurter for the Court: "War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. . . . The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subject for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility." [18]

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*Co.*, 246 U. S. 304 (1918). Analogous to and arising out of the same considerations as the political question doctrine is the "act of state" doctrine under which United States courts will not examine the validity of the public acts of foreign governments done within their own territory, typically in disputes arising out of nationalizations. E.g., *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682 (1976). Similar, also, is the doctrine of sovereign immunity of foreign states in United States courts, under which jurisdiction over the foreign state, at least after 1952, turned upon the suggestion of the Department of State as to the applicability of the doctrine. *See Alfred Dunhill of London* v. *Republic of Cuba*, *supra*, 698–706 (plurality opinion), *but see* id., 725–728 (Justice Marshall dissenting). For the period prior to 1952, *see Z. & F. Assets Corp.* v. *Hull*, 311 U.S. 470, 487 (1941). Congress in the Foreign Sovereign Immunities Act of 1976, P.L. 94–583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602–1611, provided for judicial determination of applicability of the doctrine but did adopt the executive position with respect to no applicability for commercial actions of a foreign state.

[17] 335 U.S. 160 (1948).

[18] Id., 167, 170. Four Justices dissented, by Justice Black, who said: "The Court . . . holds, as I understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General's deportation order. . . . I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Con-

The most recent Court review of the political question doctrine is found in *Baker* v. *Carr*.[19] There, Justice Brennan noted and elaborated the factors which go into making a question political and inappropriate for judicial decision.[20] On the matter at hand, he said: "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." [21] However, recently, the Court came within one vote of creating a broad application of the political question doctrine in foreign relations disputes, at least in the context of a dispute between Congress and the President with respect to a proper allocation of constitutional powers.[22] In any event, the present Court, in adjudicating on the merits disputes in which the foreign relations powers are called into question, follows a policy of such deference to executive and congressional expertise that the result may not be dissimilar to a broad application of the political question doctrine.[23]

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gress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported." Id., 174-175. *See also Woods* v. *Miller Co.*, 333 U.S. 138 (1948), where the continuation of rent control under the Housing and Rent Act of 1947, enacted after the termination of hostilities was unanimously held to be a valid exercise of the war power, but the constitutional question raised was asserted to be a proper one for the Court. Said Justice Jackson, in a concurring opinion: "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care." Id., 146-147.

[19] 369 U.S. 186 (1962).

[20] Id., 217.

[21] Id., 211-212.

[22] *Goldwater* v. *Carter*, 444 U.S. 996, 1002-1006 (Justices Rehnquist, Stewart, and Stevens and Chief Justice Burger). The doctrine was applied in just such a dispute in *Dole* v. *Carter*, 569 F.2d 1109 (C.A. 10, 1977).

[23] "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). *See also Dames & Moore* v. *Regan*, 453 U.S. 654, 688 (1981); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-68 (1981); *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976); *Parker* v. *Levy*, 417 U.S.

## THE PRESIDENT AS LAW ENFORCER

### Powers Derived From This Duty

The Constitution does not say that the President shall execute the laws, but that "he shall take care that the laws be faithfully executed," i.e., by others, who are commonly, but not always with strict accuracy, termed his subordinates. What powers are implied from this duty? In this connection five categories of executive power should be distinguished: first, there is that executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary powers which acts of Congress at any particular time confer upon heads of departments and other executive ("administrative") agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally, there are so-called "ministerial duties" which admit of no discretion as to the occasion or the manner of their discharge. Three principal questions arise: first, how does the President exercise the powers which the Constitution or the statutes confer upon him; second, in what relation does he stand by virtue of the "take care" clause to the powers of other executive or administrative agencies; third, in what relation does he stand to the enforcement of the criminal laws of the United States?

Whereas the British monarch is constitutionally under the necessity of acting always through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In the words of an opinion by Attorney General Cushing in 1855: "It may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States. . . . So he, and he alone, is the supreme commander in chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States.

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733, 756, 758 (1974); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952). Neither may private claimants seek judicial review of executive actions denying constitutional rights "in such sensitive areas as national security and foreign policy" in suits for damages against offending officials, inasmuch as the President is absolutely immune, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), and the Court has strongly hinted that in these areas the immunity of presidential aides and other executive officials "entrusted with discretionary authority" will be held to be absolute rather than qualified. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 812–813 (1982).

That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President." [1] Moreover, the obligation to act personally may be sometimes enlarged by statute, as, for example, by the act organizing the President with other designated officials into "an Establishment by name of the Smithsonian Institute." [2] Here, says the Attorney General, "the President's name of office is *designatio personae.*" He is also of opinion that expenditures from the "secret service" fund, in order to be valid, must be vouched for by the President personally.[3] On like grounds the Supreme Court once held void a decree of a court martial, because, though it has been confirmed by the Secretary of War, it was not specifically stated to have received the sanction of the President as required by the 65th Article of War.[4] This case has, however, been virtually overruled and at any rate such cases are exceptional.[5]

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus become the President's acts.[6] *Williams* v. *United States* [7] involved an act of Congress, which prohibited the advance of public money in any case whatever to disbursing officers of the United States, except under special direction by the President.[8] The Supreme Court held that the act did not require

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[1] 7 *Ops. Atty. Gen.* 453, 464–465 (1855).

[2] 9 Stat. 102 (1846), 20 U.S.C. § 41.

[3] *Cf.* 2 Stat. 78. The provision has long since dropped out of the statute book.

[4] *Runkle* v. *United States*, 122 U.S. 543 (1887).

[5] *Cf. In re Chapman*, 166 U.S. 661, 670–671 (1897), where it is held that presumptions in favor of official action "preclude collateral attack on the sentences of courts-martial." *See also United States* v. *Fletcher*, 148 U.S. 84, 88–89 (1893); *Bishop* v. *United States*, 197 U.S. 334, 341–342 (1905), both of which in effect repudiate *Runkle* v. *United States*.

[6] The President, in the exercise of his executive power under the Constitution, "speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." The heads of the departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. *Wilcox* v. *McConnel*, 13 Pet. (38 U.S.) 498, 513 (1839). *See also United States* v. *Eliason*, 16 Pet. (41 U.S.) 291 (1842); *Williams* v. *United States*, 1 How. (42 U.S.) 290, 297 (1843); *United States* v. *Jones*, 18 How. (59 U.S.) 92, 95 (1856); *The Confiscation Cases*, 20 Wall. (87 U.S.) 92 (1874); *United States* v. *Farden*, 99 U.S. 10 (1879); *Wolsey* v. *Chapman*, 101 U.S. 755 (1880).

[7] 1 How. (42 U.S.) 290 (1843).

[8] 3 Stat. 723 (1823), now covered in 31 U.S.C. § 529.

the personal performance by the President of this duty. Such a practice, said the Court, if it were possible, would absorb the duties of the various departments of the government in the personal acts of one chief executive officer, and be fraught with mischief to the public service. The President's duty in general requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.[9] As a matter of administrative practice, in fact, most orders and instructions emanating from the heads of the departments, even though in pursuance of powers conferred by statute on the President, do not even refer to the President.[10]

***Impoundment of Appropriated Funds.***—In his Third Annual Message to Congress, President Jefferson established the first faint outline of what has been in recent years a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary. . . ." But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gunboats were being obtained.[11] A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the purposes appropriated. Succeeding Presidents expanded upon these precedents and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.[12]

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[9] 1 How. (42 U.S.), 297–298.

[10] 38 *Ops. Atty. Gen.* 457, 458 (1936). And, of course, if the President exercises his duty through subordinates, he must appoint them or appoint the officers who appoint them, *Buckley* v. *Valeo*, 424 U. S. 1, 109–143 (1976), and he must have the power to discharge those officers in the Executive Branch. *Myers* v. *United States*, 272 U.S. 52 (1926).

[11] 1 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 348, 360.

[12] History and law is much discussed in *Executive Impoundment of Appropriated Funds*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971); *Impoundment of Appropriated Funds by the President*, Hearings before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973).

Impoundment [13] has been defended by Administration spokesmen as being a power derived from the President's executive powers and particularly from his obligation to see to the faithful execution of the laws, i.e., his discretion in the manner of execution. The President, the argument goes, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when for example congressional desire to spend certain moneys must yield to congressional wishes to see price and wage stability. In some respects, impoundment is said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support is sought; certain laws are said to confer discretion to withhold spending and it is argued that congressional spending programs are discretionary rather than mandatory.[14]

On the other hand, it is argued that Congress' powers under Article I, § 8, are fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allows him the power of item veto which he does not have and denies Congress the opportunity to override his veto of bills enacted by Congress. In particular the power of Congress to compel the President to spend appropriated moneys is said to derive from Congress' power "to make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers of Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof." [15]

The President's decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations with a reasonable expectation of receipt of the impounded funds upon their release brought large numbers of suits; with a few exceptions, these suits resulted in decisions denying the President either constitutional or statutory

[13] There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase "deferral of budget authority" which is defined to include: "(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law". 2 U.S.C. § 682(1).

[14] *Impoundment of Appropriated Funds by the President*, Hearings before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973), 358 (then-Deputy Attorney General Sneed).

[15] Id., 1-6 (Senator Ervin).

power to decline to spend or obligate funds and the Supreme Court, presented with only statutory arguments by the Administration, held that no discretion existed under the particular statute to withhold allotments of funds to the States.[16] Second, Congress in the course of revising its own manner of appropriating funds in accordance with budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds.[17] Presumably, judicial review of the workings of this statute will elucidate the constitutional and statutory principles that will guide future actions.

**Power and Duty of the President in Relation to Subordinate Executive Officers**

Suppose, that the law casts a duty upon a head of department *eo nomine*, does the President thereupon become entitled by virtue of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the principal officer regarding the discharge of such duty? In the debate in the House in 1789 on the location of the removal power Madison argued that it ought to be attributed to the President alone because it was "the intention of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department", and this responsibility, he held, carried with it the power to "inspect and control" the conduct of subordinate executive officers. "Vest," said he, "the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good." [1]

But this was said with respect to the office of the Secretary of State, and when shortly afterward the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different attitude, conceding in effect that this office was to be an arm of certain of Congress' own powers and should therefore be protected against the removal power.[2] And in *Marbury* v. *Madison*,[3] Chief Justice Marshall

[16] *Train* v. *City of New York*, 420 U.S. 35 (1975); *Train* v. *Campaign Clean Waters*, 420 U.S. 136 (1975). See also *State Highway Comm. of Missouri* v. *Volpe*, 479 F.2d 1099 (C.A. 8, 1973); *Commonwealth of Pennsylvania* v. *Lynn*, 501 F.2d 848 (C.A.D.C., 1974).

[17] P.L. 93-344, title X, 88 Stat. 332 (1974), 2 U.S.C. §§ 681-688.

[1] 1 *Annals of Congress* 495, 499 (1789).

[2] Id., 611-612.

[3] 1 Cr. (5 U.S.) 137 (1803).

traced a parallel distinction between the duties of the Secretary of State under the original act which had created a "Department of Foreign Affairs" and those which had been added by the later act changing the designation of the department to its present one. The former were, he pointed out, entirely in the "political field," and hence for their discharge the Secretary was left responsible absolutely to the President. The latter, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. For these, therefore, the Secretary was "an officer of the law" and "amenable to the law for his conduct." [4]

***Administrative Decentralization Versus Jacksonian Centralism.***—An opinion rendered by Attorney General Wirt in 1823 asserted the proposition that the President's duty under the "take care" clause required of him scarcely more than that he should bring a criminally negligent official to book for his derelictions, either by removing him or by setting in motion against him the processes of impeachment or of criminal prosecutions.[5] The opinion entirely overlooked the important question of the location of the power to interpret the law which is inevitably involved in any effort to enforce it. The diametrically opposed theory that Congress is unable to vest any head of an executive department, even within the field of Congress' specifically delegated powers, with any legal discretion which the President is not entitled to control was first asserted in unambiguous terms in President Jackson's Protest Message of April 15, 1834,[6] defending his removal of Duane as Secretary of the Treasury, because of the latter's refusal to remove the deposits from the Bank of the United States. Here it is asserted "that the entire executive power is vested in the President"; that the power to remove those officers who are to aid him in the execution of the laws is an incident of that power; that the Secretary of the Treasury was such an officer; that the custody of the public property and money was an executive function exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties the Secretary was subject to the supervision and control of the President; and finally that the act establishing the Bank of the United States "did not, as it could not change the relation between the President and Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control." [7] In

[4] Id., 165–166.

[5] 1 *Ops. Atty. Gen.* 624 (1823).

[6] 3 J. Richardson (comp.), *Messages and Papers of the Presidents*, (Washington 1897), 1288.

[7] Id., 1304.

short, the President's removal power, in this case unqualified, was the sanction provided by the Constitution for his power and duty to control his "subordinates" in all their official actions of public consequence.

***Congressional Power Versus Presidential Duty to the Law.***— Four years late the case of *Kendall* v. *United States ex rel. Stokes,*[8] was decided. The United States owed one Stokes money, and when Postmaster General Kendall, at Jackson's instigation, refused to pay it, Congress passed a special act ordering payment. Kendall, however, still proved noncompliant, whereupon Stokes sought and obtained a mandamus in the United States circuit court for the District of Columbia, and on appeal this decision was affirmed by the Supreme Court. While *Kendall,* like *Marbury* v. *Madison,* involved the question of the responsibility of a head of a department for the performance of a *ministerial* duty, the discussion by counsel before the Court and the Court's own opinion covered the entire subject of the relation of the President to his subordinates in the performance by them of statutory duties. The lower court had asserted that the duty of the President under the faithful execution clause gave him no other control over the officer than to see that he acts honestly, with proper motives, but no power to construe the law and see that the executive action conforms to it. Counsel for Kendall attacked this position vigorously, relying largely upon statements by Hamilton, Marshall, James Wilson, and Story having to do with the President's power in the field of foreign relations.

The Court rejected the implication with emphasis. There are, it pointed out, "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character." [9] In short, the Court recognized the underlying question of the case to be whether the President's duty to "take care that the laws be faithfully executed" made it constitutionally impossible for Congress ever to entrust the construction of its statutes to anybody but the President, and it answered this in the negative.

[8] 12 Pet. (37 U.S.) 524 (1838).
[9] Id., 610.

***Myers Case Versus Humphrey and Wiener Cases.***—How does this issue stand today? The answer to this question, so far as there is one, is to be sought in a comparison of the Court's decision in the *Myers* case, on the one hand, and its decisions in the *Humphrey* and *Wiener* cases, on the other.[10] The first decision is still valid to support the President's right to remove, and hence to control the decisions of all officials through whom he exercises the great political powers which he derives from the Constitution and also all officials—usually heads of departments—through whom he exercises powers conferred upon him by statute. The *Humphrey* and *Wiener* decisions would appear to protect the tenure, and hence the freedom of decision, of all officials upon whom, in the exercise of its delegated powers, Congress confers duties almost wholly of a "quasi-legislative" or a "quasi-judicial" nature. The first group of officials may be described as performing duties for the satisfactory discharge of which Congress justifiably feels that a specialized and informed judgment is requisite. The latter perform duties the discharge of which closely touches private rights, and which therefore ought to be accompanied or preceded by a "quasi-judicial" inquiry capable of affording the claimants of such rights the opportunity to be heard. In neither instance is the President entitled to force his reading of the law upon the officer, but only to take care that the latter exercise his powers according to his own best lights.

***Power of the President to Guide Enforcement of the Penal Law.***—This matter also came to a head in "the reign of Andrew Jackson," preceding, and indeed foreshadowing, the Duane episode by some months. "At that epoch," Wyman relates in his *Principles of Administrative Law*, "the first amendment of the doctrine of centralism in its entirety was set forth in an obscure opinion upon an unimportant matter—The Jewels of the Princess of Orange, 2 Opin. 482 (1831). These jewels . . . were stolen from the Princess by one Polari and were seized by the officers of the United States Customs in the hands of the thief. Representations were made to the President of the United States by the Minister of the Netherlands of the facts in the matter, which were followed by a request for return of the jewels. In the meantime the District Attorney was prosecuting condemnation proceedings in behalf of the United States which he showed no disposition to abandon. The President felt himself in a dilemna, whether if it was by statute the duty of the District Attorney to prosecute or not, the President could interfere and direct whether to proceed or not. The opinion was written

[10] *Myers* v. *United States*, 272 U.S. 52 (1926); *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Wiener* v. *United States*, 357 U.S. 349 (1958).

by Taney, then Attorney General; it is full of pertinent illustrations as to the necessity in an administration of full power in the chief executive as the concomitant of his full responsibility. It concludes: If it should be said that, the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it—I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and proper measure may often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could only act through his subordinate officer, the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continues a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President." [11]

**The President as Law Interpreter**

The power accruing to the President from his function of law interpretation preparatory to law enforcement is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, the Internal Security Act, and many lesser statutes. Nor is this the whole story. Not only do all presidential regulations and orders based on statutes which vest power in him or on his own constitutional powers have the force of law, provided they do not transgress the Court's reading of such statutes or of the Constitution,[1] but he sometimes makes law in a more special sense. In the famous *Neagle* case,[2] an order of the Attorney General to a United

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[11] B. Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* (St. Paul: 1903), 231–232.

[1] *United States* v. *Eliason*, 16 Pet. (41 U.S.) 291, 301–302 (1842); *Kurtz* v. *Moffitt*, 115 U.S. 487, 503 (1885); *Smith* v. *Whitney*, 116 U.S. 167, 180–181 (1886). For a recent analysis of the approach to determining the validity of presidential, or other executive, regulations and orders under purported congressional delegations or implied executive powers, *see Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301–316 (1979).

[2] *In re Neagle*, 135 U.S. 1 (1890).

States marshal to protect a Justice of the Supreme Court whose life has been threatened by a suitor was attributed to the President and held to be "a law of the United States" in the sense of § 753 of the Revised Statutes, and as such to afford basis for a writ of *habeas corpus* transferring the marshal, who had killed the attacker, from state to national custody. Speaking for the Court, Justice Miller inquired: "Is this duty [the duty of the President to take care that the laws be faithfully executed] limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?" [3] Obviously, an affirmative answer is assumed to the second branch of this inquiry, an assumption which is borne out by numerous precedents. And in *United States* v. *Midwest Oil Company*,[4] it was ruled that the President had, by dint of repeated assertion of it from an early date, acquired the right to withdraw, via the Land Department, public lands, both mineral and nonmineral, from private acquisition, Congress having never repudiated the practice.

**Military Power in Law Enforcement: The Posse Comitatus**

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

"The President, by using the militia or the armed forces, or both . . . shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law . . . ." [1]

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[3] Id., 64. The phrase, "a law of the United States," came from the Act of March 2, 1833 (4 Stat. 632). However, in 28 U.S.C. § 2241 "(c)(2) (the Act of" June 25, 1948, 62 Stat. 965), the phrase is replaced by the term, an act of Congress, thereby eliminating the basis of the holding in *Neagle*.

[4] 236 U.S. 459 (1915); *Mason* v. *United States*, 260 U.S. 545 (1923).

[1] 10 U.S.C. §§ 332, 333. The provisions were invoked by President Eisenhower when he dispatched troops to Little Rock, Arkansas in 1957 to counter resistance to

These quoted provisions of the United States Code consolidate a course of legislation which began at the time of the Whiskey Rebellion of 1792.[2] In *Martin* v. *Mott*,[3] which arose out of the War of 1812, it was held that the authority to decide whether the exigency had arisen belonged exclusively to the President.[4] Even before that time, Jefferson had, in 1808, in the course of his efforts to enforce the Embargo Acts, issued a proclamation ordering "all officers having authority, civil or military, who shall be found in the vicinity" of an unruly combination, to aid and assist "by all means in their power, by force of arms or otherwise" the suppression of such combination.[5] Forty-six years later Attorney General Cushing advised President Pierce that in enforcing the Fugitive Slave Act of 1850, marshals of the United States had authority when opposed by unlawful combinations to summon to their aid not only bystanders and citizens generally, but armed forces within their precincts, both state militia and United States officers, soldiers, sailors, and marines,[6] a doctrine which Pierce himself improved upon two years later by asserting, with reference to the civil war then raging in Kansas, that it lay within his obligation to take care that the laws be faithfully executed to place the forces of the United States in Kansas at the disposal of the marshal there, to be used as a por-

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Federal District Court orders pertaining to desegregation of certain public schools in the Little Rock School District. *See supra*, p. 473. Although the validity of his action was never expressly reviewed, the Court, in *Cooper* v. *Aaron*, 358 U.S. 1, 4, 18–19 (1958), rejected a contention advanced by critics of the legality of his conduct, namely, that the President's constitutional duty to see to the faithful execution of the laws as implemented by the provisions quoted above, does not afford a sanction for the use of troops to enforce decrees of federal courts, inasmuch as the latter are not statutory enactments which alone are comprehended within the phrase, "laws of the United States." According to the Court, a judicial decision interpreting a constitutional provision, specifically the Court's interpretation of the Fourteenth Amendment enunciated ". . . in the *Brown Case* [*Brown* v. *Board of Education*, 347 U.S. 483 (1954)] is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect . . . ."

[2] 1 Stat. 264 (1792); 1 Stat. 424 (1794); 2 Stat. 443 (1807); 12 Stat. 281 (1861); now covered by 10 U.S.C. §§ 332–334.

[3] 12 Wheat. (25 U.S.) 19 (1827).

[4] Id., 31–32.

[5] Wilson, *Federal Aid in Domestic Disturbances*, S. Doc. No. 209, 57th Congress, 2d Sess. (1907), 51.

[6] 6 *Ops. Atty. Gen.* 446 (1854). By the Posse Comitatus Act of 1878, 20 Stat. 152, 18 U.S.C. § 1385, it was provided that "it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress. . . ." The effect of this prohibition, however, was largely nullified by a ruling of the Attorney General "that by Revised Statutes §§ 5298 and 5300 [10 U.S.C. §§ 332, 334] the military forces, under the direction of the President, could be used to assist a marshal. 16 *Ops. Atty. Gen.* 162." B. Rich, *The Presidents and Civil Disorder* (Washington: 1941), 196 n. 21.

tion of the *posse comitatus*. Lincoln's call of April 15, 1861, for 75,000 volunteers was, on the other hand, a fresh invocation, though of course on a vastly magnified scale, of Jefferson's conception of a *posse comitatus* subject to presidential call.[7] The provisions above extracted from the United States Code, ratified this conception as regards the state militias and the national forces.

**Suspension of Habeas Corpus by the President**

*See* Article I, § 9, clause 2, *pp.* 376–378.

**Preventive Martial Law**

The question of executive power in the presence of civil disorder is dealt with in modern terms in *Moyer* v. *Peabody*,[1] to which the *Debs* case [2] may be regarded as an addendum. Moyer, a labor leader, brought suit against Peabody for having ordered his arrest during a labor dispute which occurred while Peabody was governor of Colorado. Speaking for a unanimous Court, one Justice being absent, Justice Holmes said: "Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. . . . The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him.

". . . In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. . . . That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground for his belief.

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[7] 12 Stat. (app.) 1258.
[1] 212 U.S. 78 (1909).
[2] *In re Debs*, 158 U.S. 564 (1895).

". . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." [3]

***The Debs Case.***—The *Debs* case of 1895 arose out of a railway strike which had caused the President to dispatch troops to Chicago the previous year. Coincidentally with this move, the United States district attorney stationed there, acting upon orders from Washington, obtained an injunction from the United States circuit court forbidding the strike because of its interference with the mails and with interstate commerce. The question before the Supreme Court was whether this injunction, for violation of which Debs had been jailed for contempt of court, had been granted with jurisdiction. Conceding, in effect, that there was no statutory warrant for the injunction, the Court nevertheless validated it on the ground that the Government was entitled thus to protect its property in the mails, and on a much broader ground which is stated in the following passage of Justice Brewer's opinion for the Court: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . . While it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its granted powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties." [4]

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[3] 212 U.S., 84–85. *See also Sterling* v. *Constantin*, 287 U.S. 378 (1932), which endorses *Moyer* v. *Peabody*, while emphasizing the fact that it applies only to a condition of disorder.

[4] 158 U.S., 584, 586. Some years earlier, In *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888), the Courts sustained the right of the Attorney General and his assistants to institute suits simply by virtue of their general official powers. "If," the Court said, "the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief . . . the question of appealing to them "must primarily be decided by the Attorney General . . . and if restrictions are to be placed upon the exercise of this authority it is for Congress to enact them. *Cf. Hayburn's Case*, 2 Dall. (2 U.S.) 409 (1792), in which the Court reject-

***Present Status of the Debs Case.***—Insofar as the use of injunctive relief in labor disputes is concerned, enactment of the Norris-LaGuardia Act [5] placed substantial restrictions on the power of federal courts to issue injunctions in such situations. Though in *United States* v. *United Mine Workers* [6] the Court held that the Norris-LaGuardia Act did not apply where the Government brought suit as operator of mines, language in the opinion appeared to go a good way toward repudiating the present viability of *Debs*, though more in terms of congressional limitations than of revised judicial opinion.[7] It should be noted that in 1947 Congress authorized the President to seek injunctive relief in "national emergency" labor disputes, which would seem to imply absence of authority to act in situations not meeting the statutory definition.[8]

With regard to the power of the President to seek injunctive relief in other situations without statutory authority, there is no clear precedent. In *New York Times Co.* v. *United States*,[9] the Government sought to enjoin two newspapers from publishing classified material given to them by a dissident former governmental employee. Though the Supreme Court rejected the Government's claim, five of the six majority Justices relied on First Amendment grounds, apparently assuming basic power to bring the action in the first place, and three dissenters were willing to uphold the constitutionality of the Government's action and its basic power on the premise that the President was authorized to protect the secrecy of governmental documents. Only one Justice denied expressly that power was lacking altogether to sue.[10]

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ed Attorney General Randolph's contention that he had the right *ex officio* to move for a writ of *mandamus* ordering the United States circuit court for Pennsylvania to put the Invalid Pension Act into effect.

[5] 47 Stat. 170 (1932), 29 U.S.C. §§ 101–115.

[6] 330 U.S. 258 (1947). In reaching the result, Chief Justice Vinson invoked the "rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." Id., 272.

[7] Thus, the Chief Justice noted that "we agree" that the debates on Norris-LaGuardia "indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes." Of course, he continued, "whether Congress so intended or not is a question different from the one before us now." Id., 278.

[8] 61 Stat. 136, 155 (1947), 29 U.S.C. §§ 176–180. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), with regard to the exclusivity of proceeding.

[9] 403 U.S. 713 (1971).

[10] On Justice Marshall's view on the lack of authorization, *see* id., 740–748 (concurring opinion); for the dissenters on this issue, *see* id., 752, 755–759 (Justice Harlan, with whom Chief Justice Burger and Justice Blackmun joined); and *see* id., 727, 729–730 (Justice Stewart, joined by Justice White, concurring).

### The President's Duty in Cases of Domestic Violence in the States

*See* Article IV, § 4, *pp.* 892-895, and *Supra, pp.* 487-488.

### The President as Executor of the Law of Nations

Illustrative of the President's duty to discharge the responsibilities of the United States in international law with a view to avoiding difficulties with other governments was the action of President Wilson in closing the Marconi Wireless Station at Siasconset, Massachusetts on the outbreak of the European War in 1914, the company having refused assurance that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Gregory said: "The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. . . . If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be endangered by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best adapted to effectuate the desired end. . . . I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any appropriate department, close down, or take charge of and operate, the plant . . . should he deem it necessary in securing obedience to his proclamation of neutrality." [1]

## PROTECTION OF AMERICAN RIGHTS OF PERSON AND PROPERTY ABROAD

In 1854, one Lieutenant Hollins, in command of a United States warship, bombarded the town of Greytown, Nicaragua because of the refusal of local authorities to pay reparations for an attack by a mob on the United States consul.[1] Upon his return to the United States, Hollins was sued in a federal court by Durand for the value of certain property which was alleged to have been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of the Navy and was sustained by Justice Nelson, on circuit.[2] "As the Executive head of the

[1] 30 *Ops. Atty. Gen.* 291 (1914).
[1] 7 J. Moore, *Digest of International Law* (Washington: 1906), 346-354.
[2] *Durand* v. *Hollins*, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy.

"Now, as it respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving." [3]

This incident and this case were but two items in the 19th century advance of the concept that the President had the duty and the responsibility to protect American lives and property abroad through the use of armed forces if deemed necessary.[4] The duty could be said to grow out of the inherent powers of the Chief Executive [5] or perhaps out of his obligation to "take Care that the Laws be faithfully executived." [6] Although there were efforts made at times to limit this presidential power narrowly to the protection of persons and property rather than to the promotion of broader national interests,[7] no such distinction was observed in practice and

[3] Id., 112.

[4] *See* United States Solicitor of the Department of State, *Right to Protect Citizens in Foreign Countries by Landing Forces* (Washington: 3d rev. ed. 1934); M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore: 1928).

[5] *Durand* v. *Hollins*, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

[6] M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore: 1928), 5.

[7] E. Corwin, *The President: Office and Powers 1787–1957* (New York: 4th ed. 1957), 198–201.

so grew the concepts which have become the source of serious national controversy in the 1960's and 1970's, the power of the President to use troops abroad to observe national commitments and protect the national interest without seeking prior approval from Congress.[8]

***Congress and the President versus Foreign Expropriation.***— Congress has asserted itself in one area of protection of United States property abroad, making provision against uncompensated expropriation of property belonging to United States citizens and corporations. The problem of expropriation of foreign property and the compensation to be paid therefor remains an unsettled area of international law, of increasing importance because of the changes and unsettled conditions following World War II.[9] It has been the position of the Executive Branch that just compensation is owed all United States property owners dispossessed in foreign countries and the many pre-World War II disputes were carried on between the President and the Department of State and the nation involved. But commencing with the Marshall Plan in 1948, Congress has enacted programs of guaranties to American investors in specified foreign countries.[10] But more relevant to discussion here is that Congress has attached to United States foreign assistance programs various amendments requiring the termination of assistance and imposing other economic inducements where uncompensated expropriations have been instituted.[11] And when the Supreme Court in 1964 applied the "act of state" doctrine so as not to examine the validity of a taking of property by a foreign government recognized by the United States but to defer to the decision of the foreign government,[12] Congress reacted by attaching another

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[8] *Supra, pp.* 473–478. In 1965, President Johnson landed troops in the Dominican Republic during a revolution, assertedly to protect the lives of United States citizens threatened by the rebels, 52 Dept. State Bull. 738 (1965), but no doubt also to serve other interests, i.e., "to help prevent another Communist state in this hemisphere." Id., 743. It should be noted that after evacuation of United States citizens had been completed, the United States military presence was increased from 400 Marines to over 20,000 troops. *New York Times*, September 5, 1965, p. 1, col. 4. It is to be noted that the War Powers Resolution, P.L. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548, now provides the framework for the exercise of power.

[9] *Cf.* Metzger, "Property in International Law," 50 Va. L. Rev. 594 (1964); Vaughn, "Finding the Law of Expropriation: Traditional v. Quantitative Research," 2 Texas Intl. L. Forum 189 (1966).

[10] 62 Stat. 143 (1948), as amended, 22 U.S.C. § 2191 et seq. *See also* 22 U.S.C. § 1621 et seq.

[11] 76 Stat. 260 (1962), 22 U.S.C. § 2370(e)(1).

[12] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

amendment to the foreign assistance act reversing the Court's application of the doctrine, except in certain circumstances, a reversal which was applied on remand of the case.[13]

## PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS STEEL SEIZURE CASE

To avert a nationwide strike of steel workers which he believed would jeopardize the national defense, President Truman, on April 8, 1952, issued an executive order directing the Secretary of Commerce to seize and operate most of the steel industry of the country.[1] The order cited no specific statutory authorization but invoked generally the powers vested in the President by the Constitution and laws of the United States. The Secretary issued the appropriate orders to steel executives. The President promptly reported his action to Congress, conceding Congress' power to supercede his order, but Congress did not do so, either then or a few days later when the President sent up a special message.[2] On suit by the steel companies, a federal district court enjoined the seizure [3] and the Supreme Court brought the case up prior to decision by the court of appeals.[4] Six-to-three the Court affirmed the district court order, each member of the majority, however, contributing an individual opinion as well as joining in some degree the opinion of the Court by Justice Black.[5] The holding and the multiple opinions represent a setback for the adherents of "inherent" executive powers,[6] but they raise difficult conceptual and practical problems with regard to presidential powers.

***The Doctrine of the Opinion of the Court.***—The chief points urged in the Black opinion are the following: There was no statute which expressly or impliedly authorized the President to take possession of the property involved. On the contrary, in its consider-

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[13] 78 Stat. 1013 (1964), as amended, 22 U.S.C. § 2370(e)(2), *applied on remand* in *Banco Nacional de Cuba* v. *Farr*, 243 F. Supp. 957 (D.C.S.D.N.Y. 1965), *aff'd* 383 F. 2d 166 (C.A. 2, 1967), *cert. den.*, 390 U.S. 956 (1968).

[1] E.O. 10340, 17 *Fed. Reg.* 3139 (1952).

[2] H. Doc. No. 422, 82d Congress, 2d sess. (1952), 98 *Cong. Rec.* 3912 (1952); H. Doc. No. 496, 82d Congress, 2d sess. (1952), 98 *Cong. Rec.* 6929 (1952).

[3] 103 F. Supp. 569 (D.C.D.C. 1952).

[4] The court of appeals had stayed the district court's injunction pending appeal. 197 F.2d 582 (C.A.D.C. 1952). The Supreme Court decision bringing the action up is at 343 U.S. 937 (1952). Justices Frankfurter and Burton dissented.

[5] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). In the majority with Justice Black were Justices Frankfurter, Douglas, Jackson, Burton, and Clark. Dissenting were Chief Justice Vinson and Justices Reed and Minton. For critical consideration of the case, *see* Corwin, "The Steel Seizure Case: A Judicial Brick Without Straw," 53 Colum. L. Rev. 53 (1953); Roche, "Executive Power and Domestic Emergency: The Quest for Prerogative," 5 West. Pol. Q. 592 (1952).

[6] *Supra*, *pp.* 445–451.

ation of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. Authority to issue such an order in the circumstances of the case was not deducible from the aggregate of the President's executive powers under Article II of the Constitution; nor was the Order maintainable as an exercise of the President's powers as Commander-in-Chief of the Armed Forces. The power sought to be exercised was the lawmaking power, which the Constitution vests in the Congress alone. Even if it were true that other Presidents have taken possession of private business enterprises without congressional authority in order to settle labor disputes, Congress was not thereby divested of its exclusive constitutional authority to make the laws necessary and proper to carry out all powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof." [7]

***The Doctrine Considered.***—The pivotal proposition of the opinion of the Court is that inasmuch as Congress could have directed the seizure of the steel mills, the President had no power to do so without prior congressional authorization. To this reasoning not only the dissenters but Justice Clark would not concur and in fact stated baldly the reasoning is contradicted by precedent, both judicial and presidential and congressional practice. One of the earliest pronouncements on presidential power in this area was that of Chief Justice Marshall in *Little* v. *Barreme.*[8] There, a United States vessel under orders from the President had seized a United States merchant ship bound *from* a French port allegedly carrying contraband material; Congress had, however, provided for seizure only of such vessels bound *to* French ports.[9] Said the Chief Justice: "It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to

[7] 343 U.S., 585–589.
[8] 2 Cr. (6 U.S.) 170 (1804).
[9] 1 Stat. 613 (1799).

have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port." [10]

Other examples are at hand. In 1799, President Adams, in order to execute the extradition provisions of the Jay Treaty, issued a warrant for the arrest of one Robbins and the action was challenged in Congress on the ground that no statutory authority existed by which the President could act; John Marshall defended the action in the House of Representatives, the practice continued, and it was not until 1848 that Congress enacted a statute governing this subject.[11] Again, in 1793, President Washington issued a neutrality proclamation; the following year Congress enacted the first neutrality statute and since then proclamations of neutrality have been based on acts of Congress.[12] Repeatedly, acts of the President have been in areas in which Congress could act as well.[13]

Justice Frankfurter's concurring opinion [14] listed statutory authorizations for seizures of industrial property, 18 in all of which all but the first were enacted between 1916 and 1951, and summaries of seizures of industrial plants and facilities by Presidents without definite statutory warrant, eight of which occurred during World War I, justified in the presidential orders as being done pursuant to "the Constitution and laws" generally, and eleven of which occurred in World War II.[15] The first such seizure in this period had been justified by then Attorney General Jackson as being based upon an "aggregate" of presidential powers stemming from his duty to see the laws faithfully executed, his commander-in-chiefship, and his general executive powers.[16] Chief Justice Vin-

[10] *Little* v. *Barreme*, 2 Cr. (6 U.S.) 170, 177–178 (1804).

[11] Marshall argued: "The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses." 10 *Annals of Congress* 596, 613–614 (1800). The argument was endorsed in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714 (1893). The presence of a treaty, of which this provision was self-executing, is perhaps sufficient to distinguish this example from the steel seizure situation.

[12] *Cf.* E. Corwin, *The President's Control of Foreign Relations* (New York: 1916), ch. 1.

[13] Corwin, "The Steel Seizure Case: A Judicial Brick Without Straw," 53 Colum. L. Rev. 53, 58–59 (1953).

[14] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 593 (1952).

[15] Id., 611–613, 620.

[16] 89 *Cong. Rec.* 3992 (1943).

son's dissent dwelt liberally upon this opinion,[17] which reliance drew a disclaimer from Justice Jackson, concurring.[18]

The dissent was also fortunate in that chief counsel for the steel companies was the eminent John W. Davis, who, as Solicitor General of the United States, had filed a brief in defense of Presidential action in 1914 which had taken precisely the view which the dissent now presented on this issue.[19] "Ours," the brief reads, "is a self-sufficient Government within its sphere. (*Ex parte Siebold*, 100 U.S. 371, 395; *in re Debs*, 158 U.S. 564, 578.) 'Its means are adequate to its ends' (*McCulloch* v. *Maryland*, 4 Wheat., 316 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the Government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking powers may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Con-

[17] Id., 695–696 (dissenting opinion).

[18] Thus, Justice Jackson notes of the earlier seizure, that "[i]ts superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure." Id., 648–649 (concurring opinion). His opinion opens with the sentence: "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety." Id., 634.

[19] Brief for the United States, *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915), 11, 75–77.

gress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress, but because Congress is enthroned in authority over him, not because the Constitution directs him to do so.

"Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts." [20]

***Power Denied by Congress.***—Justice Black's opinion of the Court notes that Congress had refused to give the President seizure authority and had authorized other actions which had not been taken.[21] This statement leads him only to conclude that since the power claimed did not stem from Congress it had to be found in the Constitution. But four of the concurring Justices made considerably more of the fact that Congress had considered seizure and had refused to authorize it. Justice Frankfurter states: "We must . . . put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given." [22] He then reviews the proceedings of Congress which attended the enactment of the Taft-Hartley Act and concludes that "Congress has expressed its will to withhold this power [of seizure] from the President as though it had said so in so many words." [23]

Justice Jackson attempts a schematic representation of presidential powers which "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Thus, there are essentially three possibilities. "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, or it includes all that he possess

[20] Quoted in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 667, 689–691 (1952) (dissenting opinion).

[21] Id., 585–587.

[22] Id., 597.

[23] Id., 602.

in his own right plus all that Congress can delegate. . . . 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." [24] The seizure in question was placed in the third category "because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure." Therefore, "we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress." [25] That holding was not possible.

Justice Burton, referring to the Taft-Hartley Act, says that "the most significant feature of that Act is its omission of authority to seize" citing debate on the measure to show that the omission was a conscious decision.[26] Justice Clark placed his reliance on *Little* v. *Barreme*,[27] inasmuch as Congress had laid down specific procedures for the President to follow which he had declined to follow.[28]

Despite the opinion of the Court, therefore, it seems clear that four of the six Justices in the majority were more moved by the fact that the President had acted in a manner considered and rejected by Congress in a field in which Congress was empowered to establish the rules, rules the President is to see faithfully executed, than with the fact that the President's action was a form of "lawmaking" in a field committed to the province of Congress. The opinion of the Court, therefore, and its doctrinal implications must be considered with care, inasmuch as it is doubtful that that opinion does lay down a constitutional rule. Whatever the implications of the opinions of the individual Justices for the doctrine of "inherent" presidential powers—and they are significant—the implica-

[24] Id., 635–638.
[25] Id., 639, 640.
[26] Id., 657.
[27] 2 Cr. (6 U.S.) 170 (1804).
[28] 343 U.S., 662, 663.

tions for the area here under consideration are cloudy and have remained so from the time of the decision.[29]

## PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

By the decision of the Court in *Mississippi* v. *Johnson* [1] in 1867, the President was placed beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise, save perhaps for what must be a small class of powers that are purely ministerial.[2] An application for an injunction to forbid President Johnson to enforce the Reconstruction Acts, on the ground of their unconstitutionality, was answered by Attorney General Stanber, who argued, *inter alia,* the absolute immunity of the President from judicial process.[3] The Court refused to permit the filing, using language construable as meaning that the President was not reachable by judicial process but which more fully paraded the horrible consequences were the Court to act. First noting the limited meaning of the term "ministerial," the Court observed that "[v]ery different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. . . . The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legisla-

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[29] In *Dames & Moore* v. *Regan,* 453 U.S. 654, 668–669 (1981), the Court recurred to the *Youngstown* analysis for resolution of the presented questions, but one must observe that it did so saying that "the parties and the lower courts . . . have all agreed that much relevant analysis is contained in" *Youngstown. See also* id., 661–662, quoting Justice Jackson's *Youngstown* concurrence, "which both parties agree brings together as much combination of analysis and common sense as there is in this area".

[1] 4 Wall. (71 U.S.) 475 (1867).

[2] The Court declined to express an opinion "whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." Id., 498. In *National Treasury Employees Union* v. *Nixon,* 492 F.2d 587 (C.A.D.C. 1974), the court held that a writ of mandamus could issue to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run it should be applied to him.

[3] *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475, 484–485 (1867) (argument of counsel).

tion alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

. . . . .

"The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?" [4]

Rare has been the opportunity for the Court to elucidate its opinion in *Mississippi* v. *Johnson*, and in the Watergate tapes case [5] it held the President amenable to subpoena to produce evidence for use in a criminal case without dealing, except obliquely, with its prior opinion. The President's counsel had argued the President was immune to judicial process, claiming "that the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications." [6] However, the Court held, "neither the doctrine of sep-

[4] Id., 499, 500–501. One must always be aware that the case was decided in the context of the congressional predominance following the Civil War. The Court's restraint was pronounced when it refused an effort to file a bill of injunction to enjoin enforcement of the same acts and directed to cabinet officers. *Georgia* v. *Stanton*, 6 Wall. (73 U.S.) 50 (1867).

[5] *United States* v. *Nixon*, 418 U.S. 683 (1974).

[6] Id., 706.

aration of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." [7] The primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity and to accept the President's argument would disturb the separation of powers function of achieving "a workable government" as well as "gravely impair the role of the courts under Art. III." [8]

Present throughout the Watergate crisis, and unresolved by it, was the question of the amenability of the President to criminal prosecution prior to conviction upon impeachment.[9] It was argued that the impeachment clause necessarily required indictment and trial in a criminal proceeding to follow a successful impeachment and that a President in any event was uniquely immune from indictment and these arguments were advanced as one ground to deny enforcement of the subpoenas running to the President.[10] Assertion of the same argument by Vice President Agnew was controverted by the Government, through the Solicitor General, but as to the President it was argued that for a number of constitutional and practical reasons he was not subject to ordinary criminal process.[11]

Finally, most recently, the Court has definitively resolved one of the intertwined issues of presidential accountability. The President is absolutely immune in actions for civil damages for all acts within the "outer perimeter" of his official duties.[12] The Court's

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[7] Ibid.

[8] Id., 706–707. The issue was considered more fully by the lower courts. *In re Grand Jury Subpoena to Richard M. Nixon*, 360 F. Supp. 1, 6–10 (D.C.D.C. 1973) (Judge Sirica), *aff'd sub nom., Nixon* v. *Sirica*, 487 F.2d 700, 708–712 (C.A.D.C. 1973) *(en banc)*. Present throughout was the conflicting assessment of the result of the subpoena of President Jefferson in the *Burr* trial. *United States* v. *Burr*, 25 Fed. Cas. 187 (No. 14,694) (C.C.D.Va. 1807).

[9] The impeachment clause, Article I, § 3, cl. 7, *supra, p.* 114; *infra, pp.* 602–609, provides that the party convicted upon impeachment shall nonetheless be liable to criminal proceedings. Morris in the Convention, 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 500, and Hamilton in *The Federalist*, Nos. 65, 69 (Modern Library ed. 1937), 426, 446, asserted that criminal trial would follow a successful impeachment.

[10] Brief for the Respondent, *United States* v. *Nixon*, 418 U.S. 683 (1974), 95–122; *Nixon* v. *Sirica*, 487 F.2d 700, 756–758 (C.A.D.C. 1973) *(en banc)* (Judge MacKinnon dissenting). The Court had accepted the President's petition to review the propriety of the grand jury's naming him as an unindicted coconspirator, but it dismissed that petition without reaching the question. *United States* v. *Nixon*, *supra*, 687 n. 2.

[11] Memorandum for the United States, *Application of Spiro T. Agnew*, Civil No. 73-965 (D.C.D.Md., filed October 5, 1973).

[12] *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

close decision was premised on the President's "unique position in the constitutional scheme," that is, it was derived from the Court's inquiry of a "kind of 'public policy' analysis" of the "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers." [13] While the Constitution expressly afforded Members of Congress immunity in matters arising from "speech or debate," and while it was silent with respect to presidential immunity, the Court nonetheless considered such immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." [14] Although the Court relied in part upon its previous practice of finding immunity for officers, such as judges, as to whom the Constitution is silent, although a long common law history exists, and in part upon historical evidence which it admitted was fragmentary and ambiguous,[15] the Court's principal focus was upon the fact that the President was distinguishable from all other executive officials. He is charged with a long list of "supervisory and policy responsibilities of utmost discretion and sensitivity," [16] and diversion of his energies by concerns with private lawsuits would "raise unique risks to the effective functioning of government." [17] Moreover, the presidential privilege is rooted in the separation of powers doctrine, counseling courts to tread carefully before intruding. Some interests are important enough to require judicial action; "merely private suit[s] for damages based on a President's official acts" do not serve this "broad public interest" necessitating the courts to act.[18] Finally, qualified immunity would not adequately protect the President, because judicial inquiry into a functional analysis of his actions would bring with it the evil immunity was to prevent; absolute immunity was required.[19]

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[13] Id., 748.

[14] Id., 749.

[15] Id., 750–752 n. 31.

[16] Id., 750.

[17] Id., 751.

[18] Id., 754.

[19] Id., 755–757. Justices White, Brennan, Marshall, and Blackmun dissented. The Court reserved decision whether Congress could expressly create a damages action against the President and abrogate the immunity, id., 748–749 n. 27, thus appearing to disclaim that the decision is mandated by the Constitution; Chief Justice Burger disagreed with the implication of this footnote, id., 763–764 n. 7 (concurring opinion), and the dissenters noted their agreement on this point with the Chief Justice. Id., 770 & n. 4.

***The President's Subordinates.***—While the courts may be unable to compel the President to act or to prevent him from acting, his acts, when performed, are in proper cases subject to judicial review and disallowance. Typically, the subordinates through whom he acts may be sued, in a form of legal fiction, to enjoin the commission of acts which might lead to irreparable damage [20] or to compel by writ of mandamus the performance of a duty definitely required by law,[21] such suits being usually brought in the United States District Court for the District of Columbia.[22] In suits under the common law, a subordinate executive officer may be held personally liable in damages for any act done in excess of authority,[23] although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.[24] Different rules prevail when such an official is sued for a "constitutional tort" for wrongs allegedly in violation of our basic charter,[25] although the Court has hinted that in some "sensitive" areas officials acting in the "outer perimeter" of their duties may be accorded an absolute immunity from liability.[26] Jurisdiction to reach such officers for acts for

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[20] E.g., *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President's order); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). *See also Noble* v. *Union River Logging Railroad*, 147 U.S. 165 (1893); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912).

[21] E.g., *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803) (suit against Secretary of State to compel delivery of commissions of office); *Kendall* v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); *Decatur* v. *Paulding*, 14 Pet. (39 U.S.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

[22] This was originally on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." *Kendall* v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 614, 620–621 (1838). Congress has now authorized federal district courts outside the District of Columbia to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. § 1361.

[23] E.g., *Little* v. *Barreme*, 2 Cr. (6 U.S.) 170 (1804); *Bates* v. *Clark*, 95 U.S. 204 (1877); *United States* v. *Lee*, 106 U.S. 196 (1882); *Virginia Coupon Cases*, 114 U.S. 269 (1885); *Belknap* v. *Schild*, 161 U.S. 10 (1896).

[24] *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Barr* v. *Mateo*, 360 U.S. 564 (1959).

[25] An implied cause of action against officers accused of constitutional violations was recognized in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Butz* v. *Economou*, 438 U.S. 478 (1978), a *Bivens* action, the Court distinguished between common-law torts and constitutional torts and denied high federal officials, including cabinet secretaries, absolute immunity, in favor of the qualified immunity previously accorded high state officials under 42 U.S.C. § 1983. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court denied presidential aides derivative absolute presidential immunity, but it modified the rules of qualified immunity, making it more difficult to hold such aides, other federal officials, and indeed state and local officials, liable for constitutional torts.

[26] *Harlow* v. *Fitzgerald*, 457 U.S. 800, 812 (1982).

which they can be held responsible must be under the general "federal question" jurisdictional statute, which, as recently amended, requires no jurisdictional amount.[27]

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## IMPEACHMENT [1]

Few provisions of the Constitution were adopted from English practice to the degree the section on impeachment was. In England, impeachment was a device to remove from office one who abused his office or misbehaved but who was protected by the Crown.[2] It was a device which figured in the plans proposed to the Convention from the first and the arguments went to such questions as what body was to try impeachments and what grounds were to be stated as warranting impeachment.[3] The attention of

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[27] *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, *see* P.L. 94-574, 90 Stat. 2721 (1976), and P.L. 96-486, 94 Stat. 2369 (1980). If such suits are brought in state courts, they can be removed to federal district courts. 28 U.S.C. § 1442(a).

[1] Impeachment is the subject of several other provisions of the Constitution. Article I, § 2, cl. 5, gives to the House of Representatives "the sole power of impeachment." Article I, § 3, cl. 6, gives to the Senate "the sole power to try all impeachments," requires that Senators be under oath or affirmation when sitting for that purpose, stipulates that the Chief Justice of the United States is to preside when the President of the United States is tried, and provides for conviction on the vote of two-thirds of the members present. Article I, § 3, cl. 7, limits the judgment after impeachment to removal from office and disqualification from future federal office holding, but allows criminal trial and conviction following impeachment. Article II, § 2, cl. 1, deprives the President of the power to pardon or reprieve in cases of impeachment. Article III, § 2, cl. 3, excepts impeachment cases from the jury trial requirement.

The word "impeachment" may be used to mean several different things. Any member of the House may "impeach" an officer of the United States by presenting a petition or memorial, which is generally referred to a committee for investigation and report. The House votes to "impeach," the meaning used in § 4, when it adopts articles of impeachment. The Senate then conducts a trial on these articles and if the accused is convicted, he has been "impeached." *See* 3 A. Hinds' *Precedents of the House of Representatives of the United States* (Washington: 1907), §§ 2469-2485, for the range of forms.

[2] 1 W. Holdsworth, *History of English Law* (London: 7th ed. 1956), 379-385; Clarke, "The Origin of Impeachment," in *Oxford Essays in Medieval History, Presented to Herbert Salter* (Oxford: 1934), 164.

[3] Simpson, "Federal Impeachments," 64 U. Pa. L. Rev. 651, 653-667 (1916).

the Framers was for the most part fixed on the President and his removal and the results of this narrow frame of reference are reflected in the questions unresolved by the language of the Constitution.

### Persons Subject to Impeachment

During the debate in the First Congress on the "removal" controversy, it was contended by some members that impeachment was the exclusive way to remove any officer of the Government from his post,[4] but Madison and others contended that this position was destructive of sound governmental practice [5] and the view did not prevail. Impeachment, said Madison, was to be used to reach a bad officer sheltered by the President and to remove him "even against the will of the President; so that the declaration in the Constitution was intended as a supplementary security for the good behavior of the public officers." [6] The language of § 4 does not leave any doubt that any officer in the executive branch is subject to the power; it does not appear that military officers are subject to it [7] nor that members of Congress can be impeached.[8]

***Judges.***—Article III, § 1, specifically provides judges with "good behavior" tenure but the Constitution nowhere expressly vests the power to remove upon bad behavior; it has been assumed that judges are made subject to the impeachment power through being labeled "civil officers." The records in the Convention make this a plausible though not necessary interpretation.[9] And in fact nine of

[4] 1 *Annals of Congress* 457, 473, 536 (1789).

[5] Id., 375, 480, 496–497, 562.

[6] Id., 372.

[7] 3 W. Willoughby, *The Constitutional Law of the United States* (New York: 2d ed. 1929), 1448.

[8] This point was established by a vote of the Senate holding a plea to this effect good in the impeachment trial of Senator William Blount in 1797. 3 A. Hinds' *Precedents of the House of Representatives of the United States* (Washington: 1907), §§ 2294–2318; F. Wharton, *State Trials of the United States During the Administrations of Washington and Adams* (Philadelphia: 1849), 200–321.

[9] For practically the entire Convention, the plans presented and adopted provided that the Supreme Court was to try impeachments. 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 22, 244, 223–224, 231; 2 id., 186. On August 27, it was successfully moved that the provision in the draft of the Committee on Detail giving the Supreme Court jurisdictions of trials of impeachment be postponed, id., 430, 431, which was one of the issues committed to the Committee of Eleven. Id., 481. That Committee reported the provision giving the Senate power to try all impeachments, id., 497, which the Convention thereafter approved. Id., 551. It may be assumed that so long as trial was in the Supreme Court the Framers did not intend that the Justices, at least, were to be subject to the process.

The Committee of Five on August 20 was directed to report "a mode for trying the supreme Judges in cases of impeachment", id., 337, and it returned a provision

the twelve impeachments reaching trial in the Senate have been directed at federal judges.[10] So settled apparently is the interpretation that the major arguments, scholarly and political, have concerned the question whether judges, as well as others, are subject to impeachment for conduct which does not constitute an indictable offense [11] and the question whether impeachment is the exclusive removal device with regard to judges.[12]

### Impeachable Offenses

The Convention came to its choice of words describing the grounds for impeachment after much deliberation but the phrasing

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making Supreme Court Justices triable by the Senate on impeachment by the House. Id., 367. Consideration of this report was postponed. On August 27, it was proposed that all federal judges should be removable by the executive upon the application of both houses of Congress but it was rejected. Id., 428–429. The matter was not resolved by the report of the Committee on Style which left in the "good behavior" tenure but contained nothing about removal. Id., 575. Therefore, unless judges were included in the term "civil officers", which had been added without comment on September 8 to the impeachment clause, id., 552, they were not made removable. *But see infra.* n. 12.

[10] John Pickering, District Judge, 1803, 3 A. Hinds' *Precedents of the House of Representatives of the United States* (Washington: 1907), §§ 2319–2341; Justice Samuel Chase, 1804, id., §§ 2342–2363; James H. Peck, District Judge, 1830, id., §§ 2364–2384; West H. Humphreys, District Judge, 1862, id., §§ 2385–2397; Charles Swayne, District Judge, 1904, id., §§ 2469–2485; Robert W. Archbald, Judge of Commerce Court, 1912, 6 C. Cannon's *Precedents of the House of Representatives of the United States* (Washington: 1936), §§ 498–512; Harold Louderback, District Judge, 1932, id., §§ 513–524; George W. English, District Judge, 1925, ten Broek, "Partisan Politics and Federal Judgship Impeachments Since 1903," 23 Minn. L. Rev. 185, 194–196 (1939); Halsted L. Ritter, 1936, District Judge, *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter*, S. Doc. No. 200, 74th Congress, 2d sess. (1936).

[11] *Infra, pp.* 606, 607–608.

[12] Briefly, it has been argued that the impeachment clause of Article II is a limitation on the power of Congress to remove judges and that Article III is a limitation on the executive power of removal but that it is open to Congress to define "good behavior" and establish a mechanism by which judges may be judicially removed. Shartel, "Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution," 28 Mich. L. Rev. 485, 723, 870 (1930). Proposals to this effect were considered in Congress in the 1930's and 1940's and revived in the late 1960's, stimulating much controversy in scholarly circles. E.g., Kramer & Barron, "The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of 'During Good Behavior,'" 35 G.W.L. Rev. 455 (1967); Ziskind, "Judicial Tenure in the American Constitution: English and American Precedents," 1969 Sup. Ct. Rev. 135 (P. Kurland ed.); Berger, "Impeachment of Judges and 'Good Behavior' Tenure," 79 Yale L. J. 1475 (1970) Congress did in the Judicial Conduct and Disability Act of 1980, P. L. 96–458, 94 Stat. 2035, 28 U.S.C. §§ 1 note, 331, 332, 372, 604, provide for judicial council of the circuit disciplinary powers over federal judges but it specifically denied any removal power. The issue has been obliquely before the Court as a result of a judicial conference action disciplining a district judge but it was not reached, *Chandler* v. *Judicial Council*, 382 U.S. 1003 (1966); id., 398 U.S. 74 (1970), except by Justices Black and Douglas in dissent, who argued that impeachment was the exclusive power.

derived directly from the English practice. The framers early adopted, on June 2, a provision that the Executive should be removable by impeachment and conviction "of mal-practice or neglect of duty." [1] The Committee of Detail reported as grounds "Treason (or) Bribery or Corruption." [2] And the Committee of Eleven reduced the phrase to "Treason, or bribery." [3] On September 8, Mason objected to this limitation, observing that the term did not encompass all the conduct which should be grounds for removal; he therefore proposed to add "or maladministration" following "bribery." Upon Madison's objection that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate," Mason suggested "other high crimes and misdemeanors," which was adopted without further recorded debate.[4] The phrase in the context of impeachments has an ancient English history, first turning up in the impeachment of the Earl of Suffolk in 1388.[5]

Treason is defined in the Constitution: [6] bribery is not but it had a clear common law meaning and is now well covered by statute.[7] High crimes and misdemeanors, however, is an undefined and indefinite phrase, which, in England, had comprehended conduct not constituting indictable offenses.[8] In an unrelated action, the Convention had seemed to understand the term "high misdemeanor" to be quite limited in meaning,[9] but debate prior to adoption of

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[1] 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 88, 90, 230.

[2] 2 id., 172, 186.

[3] Id., 499.

[4] Id., 550.

[5] 1 T. Howell, *State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Times* (London: 1809), 90, 91; A. Simpson, *Treatise on Federal Impeachments* (Philadelphia: 1916), 86.

[6] Article III, § 3. *Infra*, pp. 824-830.

[7] The use of a technical term known in the common law would require resort to the common law for its meaning, *United States* v. *Palmer*, 3 Wheat. (16 U.S.) 610, 630 (1818) (per Chief Justice Marshall); *United States* v. *Jones*, 26 Fed. Cas. 653, 655 (No. 15,494) (C.C.Pa. 1813) (per Justice Washington), leaving aside the issue of the cognizability of common law crimes in federal courts. *See* Act of April 30, 1790, § 21, 1 Stat. 117.

[8] Berger, "Impeachment for 'High Crimes and Misdemeanors,'" 44 S. Calif. L. Rev. 395, 400-415 (1971).

[9] The extradition provision reported by the Committee on Detail had provided for the delivering up of persons charged with "Treason, Felony or high Misdemeanors." 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 174. But the phrase "high Misdemeanors" was replaced with "other crimes," "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." Id., 443.

the phrase [10] and comments thereafter in the ratifying conventions [11] were to the effect that the President at least, and all the debate was in terms of the President, should be removable by impeachment for commissions or omissions in office which were not criminally cognizable. And in the First Congress' "removal" debate, Madison maintained that the wanton removal from office of meritorious officers would be an act of maladministration which would render the President subject to impeachment.[12] Other comments, especially in the ratifying conventions, tend toward a limitation of the term to criminal, perhaps gross criminal, behavior.[13] While conclusions may be drawn from the conflicting statement, it must always be recognized that a respectable case may be made for either view.

Practice over the years, however, insofar as the Senate deems itself bound by the actions of previous Senates, would appear to limit the grounds of conviction to indictable criminal offenses for all officers with the possible exception of judges.

***The Chase Impeachment.***—The issue was early joined as a consequence of the Jefferson Administration's efforts to rid itself of some of the Federalist judges who were propagandizing the country through grand jury charges and other means. The theory of extreme latitude was enunciated by Senator Giles of Virginia during the impeachment trial of Justice Chase. "The power of impeachment was given without limitation to the House of Representatives; and the power of trying impeachments was given equally without limitation to the Senate. . . . A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him . . . [but] nothing more than a declaration of Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them better." [14] Chase's counsel responded that to be im-

[10] *See* id., 64–69, 550–551.

[11] E.g., 3 J. Elliot, *Debates in the Several State Conventions on Adoption of the Constitution* (Philadelphia: 1836), 341, 498, 500, 528 (Madison); 4 id., 276, 281 (C. C. Pinckney: Rutledge); 3 id., 516 (Corbin); 4 id., 263 (Pendleton). *Cf. The Federalist* No. 65 (Modern Library ed. 1937), 423–429 (Hamilton).

[12] 1 *Annals of Congress* 372–373 (1789).

[13] 4 J. Elliot, *Debates in the Several State Conventions on Adoption of the Constitution* (Philadelphia: 1836), 126 (Iredell); 2 id., 478 (Wilson).

[14] 1 J. Q. Adams, *Memoirs* (Philadelphia: 1874), 322. *See also* 3 A. Hinds' *Precedents of the House of Representatives of the United States* (Washington: 1907), 739, 753.

peachable, conduct must constitute an indictable offense.[15] Though Chase's acquittal owed more to the political divisions in the Senate than to the merits of the arguments, it did go far to affix the latter reading to the phrase "high Crimes and Misdemeanors" until the turbulent period following the Civil War.[16]

***The Johnson Impeachment.***—President Johnson was impeached by the House on the ground that he had violated the "Tenure of Office" Act [17] by dismissing a Cabinet chief. The theory of the proponents of impeachment was succinctly put by Representative Butler, one of the managers of the impeachment in the Senate trial. "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose." [18] Former Justice Benjamin Curtis controverted this argument, saying: "My first position is, that when the Constitution speaks of 'treason, bribery, and other high crimes and misdemeanors,' it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment." [19] The President's acquittal by a single vote was no doubt not the result of a choice between the two theories but the result may be said to have placed a gloss on the impeachment language approximating the theory of the defense.

***Later Judicial Impeachments.***—With regard to federal judges, however, several successful impeachments in this Century appear to establish that the constitutional requirement of "good behavior" and "high crimes and misdemeanors" may conjoin to allow the removal of judges who have engaged in seriously questionable conduct although no specific criminal statute may have been violated. Thus, both Judge Archbald and Judge Ritter were convicted on ar-

[15] Id., 762.

[16] The full record is S. Smith & T. Lloyd (eds.), *Trial of Samuel Chase, An Associate Justice of the Supreme Court of the United States . . .* (Washington: 1805). On the political background and the meaning of the trial and acquittal, *see* Lillich, "The Chase Impeachment," 4 Amer. J. Legal Hist. 49 (1960).

[17] Act of March 2, 1867, 14 Stat. 430.

[18] 1 *Trial of Andrew Johnson, President of the United States on Impeachment* (Washington: 1868), 88, 147.

[19] Id., 409.

ticles of impeachment which charged questionable conduct which probably did not amount to indictable offenses. [20] It is possible that Members of Congress may employ different standards with regard to judges who have life tenure than they do with regard to other officers of the Government who either serve for a term of years or who serve at the pleasure of others who serve for a term of years, but such a differentiation places a substantial burden upon the language of the Constitution.

***The Nixon Impeachment.***—For the first time in over a hundred years and for only the second time in the Nation's history, Congress moved to impeach the President of the United States, a move forestalled only by the resignation of President Nixon on August 9, 1974. In the course of the proceedings, there recurred strenuous argument with regard to the nature of an impeachable offense, whether only criminally-indictable actions qualify for that status or whether the definition is broader and of course no resolution was reached.[21] A second issue arose that apparently has not been considered before: whether persons subject to impeachment could be indicted and tried prior to impeachment and conviction or whether indictment could only follow the removal from office. In fact, the argument was really directed only to the status of the President, inasmuch as it was argued that he embodied the Executive Branch itself, while lesser executive officials and judges were not of that calibre.[22] That issue similarly remained unsettled, the Supreme

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[20] ten Broek, "Partisan Politics and Federal Judgeship Impeachments Since 1903," 23 Minn. L. Rev. 185 (1939).

[21] Analyses of the issue from different points of view are contained in Impeachment Inquiry Staff, House Judiciary Committee, *Constitutional Grounds for Presidential Impeachments*, 93d Congress, 2d sess. (1974) (Comm. Print); J. St. Clair, et al., Legal Staff of the President, *Analysis of the Constitutional Standard for Presidential Impeachment* (Washington: 1974); Office of Legal Counsel, Department of Justice, *Legal Aspects of Impeachment: An Overview, and Appendix I* (Washington: 1974). And see R. Berger, *Impeachment: The Constitutional Problems* (Cambridge: 1973), which preceded the instant controversy. The House Judiciary Committee recommended three articles of impeachment, for conduct at least one of which, refusal to honor the Committee's subpoenas, was not an indictable offense, and a second that mixed indictable and nonindictable offenses. *Impeachment of Richard M. Nixon, President of the United States.* H. Rept. No. 93-1305, 93d Cong., 2d sess. (1974). Mr. Nixon's resignation of course precluded further action on the issue, although the articles were submitted to and "accepted" by the House of Representatives. 120 Cong. Rec. 29219-29362 (1974).

[22] The question first arose during the grand jury investigation of former Vice President Agnew, during which the United States, through the Solicitor General, argued that the Vice President and all civil officers were not immune from the judicial process and that removal need not precede indictment, but as to the President it was argued that for a number of constitutional and practical reasons the President was not subject to the ordinary criminal process. *Memorandum for the United States, Application of Spiro T. Agnew*, Civil No. 73-965 (D.C.D.Md., filed October 5, 1973). One court specifically held that a federal judge was indictable and could be

Court declining to provide some guidance in the course of deciding a case on executive privilege.[23]

convicted prior to removal from office. *United States*, v. *Isaacs*, 493 F.2d 1124 (C.A. 7), *cert. den. sub nom. Kerner* v. *United States*, 417 U.S. 976 (1974).

[23] The grand jury had named the President as an unindicted coconspirator in the case of *United States* v. *Mitchell*, et al., No. 74-110 (D.C.D.C.), apparently in the belief that he was not actually indictable while in office. The Supreme Court agreed to hear the President's claim that the grand jury acted outside its authority, but finding that resolution of the issue was unnecessary to decision of the executive privilege claim it dismissed the petition for *certiorari* of the President as improvidently granted, *United States* v. *Nixon*, 418 U.S. 683, 687 n. 2 (1974).

# ARTICLE III

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# JUDICIAL DEPARTMENT

## ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during the Continuance in Office.

### ORGANIZATION OF COURTS, TENURE, AND COMPENSATION OF JUDGES

The Constitution is almost completely silent concerning the organization of the federal judiciary. "That there should be a national judiciary was readily accepted by all." [1] But whether it was to consist of one high court at the apex of a federal judicial system or a high court exercising appellate jurisdiction over state courts which would initially hear all but a minor fraction of cases raising national issues was a matter of considerable controversy.[2] The Virginia Plan provided for a "National judiciary [to] be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature . . . ." [3] In the Committee of the Whole, the proposition "that a national judiciary be established" was unanimously adopted,[4] but the clause "to consist of One supreme tribunal, and of one or more inferior tribunals" [5] was first agreed to, then reconsidered, and the provision for inferior tribunals stricken out, it being argued that state courts could adequately adjudicate all necessary matters while the supreme tribu-

[1] M. Farrand, *The Framing of the Constitution of the United States* (New Haven: 1913), 79.

[2] The most complete account of the Convention's consideration of the judiciary is J. Goebel, *Antecedents and Beginnings to 1801. History of the Supreme Court of the United States, Vol. 1* (New York: 1971) ch. 5.

[3] 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 21-22. That this version might not possibly be an accurate copy, *see* 3 id., 593-594.

[4] 1 id., 95, 104.

[5] Id., 95, 105. The words "One or more" were deleted the following day without recorded debate. Id., 116, 119.

nal would protect the national interest and assure uniformity.[6] Wilson and Madison thereupon moved to authorize Congress "to appoint inferior tribunals," [7] which carried the implication that Congress could in its discretion either designate the state courts to hear federal cases or create federal courts. The word "appoint" was adopted and over the course of the Convention changed into phrasing which seems to impose an obligation on Congress to establish inferior federal courts.[8] The "good behavior" clause excited no controversy [9] while the only substantial dispute with regard to denying Congress the power to intimidate judges through actual or threatened reduction of salaries came on Madison's motion to bar increases as well as decreases.[10]

### One Supreme Court

The Convention thus left up to Congress decision on the size and composition of the Supreme Court, the time and place for sitting, its internal organization, save for the reference to the Chief Justice in the impeachment provision,[1] and other matters. These details Congress filled up in the Judiciary act of 1789, one of the seminal statutes of the United States.[2] By the Act, the Court was

[6] Id., 124–125.

[7] Madison's notes use the word "institute" in place of "appoint," id., 125, but the latter appears in the Convention Journal, id., 118, and in Yates' notes, id., 127, and when the Convention took up the draft reported by the Committee of the Whole "appoint" is used even in Madison's notes. 2 id., 38, 45.

[8] On offering their motion, Wilson and Madison "observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." 1 id., 125. The Committee on Detail provided for the vesting of judicial power in one Supreme Court "and in such inferior Courts as shall, when necessary, from time to time, be constituted by the legislature of the United States." 2 id., 186. Its draft also authorized Congress "[t]o constitute tribunals inferior to the Supreme Court." Id., 182. No debate is recorded when the Convention approved these two clauses, Id. 315, 422–423, 428–430. The Committee on Style left the clause empowering Congress to "constitute" inferior tribunals as was, but it deleted "as shall, when necessary" from the Judiciary article so that the judicial power was vested "in such inferior courts as Congress may from time to time"—and here deleted "constitute" and substituted the more forceful—"ordain and establish." Id., 600.

[9] The provision was in the Virginia Plan and was approved throughout, 1 id., 21. On its meaning, *see supra*, pp. 603–608.

[10] Id 121; 2 id., 44–45, 429–430.

[1] Article I, § 3. *Supra*, pp. 114

[2] Act of September 24, 1789, 1 Stat. 73. The authoritative works on the Act and its working and amendments are F. Frankfurter & J. Landis, *The Business of the Supreme Court* (New York: 1928); Warren, "New Light on the History of the Federal Judicial Act of 1789," 37 Harv. L. Rev. 49 (1923); *see also* J. Goebel, *Antecedents and Beginnings to 1801, History of the Supreme Court of the United States, Vol. 1* (New York: 1971), ch. 11.

made to consist of a Chief Justice and five Associate Justices.[3] The number was gradually increased until it reached a total of ten under the act of March 3, 1863.[4] As one of the Reconstruction Congress' restrictions on President Andrew Johnson, the number was reduced to seven as vacancies should occur.[5] The number actually never fell below eight before the end of Johnson's term and Congress thereupon made the number nine.[6]

Proposals have been made at various times for an organization of the Court into sections or divisions. No authoritative judicial expression is available, although Chief Justice Hughes in a letter to Senator Wheeler in 1937 expressed doubts concerning the validity of such a device and stated that "the Constitution does not appear to authorize two or more Supreme Courts functioning in effect as separate courts." [7]

Congress has also determined the time and place of sessions of the Court. It utilized this power once in 1801 to change its terms so that for fourteen months the Court did not convene, so as to forestall a constitutional attack on the repeal of the Judiciary Act of 1801.[8]

### Inferior Courts

Congress also acted in the Judiciary Act of 1789 to create inferior courts. Thirteen district courts were constituted to have four sessions annually [1] and three circuit courts were established to consist jointly of two Supreme Court justices each and one of the district judges of such districts which were to meet twice annually in the various districts comprising the circuit.[2] This system had substantial faults in operation, not the least of which was the burden imposed on the Justices who were required to travel thousands of miles each year under bad conditions.[3] Despite numerous efforts to

[3] Act of September 24, 1789, 1 Stat. 73, § 1.

[4] 12 Stat. 794. § 1.

[5] Act of July 23, 1866, 14 Stat. 209, §1.

[6] Act of April 10, 1869, 16 Stat. 44.

[7] Hearings before the Senate Judiciary Committee on S. 1392, *Reorganization of the Judiciary*, 75th Congress, 1st sess. (1937), pt. 3, 491. For earlier proposals to have the Court sit in divisions, *see* F. Frankfurter & J. Landis, *The Business of the Supreme Court* (New York: 1928), 74–85.

[8] 1 C. Warren, *The Supreme Court in United States History* (Boston: rev. ed. 1926), 222–224.

[1] Act of September 24, 1789, 1Stat. 73, §§ 2–3.

[2] Id., 74, §§ 4–5

[3] *Cf.* F. Frankfurter & J. Landis. *The Business of the Supreme Court* (New York: 1928). chs. 1–3: J. Goebel. *Antecedents and Beginnings to 1891: History of the Supreme Court of the United States. vol. 1* (New York: 1971). 554–560, 565–569. Upon receipt of a letter from President Washington soliciting suggestions regarding the

change this system, it persisted, except for one brief period, until 1891.[4] Since then, the federal judicial system has consisted of district courts with original jurisdiction, intermediate appellate courts, and the Supreme Court.

***Abolition of Courts.***—That Congress "may from time to time ordain and establish" inferior courts would seem to imply that the system may be reoriented from time to time and that Congress is not restricted to the *status quo* but may expand and contract the units of the system; but if the judges are to have life tenure what is to be done with them when the system is contracted? Unfortunately, the first exercise of the power occurred in a highly politicized situation and no definite answer emerged. By the Judiciary Act of February 13, 1801,[5] passed in the closing weeks of the Adams Administration, the districts were organized and six circuit courts consisting of three circuit judges each were created. Adams filled the positions with deserving Federalists and upon coming to power the Jeffersonians set in motion plans to repeal the Act, which were carried out.[6] No provision was made for the displaced judges, apparently under the theory that if there were no courts there could be no judges to sit on them.[7] The validity of the repeal was ques-

judicial system, *Writings of George Washington*. J. Fitzpatrick ed., (Washington: 1943). 31, Chief Justice Jay prepared a letter for the approval of the other Justices, declining to comment on the policy questions but raising several issues of constitutionality, that the same man should not be appointed to two offices, that the offices were incompatible, and that the act invaded the prerogatives of the President and Senate. 2 G. McRee, *Life and Correspondence of James Iredell* (New York: 1858), 293-296. The letter was apparently never forwarded to the President. *Writings of Washington, op. cit.*, 31-32 n. 58. When the constitutional issue was raised in *Stuart* v. *Laird*, 1 Cr. (5 U.S.) 299, 309 (1803), it was passed over with the observation that the practice was too established to be questioned.

[4] Act of March 3, 1891, 26 Stat. 826. The temporary relief came in the Act of February 13, 1801, 2 Stat. 89, which was repealed by the Act of March 8, 1802, 2 Stat. 132.

[5] Act of February 13, 1801, 2 Stat. 89.

[6] Act of March 8, 1802, 2 Stat. 132. F. Frankfurther & J. Landis, *The Business of the Supreme Court* (New York: 1928), 25-32; 1 C. Warren, *The Supreme Court in United States History* (Boston: rev. ed. 1926), 185-215.

[7] Thus, John Taylor of Caroline, upon whom the Jeffersonians in Congress relied: "The Constitution declares that the judge shall hold his office during good behavior. Could it mean that he should hold this office after it was abolished? Could it mean that his tenure should be limited by behaving well in an office which did not exist? It must either have intended these absurdities or admit of a construction which will avoid them. This construction obviously is that an officer should hold that which he might hold, namely an existing office, so long as he did that which he might do, namely his duty in that office; and not that he should hold an office which did not exist or perform duties not sanctioned by law. If, therefore, Congress can abolish the courts, as they did by the last law, the officer dies with the office, unless you allow the Constitution to admit impossibilities as well as absurdities." W. Carpenter, *Judicial Tenure in the United States* (New Haven: 1918), 63-64. The controversy is recounted in id., 58-78.

tioned in *Stuart* v. *Laird* [8] where Justice Paterson scarely noticed the argument in rejecting it.

Not until 1913 did Congress again utilize its power to abolish a federal court, this time the unfortunate Commerce Court which had disappointed the expectations of most of its friends.[9] But this time Congress provided for the redistribution of the Commerce Court judges among the circuit courts as well as a transfer of its jurisdiction to the district courts.

**Compensation**

***Diminution of Salaries.***—"The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." [1] Thus, once a salary figure has gone into effect, Congress may not reduce it nor rescind any part of an increase, although prior to the time of its effectiveness Congress may repeal a promised increase. This decision was rendered in the context of a statutory salary plan for all federal officers and employees under which increases went automatically into effect on a specified date. Four years running, Congress interdicted the pay increases, but in two instances the increases had become effective, raising the barrier of this clause.[2]

Also raising this clause was a Depression-era appropriations act reducing "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)," by a fixed amount. While this provision presented no questions of its own constitutionality, it did require an interpretation of which judges the clause applied to in order to prevent the reductions. Judges in the District of

[8] 1 Cr. (5 U.S.) 299 (1803).

[9] The Court was created by the Act of June 18, 1910, 36 Stat. 539, and repealed by the Act of October 22, 1913, 38 Stat. 208, 219. *See* F. Frankfurter & J. Landis, *The Business of the Supreme Court* (New York: 1928), 153-174; W. Carpenter, *Judicial Tenure in the United States* (New Haven: 1918), 78-94.

[1] *United States* v. *Will*, 449 U.S. 200, 217-218 (1980). Hamilton, writing in *The Federalist* No. 79 (Modern Library ed. 1937), 491, emphasized that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will."

[2] *United States* v. *Will*, 449 U.S. 200, 224-230 (1980). In one year, the increase took effect of October 1, while the President signed the bill reducing the amount during the day of October 1. The Court held the increase had gone into effect by the time the reduction was signed. *Will* is also authority for the proposition that a general, nondiscriminatory reduction, affecting judges but not aimed solely at them, is covered by the clause. Id., 226.

Columbia were held protected by Article III,[3] while, on the other hand, salaries of the judges of the Court of Claims, that being a legislative court, were held subject to the reduction.[4]

In *Evans* v. *Gore* [5] the Court invalidated the application of the income tax law to a federal judge, over the strong dissent of Justice Holmes, who was joined by Justice Brandeis. This ruling was extended in *Miles* v. *Graham* [6] to exempt the salary of a judge of the Court of Claims appointed subsequent to the enactment of the taxing act. *Evans* v. *Gore* was disapproved and *Miles* v. *Graham* in effect overruled in *O'Malley* v. *Woodrough,*[7] where the Court upheld section 22 of the Revenue Act of 1932 which extended the application of the income tax to salaries of judges taking office after June 6, 1932. Such a tax was regarded neither as an unconstitutional diminution of the compensation of judges nor as an encroachment on the independence of the judiciary.[8] To subject judges who take office after a stipulated date to a nondiscriminatory tax laid generally on an income, said the Court "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." [9]

**Courts of Specialized Jurisdiction**

By virtue of its power "to ordain and establish" courts, Congress has occasionally created courts under Article III to exercise a specialized jurisdiction. These tribunals are like other Article III courts in that they exercise "the judicial power of the United States," and only that power, that their judges must be appointed by the President and the Senate and must hold office during good behavior subject to removal by impeachment only, and that the compensation of their judges cannot be diminished during their continuance in office. One example of such courts was the Commerce Court created by the Mann-Elkins Act of 1910,[1] which was

[3] *O'Donoghue* v. *United States,* 289 U.S. 516 (1933).

[4] *Williams* v. *United States,* 289 U.S. 553 (1933). *But see Glidden Company* v. *Zdanok,* 370 U.S. 530 (1962).

[5] 253 U.S. 245 (1920).

[6] 268 U.S. 501 (1925).

[7] 307 U.S. 277 (1939).

[8] Id., 278–282.

[9] Id., 282.

[1] 36 Stat. 539.

given exclusive jurisdiction of all cases to enforce orders of the Interstate Commerce Commission except those involving money penalties and criminal punishment, of cases brought to enjoin, annul, or set aside orders of the Commission, of cases brought under the act of 1903 to prevent unjust discriminations, and of all mandamus proceedings authorized by the act of 1903. This court actually functioned for less than three years, being abolished in 1913, as was mentioned above.

Another court of specialized jurisdiction but created for a limited time only was the Emergency Court of Appeals organized by the Emergency Price Control Act of January 30, 1942.[2] By the terms of the statute this court consisted of three or more judges designated by the Chief Justice from the judges of the Untied States district courts and circuit courts of appeal. The Chief Justice was authorized to designate one of the judges as chief judge, to designate additional judges from time to time, and to revoke designations. The chief judge in turn was authorized to divide the Court into divisions of three or more members each, with any such division empowered to render judgment as the judgment of the Court. The Court was vested with jurisdiction and powers of a district court to hear appeals filed within thirty days against denials of protests by the Price Administrator and with exclusive jurisdiction to set aside regulations, orders, or price schedules, in whole or in part, or to remand the proceeding. But no regulation or price schedule could be set aside or enjoined unless the Court was satisfied that it was contrary to law or was arbitrary or capricious. Even then the effectiveness of a restraining order was to be suspended for thirty days and, if appealed to the Supreme Court within thirty days, until final disposition.

Although the act deprived the district courts of the power to enjoin the enforcement of orders and price schedules, it vested them with jurisdiction to enforce the act and orders issued thereunder in actions brought by the Administrator to enjoin violations and to try criminal prosecutions brought by the Attorney General. Since the Emergency Court of Appeals, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of any order issued under the act, it resulted that the district courts were deprived of the power to inquire into the validity of orders involved in civil or criminal proceedings in which they had jurisdiction.[3]

[2] 56 Stat. 23, 31–33.

[3] In *Lockerty* v. *Phillips*, 319 U.S. 182 (1943), the limitations on the use of injunctions except the prohibition against interlocutory decrees, was unanimously sustained.

In *Yakus* v. *United States*,[4] the Court rejected the contention of petitioners, who had not resorted to this procedure as prescribed by Congress, that the denial of an opportunity to attack the validity of a price regulation in a prosecution for its violation did not afford them due process. Justice Stone, on behalf of the Court, stated that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue." [5] In a dissent Justice Rutledge took issue with this holding, saying: "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials." [6]

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A similar court was created to be utilized in the enforcement of the economic controls imposed by President Nixon in 1971. P.L. 92-210, 85 Stat. 743, § 211(b). Although controls ended in 1974, see 12 U.S.C. § 1904 note, Congress continued the Temporary Emergency Court of Appeals and gave it new jurisdiction. Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633, 15 U.S.C. § 754, incorporating judicial review provisions of the Economic Stabilization Act. Another special court was created in 1973 by § 209 of the Regional Rail Reorganization Act, P.L. 93-236, 87 Stat. 999, 45 U.S.C. § 719, to review the final system plan under the Act. *See Blanchette* v. *Connecticut Gen. Ins. Corp.*, 419 U.S. 102 (1974).

[4] 321 U.S. 414 (1944).

[5] Id. 444.

[6] Id., 468. See the Court's treatment of similar preclusion provisions in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978).

**Legislative Courts: The Canter Case**

Legislative courts, so-called because they are created by Congress in pursuance of its general legislative powers, have comprised a significant part of the federal judiciary. The distinction between constitutional courts and legislative courts was first made in *American Ins. Co.* v. *Canter,*[1] which involved the question of the admiralty jurisdiction of the territorial court of Florida, the judges of which were limited to a four-year term in office. Said Chief Justice Marshall for the Court: "These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."[2] The Court went on to hold that admiralty jurisdiction can be exercised in the States only in those courts which are established in pursuance of Article III but that the same limitation does not apply to the territorial courts, for in legislating for them "Congress exercises the combined powers of the general, and of a state government."[3]

*Canter* postulated a simple proposition: "Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot."[4] A two-fold difficulty attended this proposition, however. Admiralty jurisdiction is included within the "judicial power of the United States" specifically in Article III, requiring an explanation how this territorial court could receive and exercise it. Second, if territorial courts could not exercise Article III power, how might their decisions be subjected to appellate review in the Supreme Court, or indeed in other Article III

[1] 1 Pet. (26 U.S.) 511 (1828).

[2] Id., 546.

[3] In *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 544-545 (1962), Justice Harlan asserted that Chief Justice Marshall in the *Canter* case "did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. . . . All the Chief Justice meant . . . is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article. . . . "

[4] *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 106 (1982) (Justice White dissenting).

courts, which could exercise only Article III judicial power?[5] Moreover, if in fact some "judicial power" may be devolved upon courts not having the constitutional security of tenure and salary, what prevents Congress from undermining those values intended to be protected by Article III's guarantees by giving jurisdiction to nonprotected entities that, being subjected to influence, would be bent to the popular will?

Attempts to explain or to rationalize the predicament or to provide a principled limiting point have from *Canter* to the present resulted in "frequently arcane distinctions and confusing precedents" spelled out in cases comprising "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night."[6]

***Power of Congress Over Legislative Courts.***—In creating legislative courts, Congress is not limited by the restrictions imposed in Article III concerning tenure during good behavior and the prohibition against diminution of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court, and it may subject the judges of legislative courts to removal by the President[7] or it may reduce their salaries during their terms.[8] Similarly, it follows that Congress can vest in legislative courts nonjudicial functions of a legislative or advisory nature and deprive their judgments of finality. Thus, in *Gordon* v. *United States*,[9] there was no objection to the power of the Secretary of the Treasury and Congress to revise or suspend the early judgments of the Court of Claims. Likewise, in *United States* v. *Ferreira*,[10] the Court sustained the act conferring powers on the Florida territorial court to examine claims rising under the Spanish treaty and to report its decisions and the evidence on which they were based to the Secretary of the Treasury for subsequent action. "A power of this description," it was said, "may constitutionally be conferred on a Secretary as well as on a commissioner. But [it] is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

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[5] That the Supreme Court could review the judgments of territorial courts was established in *Durousseau* v. *United States*, 6 Cr. (10 U.S.) 307 (1810). *See also Benner* v. *Porter*, 9 How. (50 U.S.) 235, 243 (1850); *Clinton* v. *Englebrecht*, 13 Wall. (80 U.S.) 434 (1872); *Balzac* v. *Porto Rico*, 258 U.S. 298, 312-313 (1922).

[6] *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 90, 91 (1982) (Justice Rehnquist concurring). The "darkling plain" language is his attribution to Justice White's historical summary.

[7] *McAllister* v. *United States*, 141 U.S. 174 (1891).

[8] *United States* v. *Fisher*, 109 U.S. 143 (1883); *Williams* v. *United States*, 289 U.S. 553 (1933).

[9] 2 Wall. (69 U.S.) 561 (1864).

[10] 13 How. (54 U.S.) 40, 48 (1852).

***Review of Legislative Courts by Supreme Court.***—Chief Justice Taney's view, that would have been expressed in *Gordon*,[11] that the judgments of legislative courts could never be reviewed by the Supreme Court, was tacitly rejected in *DeGroot* v. *United States*,[12] in which the Court took jurisdiction from a final judgment of the Court of Claims. Since the decision in this case, the authority of the Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts but rather upon the nature of the proceeding before the lower court and the finality of its judgment. The Supreme Court will neither review the administrative proceedings of legislative courts nor entertain appeals from the advisory or interlocutory decrees of such a body.[13] But in proceedings before a legislative court which are judicial in nature, admit of a final judgment, and involve the performance of judicial functions and therefore the exercise of judicial power, the Court may be vested with appellate jurisdiction.[14]

***The "Public Rights" Distinction.***—A major delineation of the distinction between Article I courts and Article III courts was attempted in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*[15] In this case was challenged a summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its customs collectors. It was objected that the assessment and collection was a judicial act carried out by nonjudicial officers and thus invalid under Article III. Accepting that the acts complained of were judicial, the Court nonetheless sustained the act by distinguishing between any act, "which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," which, in other words, is inherently judicial, and other acts which Congress may vest in courts or in other agencies. "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the

[11] The opinion in *Gordon* v. *United States*, 2 Wall. (69 U.S.) 561 (1864), had originally been prepared by Chief Justice Taney, but following his death and reargument of the case the opinion cited was issued. The Court later directed the publishing of Taney's original opinion at 117 U.S. 697. *See also United States* v. *Jones*, 119 U.S. 477, 478 (1886), in which the Court noted that the official report of Chief Justice Chase's *Gordon* opinion and the Court's own record showed differences and quoted the record.

[12] 5 Wall. (72 U.S.) 419 (1867). *See also United States* v. *Jones*, 119 U.S. 477 (1886).

[13] E.g., *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693 (1927); *Federal Radio Comm.* v. *General Elec. Co.*, 281 U.S. 464 (1930).

[14] *Pope* v. *United States*, 323 U.S. 1, 14 (1944).

[15] 18 How. (59 U.S.) 272 (1856).

courts of the United States, as it may deem proper." [16] The distinction was between those acts which historically had been determined by courts and those which historically had been resolved by executive or legislative acts and comprehended those matters that arose between the government and others. Thus, Article I courts "may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control." [17]

Among the matters susceptible of judicial determination, but not requiring it, are claims against the United States,[18] the disposal of public lands and claims arising therefrom,[19] questions concerning membership in the Indian tribes,[20] and questions arising out of the administration of the customs and internal revenue laws.[21] Other courts similar to territorial courts, such as consular courts and military courts martial, may be justified on like grounds.[22]

The "public rights" distinction appears today to be a description without a significant distinction. Thus, in *Crowell* v. *Benson*,[23] the Court approved an administrative scheme for determination, subject to judicial review, of maritime employee compensation claims, although it acknowledged that the case involved "one of private right, that is, of the liability of one individual to another under the law as defined." [24] Thus, while the distinction may still afford some limiting basis with respect to Congress' power to give judicial power to an Article I tribunal,[25] it is problematical how much force the distinction has.

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[16] Id., 284.

[17] *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929).

[18] *Gordon* v. *United States*, 117 U.S. 697 (1864); *McElrath* v. *United States*, 102 U.S. 426 (1880); *Williams* v. *United States*, 289 U.S. 553 (1933). On the status of the Court of Claims, see *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).

[19] *United States* v. *Coe*, 155 U.S. 76 (1894) (Court of Private Land Claims).

[20] *Wallace* v. *Adams*, 204 U.S. 415 (1907); *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899) (Choctaw and Chickasaw Citizenship Court).

[21] *Old Colony Trust Co.* v. *CIR*, 279 U.S. 716 (1929); *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929).

[22] *See In re Ross*, 140 U.S. 453 (1891) (consular courts in foreign countries). Military courts may, on the other hand, be a separate entity of the military having no connection to Article III. *Dynes* v. *Hoover*, 20 How. (61 U.S.) 65, 79 (1857).

[23] 285 U.S. 22 (1932).

[24] Id., 51. On the constitutional problems of assignment to an administrative agency, see *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442 (1977); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

[25] *Northern Pipeline Const Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 67–70 (1982).

***Constitutional Status of the Court of Claims and the Courts of Customs and Patent Appeals.***—Though the Supreme Court for a long while accepted the Court of Claims as an Article III court,[1] it later ruled that court to be an Article I court and its judges without constitutional protection of tenure and salary.[2] Then, in the 1950's Congress statutorily declared that the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals were Article III courts,[3] a questionable act under the standards the Court had utilized to determine whether courts were legislative or constitutional.[4] But in *Glidden* v. *Zdanok*,[5] five of seven participating Justices united to find that indeed the Court of Claims and the Court of Customs and Patent Appeals at least were constitutional courts and their judges eligible to participate in judicial business in other constitutional courts. Three Justices would have overruled *Bakelite* and *Williams* and have held that the courts in question were constitutional courts.[6] Whether a court is an Article III tribunal depends largely upon whether legislation establishing it is in harmony with the limitations of that Article, specifically, "whether . . . its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite." When a court is created "to carry into effect [federal] powers . . . over subject matter . . . and not over localities," a presumption arises that the status of such a tribunal is constitutional rather than legislative.[7] The other four Justices expressly declared that *Bakelite* and *Williams* should not be overruled,[8] but two of them thought the two courts had attained consti-

[1] *De Groot* v. *United States*, 5 Wall. (72 U.S.) 419 (1866); *United States* v. *Union Pacific Co.*, 98 U.S. 569, 603 (1878); *Miles* v. *Graham*, 268 U.S. 501 (1925).

[2] *Williams* v. *United States*, 289 U.S. 553 (1933); *cf. Ex Parte Bakelite Corp.*, 279 U.S. 438, 450–455 (1929).

[3] 67 Stat. 226, § 1, 28 U.S.C. § 171 (Court of Claims); 70 Stat. 532, § 1, 28 U.S.C. § 251 (Customs Court); 72 Stat. 848, § 1, 28 U.S.C. § 211 (Court of Customs and Patent Appeals).

[4] In *Ex parte Bakelite Corp.*, 279 U.S. 438, 459 (1929), Justice Van Devanter refused to give any weight to the fact that Congress had bestowed life tenure on the judges of the Court of Customs Appeals because that line of thought "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred."

[5] 370 U.S. 530 (1962).

[6] *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 531 (1962) (Justices Harlan, Brennan, and Stewart).

[7] Id., 548, 552.

[8] Id., 585 (Justice Clark and Chief Justice Warren concurring); 589 (Justices Douglas and Black dissenting).

tutional status by virtue of the clear manifestation of congressional intent expressed in the legislation.[9] Two Justices maintained that both courts remained legislative.[10] While the result is clear, no standard for pronouncing a court legislative rather than constitutional has obtained the adherence of a majority of the Court.

***Status of Courts of the District of Columbia.***—Through a long course of decisions the courts of the District of Columbia were regarded as legislative courts upon which Congress could impose nonjudicial functions. In *Butterworth* v. *United States ex rel. Hoe* [11] the Court sustained an act of Congress which conferred revisory powers upon the Supreme Court of the District in patent appeals and made its decisions binding only upon the Commissioner of Patents. Similarly, the Court later sustained the authority of Congress to vest revisory powers in the same court over rates fixed by a public utililites commission.[12] Not long after this the same rule was applied to the revisory powers of the District Supreme Court over orders of the Federal Radio Commission.[13] These rulings were based on the assumption, express or implied, that the courts of the District were legislative courts, created by Congress in pursuance of its plenary power to govern the District of Columbia. In dictum in *Ex parte Bakelite Corp.*,[14] while reviewing the history and analyzing the nature of the legislative courts, the Court stated that the courts of the District were legislative courts.

In 1933, nevertheless, the Court, abandoning all previous dicta on the subject, found the courts of the District of Columbia to be constitutional courts exercising judicial power of the United States,[15] with the result that it assumed the task of reconciling the performance of nonjudicial functions by such courts with the rule that constitutional courts can exercise only the judicial power of the United States. This task was accomplished by the argument that in establishing courts for the District, Congress is performing dual functions in pursuance of two distinct powers, the power to constitute tribunals inferior to the Supreme Court, and its plenary and exclusive power to legislate for the District of Columbia. How-

[9] Id., 585 (Justice Clark and Chief Justice Warren).

[10] Id., 589 (Justices Douglas and Black). The concurrence thought that the rationale of *Bakelite* and *Williams* was based on a significant advisory and reference business of the two courts which the two Justices now thought insignificant but what there was of it they thought nonjudicial and that the courts should not entertain it. Justice Harlan left that question open. Id., 583.

[11] 112 U.S. 50 (1884).

[12] *Keller* v. *Potomac Elec. Co.*, 261 U.S. 428 (1923).

[13] *Federal Radio Comm.* v. *General Elec. Co.*, 281 U.S. 464 (1930).

[14] 279 U.S. 438, 450–455 (1929).

[15] *O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

ever, Article III, § 1, limits this latter power with respect to tenure and compensation, but not with regard to vesting legislative and administrative powers in such courts. Subject to the guarantees of personal liberty in the Constitution, "Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a State legislature has in conferring jurisdiction on its courts." [16]

In 1970, Congress formally recognized two sets of courts in the District, federal courts, district courts and a Court of Appeals for the District of Columbia, created pursuant to Article III, and courts equivalent to state and territorial courts, created pursuant to Article I.[17] Congress' action was sustained in *Palmore* v. *United States.*[18] When legislating for the District, the Court held, Congress has the power of a local legislature and may, pursuant to Article I, § 8, cl. 17, vest jurisdiction to hear matters of local law and local concerns in courts not having Article III characteristics. The defendant's claim that he was denied his constitutional right to be tried before an Article III judge was denied on the basis that it was not absolutely necessary that every proceeding in which a charge, claim, or defense based on an act of Congress or a law made under its authority need be conducted in an Article III court. State courts, after all, could hear cases involving federal law as could territorial and military courts. "[T]he requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." [19]

***Bankruptcy Courts.***—After extended and lengthy debate, Congress in 1978 revised the bankruptcy act and created as an "adjunct" of the district courts a bankruptcy court composed of judges, vested with practically all the judicial power of the United States,

[16] Id., 535–546. Chief Justice Hughes in dissent argued that Congress' power over the District was complete in itself and the power to create courts there did not derive at all from Article III. Id., 551. See the discussion of this point of *O'Donoghue* in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949). *Cf. Hobson* v. *Hansen*, 265 F. Supp. 902 (D.C.D.C. 1967) (three-judge court).

[17] P.L. 91–358, 84 Stat. 475, D.C. Code § 11–101.

[18] 411 U.S. 389 (1973).

[19] Id., 407–408. *See also Pernell* v. *Southall Realty Co.*, 416 U.S. 363, 365–365 (1974); *Swain* v. *Pressley*, 430 U.S. 372 (1977); *Key* v. *Doyle*, 434 U.S. 59 (1978). Under *Swain*, provision for hearing of motions for postjudgement relief by convicted persons in the District, the present equivalent of *habeas* for federal convicts, is placed in Article I courts. That there are limits to Congress' discretion is asserted in dictum in *Territory of Guam* v. *Olsen*, 431 U.S. 195, 201–202, 204 (1977).

serving for 14 year terms, subject to removal for cause by the judicial councils of the circuits, and with salaries subject to statutory change.[20] The bankruptcy courts were given jurisdiction over all civil proceedings arising under the bankruptcy code or arising in or related to bankruptcy cases, with review in Article III courts under a clearly erroneous standard. In a case in which a claim was made against a company for breaches of contract and warranty, purely state law claims, the Court held unconstitutional the conferral upon judges not having the Article III security of tenure and compensation of jurisdiction to hear state law claims of traditional common law actions of the kind existing at the time of the drafting of the Constitution.[21] While the holding was extremely narrow, a plurality of the Court sought to rationalize and limit the Court's jurisprudence of Article I courts. According to the plurality, as a fundamental principle of separation of powers, the judicial power of the United States must be exercised by courts having the attributes prescribed in Article III. Congress may not evade the constitutional order by allocating this judicial power to courts whose judges lack security of tenure and compensation. Only in three narrowly circumscribed instances may judicial power be distributed outside the Article III framework: in territories and the District of Columbia, that is, geographical areas in which no State operated as sovereign and Congress exercised the general powers of government; courts martial, that is, the establishment of courts under a constitutional grant of power historically understood as giving the political branches extraordinary control over the precise subject matter; and the adjudication of "public rights," that is, the litigation of certain matters that historically were reserved to the political branches of government and that were between the government and the individual.[22] In bankruptcy legislation and litigation not involving any of these exceptions, the plurality would have held, the judicial power to process bankruptcy cases could not be assigned to the tribunals created by the act.[23] The dissent argued

[20] Bankruptcy Act of 1978, P.L. 95-598, 92 Stat. 2549, codified in titles 11, 28. The bankruptcy courts were made "adjuncts" of the district courts by § 201(a), 28 U.S.C. § 151(a). For citation to the debate with respect to Article III versus Article I status for these courts, *see Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 61 n. 12 (1982) (plurality opinion).

[21] The statement of the holding is that of the two concurring Justices, id., 89 (Justices Rehnquist and O'Connor), with which the plurality agreed "at the least," while desiring to go further. Id., 87 n. 40.

[22] Id., 63-76 (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens).

[23] The plurality also rejected an alternative basis, a contention that as "adjuncts" of the district courts, the bankruptcy courts were like United States magistrates or like those agencies approved in *Crowell* v. *Benson*, 285 U.S. 22 (1932), to

that, while on its face Article III provided for exclusivity in assigning judicial power to Article III entities, the history since *Canter* belied that simplicity. Rather, the precedents clearly indicated that there is no difference in principle between the work that Congress may assign to an Article I court and that which must be given to an Article III court. Despite this, the dissent contended that Congress did not possess plenary discretion in choosing between the two systems; rather, in evaluating whether jurisdiction was properly reposed in an Article I court, the Supreme Court must balance the values of Article III against both the strength of the interest Congress sought to further by its Article I investiture and the extent to which Article III values were undermined by the congressional action. This balancing would afford the Court, the dissent believed, the power to prevent Congress, were it moved to do so, from transferring jurisdiction in order to emasculate the constitutional courts of the United States.[24]

Again, no majority could be marshaled behind a principled discussion of the reasons for and the limitation upon the creation of legislative courts, not that a majority opinion, or even a unanimous one, would necessarily presage the settling of the law.[25] But the breadth of the various opinions left unclear not only the degree of discretion left in Congress to restructure the bankruptcy courts, but placed in issue the constitutionality of other legislative efforts to establish adjudicative systems outside a scheme involving the creation of life-tenured judges.[26]

## JUDICIAL POWER

### Characteristics and Attributes of Judicial Power

Judicial power is the power "of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." [1] It is "the right to

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which could be asigned factfinding functions subject to review in Article III courts, the fount of the administrative agency system. *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 76–86 (1982). According to the plurality, the act vested too much judicial power in the bankruptcy courts to treat them like agencies and it limited the review of Article III courts too much.

[24] Id., 92, 105–113, 113–116 (Justice White, joined by Chief Justice Burger and Justice Powell).

[25] *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), was, after all, a unanimous opinion and did not long survive.

[26] In particular, the Federal Magistrates Act of 1968, under which judges may refer certain pretrial motions and the trial of certain matters to persons appointed to a specific term, is threatened. P.L. 90–578, 82 Stat. 1108, as amended, 28 U.S.C. §§631–639. *See United States* v. *Raddatz*, 447 U.S. 667 (1980); *Mathews* v. *Weber*, 423 U.S. 261 (1976).

[1] Justice Samuel Miller, *On the Constitution* (New York: 1891), 314.

determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction." [2] Although the terms "judicial power" and "jurisdiction" are frequently used interchangeably and jurisdiction is defined as the power to hear and determine the subject matter in controversy between parties to a suit [3] or as the "power to entertain the suit, consider the merits and render a binding decision thereon," [4] the cases and commentary support, indeed require, a distinction between the two concepts. Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case.[5] Included within the general power to decide cases are the ancillary powers of courts to punish for contempts of their authority,[6] to issue writs in aid of jurisdiction when authorized by statute,[7] to make rules governing their process in the absence of statutory authorizations or prohibitions,[8] to order their own process so as to prevent abuse, oppression, and injustice and to protect their own jurisdiction and officers in the protection of property in custody of law,[9] to appoint masters in chancery, referees, auditors, and other investigators,[10] and to admit and disbar attorneys.[11]

***"Shall Be Vested."***—The distinction between judicial power and jurisdiction is especially pertinent to the meaning of the words "shall be vested" in § 1. Whereas all the judicial power of the United States is vested in the Supreme Court and the inferior federal courts created by Congress, neither has ever been vested with all the jurisdiction which could be granted and, Justice Story to the contrary,[12] the Constitution does not mandate Congress to confer

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[2] *Muskrat* v. *United States*, 219 U.S. 346, 361 (1911).

[3] *United States* v. *Arrendondo*, 6 Pet. (31 U.S.) 691 (1832).

[4] *General Investment Co.* v. *New York Central R. Co.*, 271 U.S. 228, 230 (1926).

[5] *William* v. *United States*, 289 U.S. 553, 566 (1933); *Yakus* v. *United States*, 321 U.S. 414, 467–468 (1944) (Justice Rutledge dissenting).

[6] *Michaelson* v. *United States*, 266 U.S. 42 (1924).

[7] *McIntire* v. *Wood*, 7 Cr. (11 U.S.) 504 (1813); *Ex parte Bollman*, 4 Cr. (8 U.S.) 75 (1807).

[8] *Wayman* v. *Southard*, 10 Wheat. (23 U.S.) 1 (1825).

[9] *Gumble* v. *Pitkin*, 124 U.S. 131 (1888).

[10] *Ex parte Peterson*, 253 U.S. 300 (1920).

[11] *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 378 (1867).

[12] *Fairfax's Devisee* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 328–331 (1816). *See also* 3 J. Story, *Commentaries on the Constitution of the United States* (Boston, 1833), §§ 1584–1590.

the entire jurisdiction it might.[13] Thus, except for the original jurisdiction of the Supreme Court, which flows directly from the Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it,[14] and, second, an act of Congress must have conferred it.[15] The fact that federal courts are of limited jurisdiction means that litigants in them must affirmatively establish that jurisdiction exists and may not confer nonexistent jurisdiction by consent or conduct.[16]

**Finality of Judgment as an Attribute of Judicial Power**

Since 1792 the federal courts have emphasized finality of judgment as an essential attribute of judicial power. In that year, Congress authorized Revolutionary War veterans to file pension claims in circuit courts of the United States, directed the judges to certify to the Secretary of War the degree of a claimant's disability and their opinion with regard to the proper percentage of monthly pay to be awarded, and empowered the Secretary to withhold judicially certified claimants from the pension list if he suspected "imposition or mistake." [1] The Justices then on circuit almost immediately for-

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[13] Thus, Justice Chase, in *Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 8, 10 (1799): "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposel of the judicial power (exept in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise; and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."

[14] Which was, of course, the point of *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803), once the power of the Court to hold legislation unconstitutional was established.

[15] *The Mayor* v. *Cooper*, 6 Wall. (73 U.S.) 247, 252 (1868); *Cary* v. *Curtis*, 3 How. (44 U.S.) 236 (1845); *Sheldon* v. *Sill*, 8 How. (49 U.S.) 441 (1850); *United States* v. *Hudson & Goodwin*, 7 Cr. (11 U.S.) 32, 33 (1812); *Kline* v. *Burke Construction Co.*, 260 U.S. 226 (1922). It should be noted, however, that some judges have expressed the opinion that Congress' authority is limited to some degree by the Constitution, such as by the due process clause so that a limitation on jurisdiction which denied a litigant access to any remedy might be unconstitutional *Cf. Eisentrager* v. *Forrestal*, 174 F. 2d 961, 965–966 (C.A.D.C. 1949), *rev'd on other grounds sub nom, Johnson* v. *Eisentrager*, 339 U.S. 763 (1950); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 257 (C.A. 2), *cert. den.*, 335 U.S. 887 (1948); *Petersen* v. *Clark*, 285 F. Supp. 700, 703 n. 5 (D.C.N.D. Calif. 1968); *Murray* v. *Vaughn*, 300 F. Supp. 688, 694–695 (D.C.D.R.I. 1969). The Supreme Court has had no occasion to consider the question.

[16] *Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 8 (1799); *Bingham* v. *Cabot*, 3 Dall. (3 U.S.) 382 (1798); *Jackson* v. *Ashton*, 8 Pet. (33 U.S.) 148 (1834); *Mitchell* v. *Maurer*, 293 U.S. 237 (1934).

[1] Act of March 23, 1792, 1 Stat. 243.

warded objections to the President, contending that the statute was unconstitutional because the judicial power was constitutionally committed to a separate department and the duties imposed by the act were not judicial and because the subjection of a court's opinions to revision or conrol by an officer of the executive or the legislature was not authorized by the Constitution.[2] Attorney General Randolph, upon the refusal of the circuit courts to act under the new statute, filed a motion for mandamus in the Supreme Court to direct the Circuit Court in Pennsylvania to proceed on a petition filed by one Hayburn seeking a pension. Although the Court heard argument, it put off decision until the next term, presumably because Congress was already acting to delete the objectionable features of the act, and upon enactment of a new law the Court dismissed the action.[3]

*Hayburn's Case* has been since followed so that the Court has rejected all efforts to give it and the lower federal courts jurisdiction over cases in which judgment would have been subject to exective or legislative revision.[4] Thus, in a 1948 case the Court held that an order of the Civil Aeronautics Board denying to one citizen air carrier and granting to another a certificate of convenience and necessity for an overseas and foreign air route was not reviewable. Such an order was subject to review and confirmance or revision by the President and the Court decided it could not review the discretion exercised by him in that situation; the lower court had thought the matter could be handled by permitting presidential review of the order after judicial review, but this the Court rejected. "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Depart-

[2] 1 *American State Papers: Miscellaneous Documents, Legislative and Executive, of the Congress of the United States* (Washington : 1832), 49, 51, 52. President Washington transmitted the remonstrances to Congress. 1 J. Richardson, *Messages and Papers of the Presidents* (Washington : 1897), 123, 133. The objections are also appended to the order of the Court in *Hayburn's Case*, 2 Dall. (2 U.S.) 409, 410 (1792). Note that some of the Justices declared their willingness to perform under the act as commissioners rather than as judges. *Cf. United States* v. *Ferreira*, 13 How. (54 U.S.) 40, 52-53 (1852).

[3] *Hayburn's Case*, 2 Dall. (2 U.S.) 409 (1792). The new pension law was the Act of February 28, 1793, 1 Stat. 324.

[4] *See United States* v. *Ferreira*, 13 How. (54 U.S.) 40 (1852) ; *Gordon* v. *United States*, 2 Wall. (69 U.S.) 561 (1865); *In re Sanborn*, 148 U.S. 222 (1893) ; *cf. McGrath* v. *Kritensen*, 340 U.S. 162, 167-168 (1950).

ment of Government," [5] More recently, the Court avoided a similar situation by a close construction of a statute.[6]

***Award of Execution.***—The adherence of the Court to this proposition, however, has not extended to a rigid rule formulated by Chief Justice Taney, given its fullest expression in a posthumously-published opinion.[7] In *Gordon* v. *United States*,[8] the Court refused to hear an appeal from a decision of the Court of Claims; the act establishing the Court of Claims provided for appeals to the Supreme Court after which judgments in favor of claimants were to be referred to the Secretary of the Treasury for payments out of the general appropriation for payment of private claims. But the act also provided that no funds should be paid out of the Treasury for any claims "till after an appropriation therefor shall be estimated by the Secretary of the Treasury." [9] The opinion of the Court merely stated that the implication of power in the executive officer and in Congress to revise all decisions of the Court of Claims requiring payment of money denied that court the judicial power from the exercise of which "alone" appeals could be taken to the Supreme Court.[10]

An opinion prepared by Chief Justice Taney but never delivered because of his death was later published.[11] Because the judgment of the Court of Claims and the Supreme Court depended for execution upon future action of the Secretary and of Congress, the Chief Justice regarded any such judgment as nothing more than a

[5] *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114 (1948).

[6] *Connor* v. *Johnson*, 402 U.S. 690 (1971). Under § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973c, no State may "enact or seek to administer" any change in election law or practice different from that in effect on a particular date without obtaining the approval of the Attorney General or the district court in the District of Columbia, a requirement interpreted to reach reapportionment and redistricting. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Perkins* v. *Matthews*, 400 U.S. 379 (1971). The issue in *Connor* was whether a districting plan drawn up and ordered into effect by a federal district court after it had rejected a legislatively-drawn plan must be submitted for approval. Unanimously, on the papers without oral argument, the Court ruled that despite the statute's inclusive language it did not apply to court-drawn plans.

[7] The opinion was published in 117 U.S. 697. *See infra*, n. 11, and text. *See United States* v. *Jones*, 119 U.S. 477 (1886). The Chief Justice's initial effort was in *United States* v. *Ferreira*, 13 How. (54 U.S.) 40 (1852).

[8] 2 Wall. (69 U.S.) 561 (1865).

[9] Act of February 24, 1855, 10 Stat. 612, as amended, Act of March 3, 1963, 12 Stat. 737.

[10] *Gordon* v. *United States*, 2 Wall. (69 U.S.) 561 (1865). Following congressional repeal of the objectionable section, Act of March 17, 1866, 14 Stat. 9, the Court accepted appellate jurisdiction. *United States* v. *Jones*, 119 U.S. 477 (1886); *De Groot* v. *United States*, 5 Wall. (72 U.S.) 419 (1867). But note that execution of the judgments was still dependent upon congressional appropriations.

[11] 117 U.S. 697 (decided 1864, reported 1886).

certificate of opinion and in no sense a judicial judgment. Congress could not therefore authorize appeals to the Supreme Court in a case where its judicial power could not be exercised, where its judgment would not be final and conclusive upon the parties, and where processes of execution were not awarded to carry it into effect. Taney then proceeded to enunciate a rule which was rigorously applied until 1933: the award of execution is a part and an essential part of every judgment passed by a court exercising judicial powers and no decision was a legal judgment without an award of execution.[12] The rule was most significant in barring the lower federal courts from hearing proceedings for declaratory judgments[13] and in denying appellate jurisdiction in the Supreme Court from declaratory proceedings in state courts.[14]

But in 1927 the Court began backing away from its absolute insistence upon an award of execution. Unanimously holding that a declaratory judgment in a state court was *res judicata* in a subsequent proceeding in federal court, the Court admitted that "[w]hile ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function."[15] Then in 1933 the Court interred the award-of-execution rule in its rigid form and accepted an appeal from a state court in a declaratory proceeding.[16] Finality of judgment, however, remains the rule in determination of what is judicial power without regard to the demise of Chief Justice Taney's formulation.

## ANCILLARY POWERS OF FEDERAL COURTS

### The Contempt Power

***Categories of Contempt.***—Crucial to an understanding of the history of the law governing the courts' powers of contempt is an

[12] Id., 703. Subsequent cases accepted the doctrine that an award of execution as distinguished from finality of judgment was an essential attribute of judicial power. *See In re Sanborn*, 148 U.S. 122, 226, (1893); *ICC* v. *Brimson*, 154 U.S. 447, 483 (1894); *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 457 (1899); *Frasch* v. *Moore*, 211 U.S. 1 (1908); *Muskrat* v. *United States*, 219 U.S. 346, 355, 361-362 (1911); *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693 (1927).

[13] *Liberty Warehouse Co.* v. *Grannis*, 273 U.S. 70 (1927).

[14] *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Coop. Marketing Assn.*, 276 U.S. 71 (1928).

[15] *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U.S. 123, 132 (1927).

[16] *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933). The decisions in *Swope* and *Wallace* removed all constitutional doubts previously shrouding a proposed federal declaratory judgment act, which was enacted in 1934, 48 Stat. 955, 28 U.S.C. §§ 2201-2202, and unanimously sustained in *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937). *See infra. pp.* 690-694.

awareness of the various kinds of contempt. With a few notable exceptions,[1] the Court has consistently distinguished between criminal and civil contempts on the basis of the vindication of the authority of the courts on the one hand and the preservation and enforcement of the rights of the parties on the other. A civil contempt has been traditionally viewed as the refusal of a person in a civil case to obey a mandatory order. It is incomplete in nature, may be purged by obedience to the court order, and does not involve a sentence for a definite period of time. The classic criminal contempt is one where the act of contempt has been completed, punishment is imposed to vindicate the authority of the court, and a person cannot by subsequent action purge himself of such contempt.[2] In the case of *Shillitani* v. *United States*,[3] the defendants were sentenced by their respective District Courts for two years imprisonment for contempt of court; the sentence contained a purge clause providing for the unconditional release of the contemnors upon agreeing to testify before a grand jury.

Upon appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing sentence.[4] Here, the purpose was to obtain answers to the questions for the grand jury and the court provided for the defendants' release upon compliance; whereas, "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterence." [5] The issue of whether a certain contempt is either civil or criminal can be of great importance as demonstrated in the dictum of *Ex parte Grossman*,[6] in which Chief Justice Taft, while holding for the Court on the main issue that the President may pardon a criminal contempt, noted that he may not pardon a civil contempt. Notwithstanding the importance of distinguishing between the two,

[1] E.g., *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).

[2] *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441–443 (1911); *Ex parte Grossman*, 267 U.S. 87 (1925). *See also Bassette* v. *W. B. Conkey Co.*, 194 U.S. 324, 327–328 (1904).

[3] 384 U.S. 364 (1966).

[4] Id., 370.

[5] Ibid., n. 6.

[6] 267 U.S. 87, 119–120 (1925). In an analogous case, the Court was emphatic in a dictum that Congress cannot require a jury trial where the contemnor has failed to perform a positive act for the relief of private parties. *Michaelson* v. *United States ex rel. Chicago, S.P., M. & Ry. Co.*, 266 U.S. 42, 65–66 (1924). *But see Bloom* v. *Illinois*, 391 U.S. 194, 202 (1968).

there have been instances where defendants have been charged with both civil and criminal contempt for the same act.[7]

A second but more subtle distinction, with regard to the categories of contempt, is the difference between direct and indirect contempt—albeit civil or criminal in nature. Direct contempt results when the contumacious act is committed "in the presence of the Court or so near thereto as to obstruct the administration of justice;" [8] indirect contempt is behavior which the Court did not itself witness.[9] The nature of the contumacious act, i.e., whether it is direct or indirect, is important because it determines the appropriate procedure for charging the contemnor. As will be evidenced in the following discussion, the history of the contempt powers of the American judiciary is marked by two trends: a shrinking of the court's power to punish summarily a person and a multiplying of the due process requirements which must otherwise be met when finding an individual to be in contempt.[10]

***The Act of 1789.***—The summary power of the courts of the United States to punish contempts of their authority had its origin in the law and practice of England where disobedience of court orders was regarded as contempt of the King himself and attachment was a prerogative process derived from presumed contempt of the sovereign.[11] By the latter part of the eighteenth century, summary power to punish was extended to all contempts whether committed in or out of court.[12] In the United States, the Judiciary Act of 1789 in section 17 [13] conferred power on all courts of the United

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[7] *See United States* v. *United Mine Workers*, 330 U.S. 258, 299 (1947).

[8] Act of March 2, 1831, ch. 99, § 1, 4 Stat. 488. *Cf.* Rule 42(a) which provides that "[a] criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." *See also* Peale, "Contempt of Court, Civil and Criminal," 21 Harv. L. Rev. 161, 171–172 (1908); pp. 642–643, *infra.*

[9] *See* Fox, "The Nature of Contempt of Court," 37 L.Q. Rev. 191 (1921).

[10] Many of the limitations placed on the inferior federal courts have been issued on the basis of the Supreme Court's supervisory power over them rather than upon a constitutional foundation, while, of course, the limitations imposed on state courts necessarily are on constitutional dimensions. Indeed, it is often the case that a limitation which is applied to an inferior federal court as a superintending measure is then transformed into a constitutional limitation and applied to state courts. *Compare Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), *with Bloom* v. *Illinois*, 391 U.S. 194 (1968). In the latter stage, the limitations then bind both federal and state courts alike. Therefore, in this section, Supreme Court constitutional limitations on state court contempt powers are cited without restriction for equal application to federal courts.

[11] Fox, "The King v. Almon," 24 L.Q. Rev. 184, 194–195 (1908).

[12] Fox, "The Summary Power to Punish Contempt," 25 L.Q. Rev. 238, 252 (1909).

[13] 1 Stat. 83 (1789).

States "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." The only limitation placed on this power was that summary attachment was made a negation of all other modes of punishment. The abuse of this extensive power led, following the unsuccessful impeachment of Judge James H. Peck of the Federal District Court of Missouri, to the passage of the Act of 1831 limiting the power of the federal courts to punish contempts to misbehavior in the presence of the courts, "or so near thereto as to obstruct the administration of justice," to the misbehavior of officers of courts in their official capacity, and to disobedience or resistance to any lawful writ, process or order of the court.[14]

***An Inherent Power.***—The validity of the act of 1831 was sustained forty-three years later in *Ex parte Robinson,*[15] in which Justice Field for the Court expounded principles full of potentialities for conflict. He declared: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, that there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their "powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."[16] With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.

By 1911, the Court was saying that the contempt power must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal.[17] In *Michael-*

[14] 18 U.S.C. § 401. For a summary of the Peck Impeachment and the background of the act of 1831, *see* Frankfurter and Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010, 1024–1028 (1924).

[15] 19 Wall. (86 U.S.) 505 (1874).

[16] Id., 505–511.

[17] *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). *See also In re Debs*, 158 U.S. 564, 595 (1895).

*son* v. *United States,*[18] the Supreme Court intentionally placed a narrow interpretation upon those sections of the Clayton Act [19] relating to punishment for contempt of court by disobedience to injunctions in labor disputes. The sections in question provided for a jury upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the State where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that "the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative." The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," and the power to enforce mandatory decrees by coercive means.[20]

***First Amendment Limitations on the Contempt Power.***—The phrase "in the presence of the Court or so near thereto as to obstruct the administration of justice" was interpreted in *Toledo Newspaper Co.* v. *United States* [21] so broadly as to uphold the action of a district court judge in punishing for contempt a newspaper for publishing spirited editorials and cartoons on questions at issue in a contest between a street railway company and the public over rates. A majority of the Court held that the test to be applied in determining the obstruction of the administration of justice is not the actual obstruction resulting from an act, but "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty." Similarly, the test whether a particular act is an attempt to influence or intimidate a court is not the influence exerted upon the mind of a particular judge but "the reasonable tendency of the acts done to influence or bring about the baleful result . . . without reference to the consideration of how far they may have been without influence in a particular case." [22] In *Craig* v. *Hecht,*[23] these criteria were applied to sustain the impris-

[18] 266 U.S. 42 (1924).

[19] 38 Stat. 730, 738 (1914).

[20] 266 U.S., 65-66. *See generally,* Frankfurter and Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010 (1924).

[21] 247 U.S. 402 (1918).

[22] Id., 418-421.

[23] 263 U.S. 255 (1923).

onment of the comptroller of New York City for writing and publishing a letter to a public service commissioner which criticized the action of a United States district judge in receivership proceedings.

The decision in the *Toledo Newspaper* case, however, did not follow earlier decisions interpreting the act of 1831 and was grounded on historical error. For these reasons it was reversed in *Nye* v. *United States*[24] and the theory of constructive contempt based on the "reasonable tendency" rule was rejected in a proceeding wherein defendants in a civil suit, by persuasion and the use of liquor, induced a plaintiff feeble in mind and body to ask for dismissal of the suit he had brought against them. The events in the episode occurred more than 100 miles from where the court was sitting, and were held not to put the persons responsible for them in contempt of court. Although *Nye* v. *United States* was exclusively a case of statutory construction, it was significant from a constitutional point of view because its reasoning was contrary to that of earlier cases narrowly construing the act of 1831 and asserting broad inherent powers of courts to punish contempts independently of, and contrary to, congressional regulation of this power. *Bridges* v. *California*[25] was noteworthy for the dictum of the majority that the contempt power of all courts, federal as well as state, is limited by the guaranty of the First Amendment against interference with freedom of speech or of the press.[1]

A series of cases involving highly publicized trials and much news media attention and exploitation,[2] however, has caused the Court to suggest that the contempt and other powers of trial courts should be utilized to stem the flow of publicity before it can taint a trial. Thus, Justice Clark, speaking for the majority in *Shepard* v. *Maxwell*,[3] notes that "[i]f publicity during the proceedings threat-

[24] 313 U.S. 33, 47–53 (1941).

[25] 314 U.S. 252, 260 (1941).

[1] *See also Wood* v. *Georgia*, 370 U.S. 375 (1962), further clarifying the limitations imposed by the First Amendment upon this judicial power, and delineating the requisite serious degree of harm to the administration of law necessary to justify exercise of the contempt power to punish the publisher of an out of court statement attacking a charge to the grand jury, absent any showing of actual interference with the activities of the grand jury.

It is now clearly established that courtroom conduct to be punishable as contempt "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney*, 331 U.S. 367, 376 (1947); *In re Little*, 404 U.S. 553, 555 (1972).

[2] E.g., *Estes* v. *Texas*, 381 U.S. 532 (1965); *Marshall* v. *United States*, 360 U.S. 310 (1959); *Shepard* v. *Maxwell*, 384 U.S. 333 (1966).

[3] 384 U.S. 333, 363 (1966).

ens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but pallatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Though the regulation the Justice had in mind was presumably to be of the parties and related persons rather than of the press, the potential for conflict with the First Amendment is obvious as well as is the necessity for protection of the equally important right to a fair trial.

***Due Process Limitations on Contempt Power: Right to Notice and to a Hearing versus Summary Punishment.***—Included among the notable cases raising questions concerning the power of a trial judge to punish summarily for alleged misbehavior in the course of a trial is *Ex parte Terry* [4] decided in 1888. Terry had been jailed by the United States Circuit Court of California for assaulting in its presence a United States marshal. The Supreme Court denied his petition for a writ of *habeas corpus.* In *Cooke* v. *United States,* [5] however, the Court remanded for further proceedings a judgment of the United States Circuit Court of Texas sustaining the judgment of a United States district judge sentencing to jail an attorney and his client for presenting the judge a letter which impugned his impartiality with respect to their case, still pending before him. Distinguishing the case from that of *Terry,* Chief Justice Taft, speaking for the unanimous Court, said: "The important distinction . . . is that this contempt was not in open court . . . . To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law." [6]

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[4] 128 U.S. 289 (1888).
[5] 267 U.S. 517 (1925).
[6] Id., 535, 534.

As to the timeliness of summary punishment, the Court at first construed Rule 42(a) of the Federal Rules of Criminal Procedure—which was designed to afford judges clearer guidelines as to the exercise of their contempt power—in *Sacher* v. *United States* [7] as to allow "the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay [would] prejudice the trial. . . . [On the other hand,] if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." [8] However, subsequently, interpreting the due process clause and thus binding both federal and state courts, the Court held that, although the trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, if he does choose to wait until the conclusion of the proceeding he must afford the alleged contemnor at least reasonable notice of the specific charge and opportunity to be heard in his own defense. Apparently, a "full scale trial" is not contemplated.[9]

Curbing the judge's power to consider conduct as occurring in his presence, the Court, in *Harris* v. *United States*,[10] held that summary contempt proceedings in aid of a grand jury probe, achieved through swearing the witness and repeating the grand jury's questions in the presence of the judge did not constitute contempt "in the actual presence of the court" for purposes of Rule 42(a); rather, the absence of a disturbance in the court's proceedings or of the need to immediately vindicate the court's authority makes the witness' refusal to testify an offense punishable only after notice and a hearing.[11] Moreover, when it is not clear the judge was fully aware of the contemptuous behavior when it occurred, notwithstanding the fact it occurred during the trial, "a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete." [12]

[7] 343 U.S. 1 (1952).

[8] Id., 11.

[9] *Taylor* v. *Hayes*, 418 U.S. 488 (1974). In a companion case, the Court observed that although its rule conceivably encourages a trial judge to proceed immediately rather than awaiting a calmer moment, "[s]ummary convictions during trials that are unwarranted by the facts will not be invulnerable to appellate review." *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 517 (1974).

[10] 382 US. 162 (1965), overturning *Brown* v. *United States*, 359 U.S. 41 (1959).

[11] *But see Green* v. *United States*, 356 U.S. 165 (1958) (noncompliance with order directing defendants to surrender to marshal for execution of their sentence is an offense punishable summarily as a criminal contempt); *Reina* v. *United States*, 364 U.S. 507 (1960).

[12] *Johnson* v. *Mississippi*, 403 U.S. 212, 215 (1971), citing *In re Oliver*, 333 U.S. 257, 275–276 (1948).

***Due Process Limitations on Contempt Power: Right to Jury Trial.***—Until recently, it was the rule that the right to a jury trial was not available in criminal contempt cases.[13] But in *Cheff* v. *Schnackenberg,*[14] it was held that when the punishment in a criminal contempt case in federal court is more than the sentence for a petty offense—the Court drew the traditional line at six months—a defendant is entitled to trial by jury. Although the ruling was made pursuant to the Supreme Court's supervisory powers and was thus inapplicable to state courts and presumably subject to legislative revision, two years later the Court held that the Constitution did require jury trials in criminal contempt cases in which the offense was more than a petty one.[15] Whether an offense is petty or not is determined by the maximum sentence authorized by the legislature or, in the absence of a statute, by the sentence actually imposed. Again the Court drew the line between petty offenses and more serious ones at six months imprisonment. Although this case involved an indirect criminal contempt, willful petitioning to admit to probate a will known to be falsely prepared, the majority in dictum indicated that even in cases of direct contempt a jury will be required in appropriate instances. "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power." [16] Presumably, there is no equivalent right to a jury trial in civil contempt cases,[17] although one could spend much more time in jail pursuant to a judgment of civil contempt than would be the case with most criminal contempts; [18] however, the Court has expanded the right to jury trials in federal civil cases on

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[13] *See Green* v. *United States,* 356 U.S. 165 (1958); *United States* v. *Barnett,* 376 U.S. 681 (1964), and cases cited. The dissents of Justices Black and Douglas in those cases prepared the ground for the Court's later reversal. On the issue, *see* Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010, 1042-1048 (1924).

[14] 384 U.S. 373 (1966).

[15] *Bloom* v. *Illinois,* 391 U.S. 194 (1968).

[16] Id., 209. In *Codispoti* v. *Pennsylvania,* 418 U.S. 506 (1974) the Court held required a jury trial when the trial judge awaits the conclusion of the proceeding and then imposes separate sentences in which the total aggregated more than six months. For a tentative essay at defining a petty offense when a fine is levied, see *Muniz* v. *Hoffman,* 422 U.S. 454, 475-477 (1975).

[17] The Sixth Amendment is applicable only to criminal cases and the Seventh to suits at common law, but the due process clause is available if needed.

[18] Note that under 28 U.S.C. § 1826 a recalcitrant witness before a grand jury may be imprisoned for the term of the grand jury, which can be 36 months. 18 U.S.C. § 3331(a).

nonconstitutional grounds,[19] so that it is possible the process followed in criminal contempts could be repeated.

***Due Process Limitations on Contempt Powers: Impartial Tribunal.***—In *Cooke* v. *United States*,[20] Chief Justice Taft uttered some cautionary words to guide trial judges in the utilization of their contempt powers. "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course, where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. *Cornish* v. *United States*, 299 F. 283, 285; *Toledo Newspaper Co.* v. *United States*, 237 F. 986, 988. The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."

*Sacher* v. *United States*,[21] grew out of a tempestuous trial of eleven Communist Party leaders in which Sacher and others were counsel for the defense. Upon the conviction of the defendants, the trail judge at once found counsel guilty of criminal contempt and imposed jail terms of up to six months. At issue directly was whether the contempt charged was one which the judge was authorized to determine for himself or whether it was one which

[19] E.g., *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *Ross* v. *Bernhard*, 396 U.S. 531 (1970). However, the Court's expansion of jury trial rights may have halted with *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971).

[20] 267 U.S. 517, 539 (1925).

[21] 343 U.S. 1 (1952). *See Dennis* v. *United States*, 341 U.S. 494 (1951).

under Rule 42(b) could only be passed upon by another judge and after notice and hearing, but behind this issue loomed the applicability and nature of due process requirements, in particular whether the defense attorneys were constitutionally entitled to trial before a different judge. A divided Court affirmed most of the convictions, setting aside others, and denied that due process required a hearing before a different judge. "We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power . . . . We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt. But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyers calling.[22]

In *Offutt* v. *United States,*[23] acting under its supervisory powers over the lower federal courts, the Court set aside a criminal contempt conviction imposed on a lawyer after a trial marked by highly personal recriminations between the trial judge and the lawyer. In a situation in which the record revealed that the contumacious conduct was the product of both lack of self-restraint on the part of the contemnor and a reaction to the excessive zeal and personal animosity of the trial judge, the majority felt that any contempt trial must be held before another judge. This holding that when a judge becomes personally embroiled in the controversy with an accused he must defer trial of his contempt citation to another judge, founded on the Court's supervisory powers, was constitutionalized in *Mayberry* v. *Pennsylvania,*[24] in which a defendant

[22] Id., 13–14.

[23] 348 U.S. 11 (1954).

[24] 400 U.S. 455 (1971). *See also Johnson* v. *Mississippi,* 403 U.S. 212 (1971); *Holt* v. *Virginia,* 381 U.S. 131 (1965). Even in the absence of a personal attack on a judge

acting as his own counsel engaged in quite personal abuse of the trial judge. The Court appeared to leave open the option of the trial judge to act immediately and summarily to quell contempt by citing and convicting an offender, thus empowering the judge to keep the trial going,[25] but if he should wait until the conclusion of the trial he must defer to another judge.

***Contempt by Disobedience of Orders.***—Disobedience of injunctive orders, particularly in labor disputes, has been a fruitful source of cases dealing with contempt of court. In *United States* v. *United Mine Workers,*[1] the Court held that disobedience of a temporary restraining order issued for the purpose of maintaining existing conditions, pending the determination of the court's jurisdiction, is punishable as criminal contempt where the issue is not frivolous but substantial. Secondly, the Court held that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional.[2] Thirdly, on the basis of *United States* v. *Shipp,*[3] it was held that violations of a court's order are punishable as criminal contempt even though the order is set aside on appeal as in excess of the court's jurisdiction or though the basic action has become moot. Finally, the Court held that conduct can amount to both civil and criminal contempt, and the same acts may justify a court in resorting to coercive and punitive measures, which may be imposed in a single proceeding.[4]

***Contempt Power in Aid of Administrative Power.***—Proceedings to enforce the orders of administrative agencies and subpoenas issued by them to appear and produce testimony have become increasingly common since the leading case of *ICC* v. *Brimson,*[5]

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that would tend to impair his detachment, the judge may still be required to excuse himself and turn a citation for contempt over to another judge if the response to the alleged misconduct in his courtroom partakes of the character of "marked personal feelings" being abraded on both sides, so that it is likely the judge has felt a "sting" sufficient to impair his objectivity. *Taylor* v. *Hayes,* 418 U.S. 488 (1974).

[25] *See Illinois* v. *Allen,* 397 U.S. 337 (1970), in which the Court affirms that summary contempt or expulsion may be used to keep a trial going.

[1] 330 U.S. 258, 293-307 (1947).

[2] *See Walker* v. *City of Birmingham,* 388 U.S. 307 (1967).

[3] 203 U.S. 563 (1906).

[4] *See United States* v. *United Mine Workers,* 330 U.S. 258, 299 (1947). *But see Cheff* v. *Schnackenberg,* 384 U.S. 273 (1966), and *supra, p.* 644, as to due process limitations.

[5] 154 U.S. 447 (1894).

where it was held that the contempt power of the courts might by statutory authorization be utilized in aid of the Interstate Commerce Commission in enforcing compliance with its orders. In 1947 a proceeding to enforce a *subpoena duces tecum* issued by the Securities and Exchange Commission during the course of an investigation was ruled to be civil in character on the ground that the only sanction was a penalty designed to compel obedience. The Court then enunciated the principle that where a fine or imprisonment imposed on the contemnor is designed to coerce him to do what he has refused to do, the proceeding is one for civil contempt.[6] Notwithstanding the power of administrative agencies to cite an individual for contempt, however, such bodies must be acting within the authority that has been lawfully delegated to them.[7]

**Power to Issue Writs: The Act of 1789**

From the beginning of government under the Constitution of 1789, Congress has assumed, under the necessary and proper clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts and the power to regulate the issuance of writs.[1] The Thirteenth section of the Judiciary Act of 1789 authorized the circuit courts to issue writs of prohibition to the district courts and the Supreme Court to issue such writs to the circuit courts. The Supreme Court was also empowered to issue writs of mandamus "in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." [2] Section 14 provided that all courts of the United States should "have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law." [3] Although the Act of 1789 left the power over writs

[6] *Penfield Co.* v. *SEC,* 330 U.S. 585 (1947). Note the dissent of Justice Frankfurter. For delegations of the subpoena power to administrative agencies and the use of judicial process to enforce them, *see also McCrone* v. *United States,* 307 U.S. 61 (1939); *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501 (1943); *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186 (1946).

[7] *Gojack* v. *United States,* 384 U.S. 702 (1966). *See also* supra for a discussion on Congress' power to cite an individual for contempt by virtue of its investigatory duties, which is applicable, at least by analogy, to administrative agencies.

[1] Frankfurter & Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010, 1016–1023 (1924).

[2] 1 Stat. 73, 81.

[3] Id., 81–82. *See also United States* v. *Morgan,* 346 U.S. 502 (1954), holding that the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a), gives federal courts the power to employ the ancient writ of *coram nobis.*

subject largely to the common law, it is significant as a reflection of the belief, in which the courts have on the whole concurred, that an act of Congress is necessary to confer judicial power to issue writs.

***Common Law Powers of District of Columbia Courts.***—That portion of § 13 which authorized the Supreme Court to issue writs of mandamus in the exercise of its original jurisdiction was held invalid in *Marbury* v. *Madison*,[4] as an unconstitutional enlargement of the Supreme Court's original jurisdiction. After two more futile efforts to obtain a writ of mandamus, in cases in which the Court found that power to issue the writ had not been vested by statute in the courts of the United States except in aid of already existing jurisdiction,[5] a litigant was successful in *Kendall* v. *United States* [6] in finding a court that would take jurisdiction in a mandamus proceeding. This was the circuit court of the United States for the District of Columbia which was held to have jurisdiction, on the theory that the common law, in force in Maryland when the cession of that part of the State which became the District of Columbia was made to the United States, remained in force in the District. At an early time, therefore, the federal courts established the rule that mandamus can be issued only when authorized by a constitutional statute and within the limits imposed by the common law and the separation of powers.[7]

***Habeas Corpus: Congressional and Judicial Control.***—Although the writ of *habeas corpus* [8] has a special status because its suspen-

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[4] 1 Cr. (5 U.S.) 137 (1803). *Cf. Wiscart* v. *D'Auchy*, 3 Dall. (3 U.S.) 321 (1796).

[5] *McIntire* v. *Wood*, 7 Cr. (11 U.S.) 504 (1813); and *McClung* v. *Silliman*, 6 Wheat. (19 U.S.) 598 (1821).

[6] 12 Pet. (37 U.S.) 524 (1838).

[7] In 1962 Congress conferred upon district courts the same power to issue writs of mandamus as was hitherto exercisable by federal courts in the District of Columbia. 76 Stat. 744, 28 U.S.C § 1361.

[8] Reference to the "writ of *habeas corpus*" is to the "Great Writ," *habeas corpus ad subjiciendum*, by which a court would inquire into the lawfulness of a detention of the petitioner. *Ex parte Ballman*, 4 Cr. (8 U.S.) 75, 95 (1807). For other uses, *see Carbo* v. *United States*, 364 U.S. 611 (1961); *Price* v. *Johnston*, 334 U.S. 266 (1948). Technically, federal prisoners no longer utilize the writ of *habeas corpus* in seeking post-conviction relief, now the largest office of the writ, but proceed under 28 U.S.C. § 2255, on a motion to vacate judgment. Intimating that if § 2255 afforded prisoners a less adequate remedy than they would have under *habeas corpus* it would be unconstitutional, the Court in *United States* v. *Hayman*, 342 U.S. 205 (1952), held the two remedies to be equivalent. *Cf. Sanders* v. *United States*, 373 U.S. 1, 14 (1963). The claims cognizable under one are cognizable under the other. *Kaufman* v. *United States*, 394 U.S. 217 (1969). Therefore, the term *habeas corpus* is used here to include the § 2255 remedy.

sion is forbidden, except in narrow circumstances, by Article I. § 9, cl. 2,[9] nowhere in the Constitution is the power to issue the writ vested in the federal courts. Could it be that despite the suspension clause restriction Congress could suspend *de facto* the writ simply by declining to authorize its issuance? Is a statute needed to make the writ available or does the right to *habeas corpus* stem by implication from the suspension clause or from the grant of judicial power without need of a statute? [10] Since Chief Justice Marshall's opinion in *Ex parte Bollman* [11] it has been generally accepted that "the power to award the writ by any of the courts of the United States, must be given by written law." [12] The suspension clause, Marshall explained, was an "injunction," an "obligation" to provide "efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." [13] And so it has been understood since,[14] with a few judicial voices raised to suggest that what Congress could not do directly it could not do by omission,[15] but inasmuch as statutory authority has always existed authorizing the federal courts to grant the relief they deemed necessary under *habeas corpus* the Court has never had to face the question.[16]

Having determined that a statute was necessary before the federal courts had power to issue writs of *habeas corpus,* Chief Justice Marshall pointed to § 14 of the Judiciary Act of 1789 as containing the necessary authority.[17] As the Chief Justice read it, the authori-

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[9] *Supra, pp.* 376-377.

[10] Professor Chafee contended that by the time of the Constitutional Convention the right to *habeas corpus* was so well established no affirmative authorization was needed. "The Most Important Human Right in the Constitution," 32 B.U.L. Rev. 143, 146 (1952). *But compare* Collins, "*Habeas Corpus* for Convicts—Constitutional Right or Legislative Grace?" 40 Calif. L. Rev. 335, 344-345 (1952).

[11] 4 Cr. (8 U.S.) 75 (1807).

[12] Id., 94.

[13] Id., 95. Note that in quoting the clause, Marshall renders "shall not be suspended" as "should not be suspended".

[14] *See Ex parte McCardle,* 7 Wall. (74 U.S.) 506 (1869), considered *infra, pp.* 793, 798-800; *cf. Carbo* v. *United States,* 364 U.S. 611, 614 (1961).

[15] E.g., *Eisentrager* v. *Forrestal,* 174 F. 2d 961, 966 (C.A.D.C. 1949), *rev'd on other grounds sub nom, Johnson* v. *Eisentrager,* 339 U.S. 763 (1950); and *see* Justice Black's dissent, id., 791, 798: "*Habeas corpus,* as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress." And in *Jones* v. *Cunningham,* 371 U.S. 236, 238 (1963), the Court said: "The *habeas corpus* jurisdictional statute implements the *constitutional command* that the writ of *habeas corpus* be made available." [emphasis supplied] *Supra, pp.* 376-377.

[16] *Cf. Ex Parte McCardle,* 7 Wall. (74 U.S.) 506 (1869), considered *infra, pp.* 793, 798-800.

[17] *Ex parte Bollman,* 4 Cr. (8 U.S.) 75, 94 (1807). *See Fay* v. *Noia,* 372 U.S. 391, 409 (1963).

zation was limited to persons imprisoned under federal authority, and it was not until 1867, with two small exceptions,[18] that legislation specifically empowered federal courts to inquire into the imprisonment of persons under state authority.[19] Pursuant to this authorization the Court has expanded the use of the writ into a major instrument to reform procedural criminal law in federal and state jurisdictions.[20]

***Habeas Corpus: Scope of the Writ.***—At the English common law, *habeas corpus* was available to attack pretrial detention and confinement by executive order; it could not be used to question the conviction of a person pursuant to the judgment of a court with jurisdiction over the person. That common law meaning was that applied in the federal courts.[21] Expansion began after the Civil War through more liberal court interpretation of "jurisdiction." Thus, one who had already completed one sentence on a conviction was released from custody on a second sentence on the ground that the court had lost jurisdiction upon completion of the first sentence.[22] Then the Court held that the constitutionality of the statute upon which a charge was based could be examined on *habeas corpus,* because an unconstitutional statute was said to deprive the trial court of its jurisdiction.[23] Other cases expanded the want-of-jurisdiction rationale.[24] But the present status of the writ of

[18] Act of March 2, 1833, § 7, 4 Stat. 634 (federal officials imprisoned for enforing federal law); Act of August 29, 1842, 5 Stat. 539 (foreign nationals detained by a State in violation of a treaty). *See also* Bankruptcy Act of April 4, 1800, § 38, 2 Stat. 19, 32 (*habeas corpus* for imprisoned debtor discharged in bankruptcy), repealed by Act of December 19, 1803, 2 Stat. 248.

[19] Act of February 5, 1867, 14 Stat. 385, conveyed power to federal courts "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . ." On the law with respect to state prisoners prior to this statute, *see Ex Parte Dorr,* 3 How, (44 U.S.) 103 (1845); *cf. Elkison* v. *Deliesseline,* 8. Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823) (Justice Johnson); *Ex parte Cabrera,* 4 Fed. Cas. 964 (No. 2278) (C.C.D.Pa. 1805) (Justice Washington).

[20] *Infra, pp.* 816–822.

[21] *Ex parte Watkins,* 3 Pet. (28 U.S.) 193 (1830) (Chief Justice Marshall); *cf. Ex parte Parks,* 93 U.S. 18 (1876). *But see Fay* v. *Noia,* 372 U.S. 391, 404–415 (1963). It should be noted that the expansive language used when Congress in 1867 extended the *habeas* power of federal courts to state prisoners "restrained of . . . liberty in violation of the constitution, or of any treaty or law of the United States. . . .," 14 Stat. 385, could have encouraged an expansion of the writ to persons convicted after trial.

[22] *Ex parte Lange,* 18 Wall. (85 U.S.) 163 (1874).

[23] *Ex parte Siebold.* 100 U.S. 371 (1880); *Ex parte Royall,* 117 U.S. 241 (1886); *Crowley* v. *Christensen,* 137 U.S. 86 (1890); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

[24] *Ex parte Wilson,* 114 U.S. 417 (1885); *Nielsen, Petitioner,* 131 U.S. 176 (1889); *In re Snow,* 120 U.S. 274 (1887); *but see Ex parte Parks,* 93 U.S. 18 (1876); *Ex parte Bigelow,* 113 U.S. 328 (1885); It is possible that the Court expanded the office of the writ because its reviewing power over federal convictions was closely limited. F.

*habeas corpus* may be said to have been started in its development in *Frank* v. *Mangum,*[25] in which the Court reviewed on *habeas corpus* a murder conviction in a trial in which there was substantial evidence of mob domination of the judicial process. This issue had been considered and rejected by the state appeals court. The Supreme Court indicated that though it might initially have had jurisdiction the trial court could have lost it if mob domination rendered the proceedings lacking in due process.

Further, in order to determine if there had been a denial of due process, a *habeas* court should examine the totality of the process, including the appellate proceedings. Since Frank's claim of mob domination was reviewed fully and rejected by the state appellate court, he had been afforded an adequate corrective process for any denial of rights and his custody was not in violation of the Constitution. Then, eight years later in *Moore* v. *Dempsey,*[1] involving another conviction in a trial in which the court was alleged to have been influenced by a mob and in which the state appellate court had heard and rejected Moore's contentions, the Court directed that the federal district judge himself determine the merits of the petitioner's allegations.

Moreover, the Court shortly abandoned its emphasis upon want of jurisdiction and held that the writ was available to consider constitutional claims as well as questions of jurisdiction.[2] The landmark case was *Brown* v. *Allen,*[3] in which the Court laid down several principles of statutory construction of the *habeas* statute. First, all federal constitutional questions raised by state prisoners are cognizable in federal *habeas.* Second, a federal court is not bound by state court judgments on federal questions, even though the state courts may have fully and fairly considered the issues. Third, a federal *habeas* court may inquire into issues of fact as well as of law, although the federal court may defer to the state court if the prisoner received an adequate hearing. Fourth, new evidentiary hearings must be held when there are unusual circumstances, when there is a "vital flaw" in the state proceedings or when the state court record is incomplete or otherwise inadequate.

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Frankfurter & J. Landis, *The Business of the Supreme Court* (New York: 1928), 109–113. Once such review was granted, the Court began to restrict the use of the writ. E.g., *Glasgow* v. *Moyer,* 225 U.S. 420 (1912); *In re Lincoln,* 202 U.S. 178 (1906); *In re Morgan,* 203 U.S. 96 (1906).

[25] 237 U.S. 309 (1915).

[1] 261 U.S. 86 (1923).

[2] *Waley* v. *Johnston,* 316 U.S. 101 (1942). *See also Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Walker* v. *Johnson,* 312 U.S. 275 (1941).

[3] 344 U.S. 443 (1953).

Almost plenary federal *habeas* review of state court convictions was authorized and rationalized in the Court's famous "1963 trilogy." [4] First, the Court dealt with the established principle that a federal *habeas* court is empowered, where a prisoner alleges facts which if proved would entitle him to relief, to relitigate facts, to receive evidence and try the facts anew, and sought to lay down broad guidelines in order to guide district courts as to when they *must* hold a hearing and find facts.[5] "Where the facts are in dispute, the federal court in *habeas corpus* must hold an evidentiary hearing if the *habeas* applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." [6] To "particularize" this general test, the Court went on to hold that an evidentiary hearing must take place when (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) for any reason it appears that the state trier of fact did not afford the *habeas* applicant a full and fair fact hearing.[7]

Second, *Sanders* v. *United States* [8] dealt with two interrelated questions: the effects to be given successive petitions for the writ, when the second or subsequent application presented grounds previously asserted or grounds not theretofore raised. Emphasizing that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged",[9] the Court set out generous standards for consid-

[4] *Sanders* v. *United States*, 373 U.S. 1 (1963); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Townsend* v. *Sain*, 372 U.S. 293 (1963).

[5] *Townsend* v. *Sain*, 372 U.S. 293, 310–312 (1963). If the district judge concludes that the *habeas* applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, defer to the state factfinding. Id., 318. Under the 1966 statutory revision, a state finding cannot be set aside merely on a preponderance of the evidence and the federal court granting the writ must include in its opinion the reason it found the state findings not fairly supported by the record or the existence of one or more listed factors justifying disregard of the factfinding. P.L. 89–711, 80 Stat. 1105, 28 U.S.C. § 2254(d). *See Sumner* v. *Mata*, 449 U.S. 539 (1981); *Sumner* v. *Mata*, 455 U.S. 591 (1982).

[6] *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963). The Court was unanimous on the statement, but it divided 5-to-4 on application.

[7] Id., 313–318. Congress in 1966 codified the factors in somewhat different form but essentially codified *Townsend*. P.L. 89–711, 80 Stat. 1105, 28 U.S.C. § 2254.

[8] 373 U.S. 1 (1963).

[9] Id., 8. The statement accorded with the established view that principles of *res judicata* were not applicable in *habeas*. E.g., *Price* v. *Johnston*, 334 U.S. 266 (1948); *Wong Doo* v. *United States*, 265 U.S. 239 (1924); *Salinger* v. *Loisel*, 265 U.S. 224

eration of successive claims. As to previously asserted grounds, the Court held that controlling weight may be given to a prior denial of relief if (1) the same ground presented was determined adversely to the applicant before, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application, so that the *habeas* court might but was not obligated to deny relief without considering the claim on the merits.[10] With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim only if it decided the petitioner had deliberately bypassed the opportunity in the prior proceeding to raise it; if not, "[n]o matter how many prior applications for federal collateral relief a prisoner has made," the court must consider the merits of the new claim.[11]

Third, the most controversial of the 1963 cases, *Fay* v. *Noia,*[12] dealt with the important issue of state defaults, of, that is, what the effect on *habeas* is when a defendant in a state criminal trial has failed to raise in a manner in accordance with state procedure a claim which he subsequently wants to raise on *habeas.* If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the State's "independent and adequate state ground" bars direct federal review of the claim.[13] Whether a similar result prevailed upon *habeas* divided the Court in *Brown* v. *Allen,*[14] in which the majority held that a prisoner, refused consideration of his appeal in state court because his papers had been filed a day late, could not be heard on *habeas* because of his state procedural default. The result was changed in *Fay* v. *Noia,* in which the Court held that the adequate and independent state ground doctrine was a limitation only upon the Court's appellate review, but that it had no place in

(1924). Congress in 1948 had appeared to adopt some limited version of *res judicata* for federal prisoners but not for state prisoners, Act of June 25, 1948, 62 Stat. 965, 967, 28 U.S.C. §§ 2244, 2255, but the Court in *Sanders* held the same standards applicable and denied the statute changed existing caselaw. *Supra,* 373 U.S., 11-14. *But see* id., 27-28 (Justice Harlan dissenting).

[10] Id., 15. In codifying the *Sanders* standards in 1966, P.L. 89-711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the "ends of justice" language but probably to no substantive effect.

[11] Id., 17-19.

[12] 372 U.S. 391 (1963).

[13] E.g., *Murdock* v. *City of Memphis,* 20 Wall. (87 U.S.) 590 (1875); *Herb* v. *Pitcairn,* 324 U.S. 117 (1945).

[14] 344 U.S. 443 (1953); *See also Re Application of Spencer,* 228 U.S. 652, 659-660 (1913); *Irvin* v. *Dowd,* 359 U.S. 394 (1959).

*habeas*. A federal court has power to consider any claim that has been procedurally defaulted in state courts.[15]

Still, the Court recognized that the States had legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had discretion to deny a *habeas* petitioner relief if it found that he had deliberately bypassed state procedure; the discretion could be exercised only if the court found that the prisoner had intentionally waived his right to pursue his state remedy.[16]

Liberalization of the writ thus made it possible for convicted persons who had fully litigated their claims at state trials and on appeal, who had because of some procedural default been denied the opportunity to have their claims reviewed, or who had been at least once heard on federal *habeas* to have the chance to present their grounds for relief to a federal *habeas* judge. In addition to opportunities to relitigate the facts and the law relating to their convictions, prisoners could as well take advantage of new constitutional decisions that were retroactive.[17] The filings in federal courts increased year by year, but the numbers of prisoners who in fact obtained either release or retrial remained quite small. A major effect, however, was to exacerbate the feelings of state judges and state law enforcement officials and to stimulate many efforts in Congress to enact restrictive *habeas* amendments.[18] While the efforts were unsuccessful, complaints were received more sympathetically in a newly-constituted Supreme Court and more restrictive rulings ensued.

The discretion afforded the Court was sounded by Justice Rehnquist, who, after reviewing the case law on the 1867 statute, remarked that the history "illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." [19] The emphasis from early on has been

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[15] *Fay* v. *Noia*, 372 U.S. 391, 424–434 (1963).

[16] Id., 438–440. The Court appeared to insist on the personal participation of the defendant in the bypass decision. E.g., *Humphrey* v. *Cady*,, 405 U.S. 504 (1972); *Kaufman* v. *United States*, 394 U.S. 217 (1969).

[17] On retroactivity of criminal decisions, see *infra*, *pp.* 700–703.

[18] In 1961, state prisoner *habeas* filings totaled 1,020, in 1965, 4,845, in 1970, a high (to date) of 9,063, in 1975, 7,843 in 1980, 7,031, in 1982, 8,059. On relief afforded, no reliable figures are available, but estimates indicate that at most 4% of the filings result in either release or retrial. C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (1978), §4261, at 601.

[19] *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977).

upon the equitable nature of the *habeas* remedy and the judiciary's responsibility to guide the exercise of that remedy in accordance with equitable principles; thus, the Court time and again underscores that the federal courts have plenary *power* under the statute to implement it to the fullest while the Court's decisions may deny them the discretion to exercise the power.[20]

Change has occurred in two respects to date in regard to the scope of the writ. First, the Court in search and seizure cases has returned to the standard of *Frank* v. *Mangum,* holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review and that he cannot raise those claims again in a *habeas* petition.[21] Grounded in the Court's dissatisfaction with the exclusionary rule, the case has not since been extended to other constitutional grounds,[22] but the rationale of the opinion suggests the likelihood of reaching other exclusion questions.[23]

Second, the Court has severely curtailed if not explicitly overruled *Fay* v. *Noia* by modifying the rules governing the raising of claims not presented when or as required under state rules. Thus, in a trilogy of ambiguous opinions, it denied the petitions of claimants who had pled guilty to charges and then subsequently attempted to attack the ensuing convictions on the basis that the government had unconstitutionally structured the process in order to coerce the plea. A defendant who voluntarily pleads guilty, knowing the consequences and following competent legal advice, may not collaterally attack the result.[24] But of greater conse-

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[20] Id., 83; *Stone* v. *Powell,* 428 U.S. 465, 495 n. 37 (1976); *Francis* v. *Henderson,* 425 U.S. 536, 538 (1976); *Fay* v. *Noia,* 372 U.S. 391, 438 (1963). The dichotomy between power and discretion goes all the way back to the case imposing the rule of exhaustion of state remedies. *Ex parte Royall,* 117 U.S. 241, 251 (1886).

[21] *Stone* v. *Powell,* 428 U.S. 465 (1976). *Cf. Kaufman* v. *United States,* 394 U.S. 217 (1969).

[22] *Rose* v. *Mitchell,* 443 U.S. 545 (1979) (racial discrimination in selection of grand jury foreman); *Jackson* v. *Virginia,* 443 U.S. 307 (1979) (insufficient evidence to satisfy reasonable doubt standard).

[23] Issues of admissibility of confessions (*Miranda* violations) and eyewitness identifications are obvious candidates. *See,* e.g., *Brewer* v. *Williams,* 430 U.S. 387, 413–414 (1977) (Justice Powell concurring), and id., 415 (Chief Justice Burger dissenting); *Wainwright* v. *Sykes,* 433 U.S. 72, 87 n. 11 (1977) (reserving *Miranda*).

[24] *Parker* v. *North Carolina,* 397 U.S. 790 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970); *Brady* v. *United States,* 397 U.S. 742 (1970). *See also Tollett* v. *Henderson,* 411 U.S. 258 (1973). Of course, federal *habeas* is precluded only if under state law one pleading guilty is barred from collaterally attacking his conviction. *Lefkowitz* v. *Newsome,* 420 U.S. 283 (1975).

quence was a series of holdings to the effect that a prisoner who failed to raise constitutional claims in the state proceedings, either bypassing the process or defaulting under valid state requirements, will be precluded from raising those claims on *habeas*, even in the absence of a showing of a deliberate bypass, unless he can show both cause for noncompliance and resulting prejudice.[25] While clear in its intent that federal *habeas* courts must accord greater respect than previously to state interests in enforcing procedural rules through forfeiture sanctions, the Court has indicated that it will proceed to develop standards for "cause" and "prejudice" case-by-case rather than by laying down overarching standards.[1] Thus, a prisoner having bypassed the opportunity to have presented his claims in state court, either intentionally or inadvertently, must present a good reason for having done so.[2] Further, the concept of "prejudice" is even more vague, but it apparently requires a showing by petitioner that the alleged constitutional error about which he now complains worked to his actual and substantial disadvantage, infecting his entire trial with constitutional error.[3]

Much more significant, potentially, is the proposal of a number of Justices to import into *habeas* considerations of guilt or innocence, so that claims on *habeas* would be cognizable only if those claims went to the integrity of the fact-finding process, which would raise questions of the integrity of a guilty verdict, or, more radically, only if the prisoner was able to make a credible showing of "factual innocence." [4] While still a minority position, changes in

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[25] *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973) (under Federal Rules). The federal *habeas* court must determine whether there is an applicable state procedural bar which the state courts followed. *See County Court of Ulster County* v. *Allen*, 442 U.S. 140, 147–154 (1979).

[1] *Wainwright* v. *Sykes*, 433 U.S. 72, 90–91 (1977); *Engle* v. *Isaac*, 456 U.S. 107, 135 (1982) ("not rigid concepts; they take their meaning from the principles of comity and finality"); *United States* v. *Frady*, 456 U.S. 152, 168 (1982).

[2] Thus, in *Engle* v. *Isaac*, 456 U.S. 107, 130–134 (1982), the Court held that defendant's perception of futility in presenting an objection to state courts was inadequate cause and denied the argument that the objection now raised could not have been known at the time, finding that the seminal cases had already been decided, but reserving whether the novelty at the time of a constitutional question would be sufficient cause.

[3] *United States* v. *Frady*, 456 U.S. 152, 169–174 (1982).

[4] *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurring). Many of the same themes pervaded Justice Powell's opinion for the Court in *Stone* v. *Powell*, 428 U.S. 465 (1976), but the case did not adopt the innocence standard. The proposal finds its genesis in Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142 (1970).

membership of the Court could over time make it a majority holding.

***Habeas Corpus: The Process of the Writ.***—A petition for a writ of *habeas corpus* is filed by or on behalf of a person in "custody," a concept which has been expanded so much that it is no longer restricted to actual physical detention in jail or prison.[5] Traditionally, the proceeding could not be used to secure an adjudication of a question which if determined in the petitioner's favor would not result in his immediate release, since a discharge from custody was the only function of the writ,[6] but this restraint too the Court has abandoned in an emphasis upon the statutory language directing the *habeas* court to "dispose of the matter as law and justice require." [7] Thus, even if a prisoner has been released from jail, the presence of collateral consequences flowing from his conviction gives the court jurisdiction to determine the constitutional validity of the conviction.[8]

Petitioners coming into federal *habeas* must first exhaust their state remedies, a limitation long settled in the case law and codified in 1948.[9] It is only required that prisoners once present their

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[5] 28 U.S.C. § 2241(c). "Custody" does not mean one must be confined; a person on parole or probation is in custody. *Jones* v. *Cunningham*, 371 U.S. 236 (1963). A person on bail or on his own recognizance is in custody, *Hensley* v. *Municipal Court* 411 U.S. 345 (1973), and *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), held that an inmate of an Alabama prison was sufficiently in custody as well of Kentucky authorities who had lodged a detainer with Alabama to obtain the prisoner upon his release.

[6] *McNally* v. *Hill*, 293 U.S. 131 (1934); *Parker* v. *Ellis*, 362 U.S. 574 (1960).

[7] 28 U.S.C. § 2243. *See Peyton* v. *Rowe*, 391 U.S. 54 (1968).

[8] *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), overruling *Parker* v. *Ellis*, 362 U.S. 574 (1960). In *Peyton* v. *Rowe*, 391 U.S. 54 (1968), the Court overruled *McNally* v. *Hill*, 293 U.S. 131 (1934), and held that a prisoner may attack on *habeas* the second of two consecutive sentences while still serving the first. *See also Walker* v. *Wainwright*, 390 U.S. 335 (1968) (prisoner may attack the first of two consecutive sentences although the only effect of a successful attack would be immediate confinement on the second sentence). *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), held that one sufficiently in custody of a State could use *habeas* to challenge the State's failure to bring him to trial on pending charges.

Abandonment of this limiting doctrine is also evident in the cases permitting, indeed confining, challenges to prison conditions and restraints to be brought on *habeas*, even though no release is contemplated. E.g., *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

[9] 28 U.S.C. § 2254(b). *See Preiser* v. *Rodriguez*, 411 U.S. 475, 490–497 (1973), and id. 500, 512–524 (Justice Brennan dissenting); *Rose* v. *Lundy*, 455 U.S. 509, 515–521 (1982). If a prisoner submits a petition with both exhausted and unexhausted claims, the *habeas* court must dismiss the entire petition. *Rose* v. *Lundy*, *supra*, 518–519. Exhaustion first developed in cases brought by persons in state custody prior to any judgment. *Ex parte Royall*, 117 U.S. 241 (1886); *Urquhart* v. *Brown*, 205 U.S. 179 (1907).

claims in state court, either on appeal or collateral attack, and they need not return time and again to raise their issues before coming to federal court.[10] While they were once required to petition the Supreme Court on *certiorari* to review directly their state convictions, prisoners have been relieved of this largely pointless exercise,[11] although if the Supreme Court has taken and decided a case its judgment is conclusive in *habeas* on all issues of fact or law actually adjudicated.[12]

A federal prisoner in a § 2255 proceeding will file his motion in the court which sentenced him;[13] a state prisoner in a federal *habeas* action may file either in the district of the court in which he was sentenced or in the district in which he is in custody.[14]

*Habeas corpus* is not a substitute for an appeal.[15] It is not a method to test ordinary procedural errors at trial or violations of state law but only to challenge alleged errors which if established would go to make the entire detention unlawful under federal law.[16] If after appropriate proceedings, the *habeas* court finds that on the facts discovered and the law applied the prisoner is entitled to relief, it must grant it, ordinarily ordering the government to release the prisoner unless he is retried within a certain period.[17]

### Congressional Limitation of the Injunctive Power

Although the speculations of some publicists and some judicial dicta[1] support the idea of an inherent power of the federal courts

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[10] *Brown* v. *Allen*, 344 U.S. 443, 447–450 (1953); id., 502 (Justice Frankfurter concurring); *Fay* v. *Noia*, 372 U.S. 391, 399, 418–420 (1963).

[11] *Fay* v. *Noia*, 372 U.S. 391, 435 (1963), overruling *Darr* v. *Burford*, 339 U.S. 200 (1950).

[12] 28 U.S.C. § 2244(c). But an affirmance of a conviction by an equally divided Court is not an adjudication on the merits. *Neil* v. *Biggers*, 409 U.S. 188 (1972).

[13] 28 U.S.C. § 2255.

[14] 28 U.S.C. § 2241(d). *Cf. Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), overruling *Ahrens* v. *Clark*, 335 U.S. 188 (1948), and holding a petitioner may file in the district in which his custodian is located although the prisoner may be located elsewhere.

[15] *Glasgow* v. *Moyer*, 225 U.S. 420, 428 (1912); *Riddle* v. *Dyche*, 262 U.S. 333, 335 (1923); *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 311 (1946). But compare *Brown* v. *Allen*, 344 U.S. 443, 558–560 (1953) (Justice Frankfurter dissenting in part).

[16] *Smith* v. *Phillips*, 455 U.S. 209, 221 (1982); *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973); *cf. United States* v. *Timmreck*, 441 U.S. 780, 783 (1979).

[17] 28 U.S.C. § 2244(b). *See Whiteley* v. *Warden*, 401 U.S. 560, 569 (1971); *Irvin* v. *Dowd*, 366 U.S. 717, 729 (1961).

[1] In *United States* v. *Detroit Timber Lumber Co.*, 200 U.S. 321, 339 (1906), Justice Brewer, speaking for the Court, approached a theory of inherent equity jurisdiction when he declared: "The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either enunciations of those principles or limitations upon their application in particular cases." It should be emphasized, however, that the Court made no suggestion that it could apply pre-exist-

sitting in equity to issue injunctions independently of statutory limitations, neither the course taken by Congress nor the specific rulings of the Supreme Court support any such principle. Congress has repeatedly exercised its power to limit the use of the injunction in federal courts. The first limitation on the equity jurisdiction of the federal courts is to be found in § 16 of the Judiciary Act of 1789, which provided that no equity suit should be maintained where there was a full and adequate remedy at law. Although this provision did no more than declare a pre-existing rule long applied in chancery courts,[2] it did assert the power of Congress to regulate the equity powers of the federal courts. The Act of March 2, 1793,[3] prohibited the issuance of any injunction by any court of the United States to stay proceedings in state courts except where such injunctions may be authorized by any law relating to bankruptcy proceedings. In subsequent statutes Congress has prohibited the issuance of injunctions in the federal courts to restrain the collection of taxes,[4] provided for a three-judge court as a prerequisite to the issuance of injunctions to restrain the enforcement of state statutes for unconstitutionality,[5] for enjoining federal statutes for unconstitutionality,[6] and for enjoining orders of the Interstate Commerce Commission,[7] limited the power to issue injunctions restraining rate orders of state public utility commissions,[8] and the use of injunctions in labor disputes,[9] and placed a very rigid restriction on the power to enjoin orders of the Administrator under the Emergency Price Control Act.[10]

All of these restrictions have been sustained by the Supreme Court as constitutional and applied with varying degrees of thoroughness. The Court has made exceptions to the application of the prohibition against the stay of proceedings in state courts,[11] but

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ing principles of equity without jurisdiction over the subject matter. Indeed, the inference is to the contrary. In a dissenting opinion in which Justices McKenna and Van Devanter joined, in *Paine Lumber Co.* v. *Neal,* 244 U.S. 459, 475 (1917). Justice Pitney contended that Article III, § 2, "had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate."

[2] *Boyce's Executors* v. *Grundy,* 3 Pet. (28 U.S.) 210 (1830).

[3] 1 Stat. 333, 28 U.S.C. § 2283, *See infra, pp.* 811–812.

[4] 26 U.S.C. § 7421(a).

[5] 28 U.S.C. § 2281.

[6] 28 U.S.C. § 2282.

[7] 28 U.S.C. § 2325.

[8] 28 U.S.C. § 1342.

[9] 29 U.S.C. §§ 52, 101–110.

[10] 56 Stat. 31, § 204 (1942).

[11] *Freeman* v. *Howe,* 24 How. (65 U.S.) 450 (1861); *Gaines* v. *Fuenies,* 92 U.S. 10 (1876); *Ex parte Young,* 209 U.S. 123 (1908); *see pp.* 811–812.

has on the whole adhered to the statute. The exceptions raise no constitutional issues and the tendency has been alternately to contract and to expand the scope of the exceptions.[12]

In *Duplex Printing Press* v. *Deering*,[13] the Supreme Court placed a narrow construction upon the labor provisions of the Clayton Act and thereby contributed in part to the more extensive restriction by Congress on the use of injunctions in labor disputes in the Norris-LaGuardia Act of 1932 which has not only been declared constitutional [14] but has been applied liberally [15] and in such a manner as to repudiate the notion of an inherent power to issue injunctions contrary to statutory provisions.

***Injunctions Under the Emergency Price Control Act of 1942.***—*Lockerty* v. *Phillips* [16] justifies the same conclusion. Here the validity of the special appeals procedure of the Emergency Price Control Act of 1942 was sustained. This act provided for a special Emergency Court of Appeals which, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of regulations, orders, and price schedules issued by the Office of Price Administration. The Emergency Court and the Emergency Court alone was permitted to enjoin regulations or orders of OPA and even it could enjoin such orders only after finding that the order was not in accordance with law or was arbitrary or capricious. The Emergency Court was expressly denied power to issue temporary restraining orders or interlocutory decrees, and in addition the effectiveness of any permanent injunction it might issue was to be postponed for thirty days. If review was sought in the Supreme Court by *certiorari*, effectiveness was to be postponed until final disposition. A unanimous Court, speaking through Chief Justice Stone, declared that there "is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court." All federal courts, other than the Supreme Court, it was asserted, derive their jurisdiction solely from the exercise of the authority to ordain and establish inferior courts conferred on Congress by Article III, § 1, of the Constitution. This power, which Congress is left free to exercise or not, was held to include the power " 'of investing them with jurisdiction either lim-

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[12] *Infra*, pp. 811–812, 815–820.

[13] 254 U.S. 443 (1921).

[14] *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323 (1938); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938).

[15] Ibid., *see also Drivers' Union* v. *Valley Co.*, 311 U.S. 91, 100–103 (1940), and *compare Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), *with Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

[16] 319 U.S. 182 (1943).

ited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good,' " [17] Although the Court avoided passing upon the constitutionality of the prohibition against interlocutory decrees, the language of the Court was otherwise broad enough to support it, as was the language of *Yakus* v. *United States* [18] which sustained a different phase of the special procedure for appeals under the Emergency Price Control Act.

**The Rule-Making Power and Powers Over Process**

Among the incidental powers of courts is that of making all necessary rules governing their process and practice and for the orderly conduct of their business.[1] However, this power too is derived from the statutes and cannot go beyond them. The landmark case is *Wayman* v. *Southard* [2] which sustained the validity of the Process Acts of 1789 and 1792 as a valid exercise of authority under the necessary and proper clause. Although Chief Justice Marshall regarded the rule-making power as essentially legislative in nature, he ruled that Congress could delegate to the courts the power to vary minor regulations in the outlines marked out by the statute. Fifty-seven years later in *Fink* v. *O'Neil,*[3] in which the United States sought to enforce by summary process the payment of a debt, the Supreme Court ruled that under the process acts the law of Wisconsin was the law of the United States and hence the Government was required to bring a suit, obtain a judgment, and cause execution to issue. Justice Matthews for a unanimous Court declared that the courts have "no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the law confers and limits it." [4] Conceding, in 1934, the limited compe-

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[17] Id., 187, quoting *Cary* v. *Curtis.* 3 How. (44 U.S.) 236, 245 (1845).

[18] 321 U.S. 414 (1944). *But compare Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978). *See South Carolina* v. *Katzenback,* 383 U.S. 301, 331–332 (1966), upholding a provision of the Voting Rights Act of 1965 that made the district court for the District of Columbia the only avenue of relief for States seeking to remove the coverage of the Act.

[1] *Washington-Southern Co.* v. *Baltimore Co.,* 263 U.S. 629 (1924).

[2] 10 Wheat. (23 U.S.) 1 (1825).

[3] 106 U.S. 272, 280 (1882).

[4] *See Miner* v. *Atlass,* 363 U.S. 641 (1960), holding that a federal district court, sitting in admiralty, has no inherent power, independent of any statute or the Supreme Court's Admiralty Rules, to order the taking of deposition for the purpose of discovery. *See also Harris* v. *Nelson.* 394 U.S. 286 (1969), in which the Court found statutory authority in the "All Writs Statute" for a *habeas corpus* court to propound interrogatories.

tence of legislative bodies to establish a comprehensive system of court procedure, and acknowledging the inherent power of courts to regulate the conduct of their business, Congress authorized the Supreme Court to prescribe rules for the lower federal courts not inconsistent with the Constitution and statutes.[5] Their operation being restricted, in conformity with the proviso attached to the congressional authorization, to matters of pleading and practice, the Federal Rules of Civil Procedure [6] thus judicially promulgated neither affect the substantive rights of litigants [7] nor alter the jurisdiction [8] of federal courts and the venue of actions therein [9] and, thus circumscribed, have been upheld as valid.

***Limitations to This Power.***—The principal function of court rules is that of regulating the practice of courts as regards forms, the operation and effect of process, and the mode and time of proceedings. However, rules are sometimes employed to state in convenient form principles of substantive law previously established by statutes or decisions. But no such rule "can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law." This rule is applicable equally to courts of law, equity, and admiralty, to rules prescribed by the Supreme Court for the guidance of lower courts, and to rules "which lower courts make for their own guidance under authority conferred." [10] As incident to the judicial power, courts of the United States possess inherent authority to supervise the conduct of their officers, parties, witnesses, counsel, and jurors by self-preserving rules for the protection of the rights of litigants and the orderly administration of justice.[11]

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[5] In the Act of June 19, 1934, 48 Stat. 1064, and contained in 28 U.S.C. § 2072, Congress, in authorizing promulgation of rules of civil procedure, reserved the power to examine and veto rules proposed pursuant to the act which it found to be contrary to its legislative policy. *See Sibbach* v. *Wilson*, 312 U.S. 1, 14-16 (1941). Federal Rules of Criminal Procedure, also formulated pursuant to congressional authorization, are to be found in 18 U.S.C. App. Congress in the 1970s disagreed with the direction of proposed rules of evidence and of *habeas* practice, and, first postponing their effectiveness, enacted revised rules. P.L. 93-505, 88 Stat. 1926 (1974); P.L. 94-426, 90 Stat. 1334 (1976).

[6] 28 U.S.C. App.

[7] However, the abolition of old rights and the creation of new ones in the course of litigation conducted in conformance with these judicially prescribed federal rules has been sustained as against the contention of a violation of substantive rights, *Sibbach* v. *Wilson*, 312 U.S. 1, 14 (1941).

[8] *Cf. United States* v. *Sherwood*, 312 U.S. 584, 589-590 (1941).

[9] *Mississipp: Pub. Corp.* v. *Murphree*, 326 U.S. 438 (1946).

[10] *Washington-Southern Nav. Co.* v. *Baltimore & P.S.B.C. Co.*, 263 U.S. 629, 635, 636 (1924). It is not for the Supreme Court to prescribe how the discretion vested in a Court of Appeals should be exercised. As long as the latter court keeps within the bounds of judicial discretion, its action is not reviewable. *In re Burwell*, 350 U.S. 521 (1956).

[11] *McDonald* v. *Pless*, 238 U.S. 264, 266 (1915); *Griffin* v. *Thompson*, 2 How. (43 U.S.) 244, 257 (1844). In *Rea* v. *United States*, 350 U.S. 214, 218 (1956), the Court,

The courts of the United States possess inherent equitable powers over their process to prevent abuse, oppression, and injustice, and to protect their jurisdiction and officers in the protection of property in the custody of law.[12] Such powers are said to be essential to and inherent in the organization of courts of justice.[13] The courts of the United States also possess inherent power to amend their records, correct the errors of the clerk or other court officers, and to rectify defects or omissions in their records even after the lapse of a term, subject, however, to the qualification that the power to amend records conveys no power to create a record or re-create one of which no evidence exists.[14]

**Appointment of Referees, Masters, and Special Aids**

The administration of insolvent enterprises, investigations into the reasonableness of public utility rates, and the performance of other judicial functions often require the special services of masters in chancery, referees, auditors, and other special aids. The practice of referring pending actions to a referee was held in *Heckers* v. *Fowler* [1] to be coequal with the organization of the federal courts. In the leading case of *Ex parte Peterson* [2] a United States district court appointed an auditor with power to compel the attendance of witnesses and the production of testimony. The court authorized him to conduct a preliminary investigation of facts and file a report thereon for the purpose of simplifying the issues for the jury. This action was neither authorized nor prohibited by statute. In sustaining the action of the district judge, Justice Brandeis, speaking for the Court, declared: "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." [3] The power to appoint auditors by federal courts sitting

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citing *McNabb* v. *United States*, 318 U.S. 332 (1943), asserted that this supervisory power extends to policing the requirements of the Court's rules with respect to the law enforcement practices of federal agents. *But compare United States* v. *Payner*, 447 U.S. 727 (1980).

[12] *Gumbel* v. *Pitkin*, 124 U.S. 131 (1888); *Covell* v. *Heyman*, 111 U.S. 176 (1884); *Buck* v. *Colbath*, 3 Wall. (70 U.S.) 334 (1866).

[13] *Eberly* v. *Moore*, 24 How. (65 U.S.) 147 (1861); *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134 (1919).

[14] *Gagnon* v. *United States*, 193 U.S. 451, 458 (1904).

[1] 2 Wall. (69 U.S.) 123, 128–129 (1864).

[2] 253 U.S. 300 (1920).

[3] Id., 312.

in equity has been exercised from their very beginning, and here it was held that this power is the same whether the court sits in law or equity.

**Power to Admit and Disbar Attorneys**

Subject to general statutory qualifications for attorneys, the power of the federal courts to admit and disbar attorneys rests on the common law from which it was originally derived. According to Chief Justice Taney, it was well settled by the common law that "it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." Such power, he made clear, however, "is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the right and dignity of the Court itself." [1] The Test-Oath Act of July 2, 1862, which purported to exclude former Confederates from the practice of law in the federal courts, was invalidated in *Ex parte Garland.*[2] In the course of his opinion for the Court, Justice Field discussed generally the power to admit and disbar attorneys. The exercise of such a power, he declared, is judicial power. The attorney is an officer of the court and though Congress may prescribe qualifications for the practice of law in the federal courts, it may not do so in such a way as to inflict punishment contrary to the Constitution or to deprive a pardon of the President of its legal effect.[3]

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[1] *Ex parte Secombe*. 19 How. (60 U.S.) 9, 13 (1857). *See In re Sawyer*, 360 U.S. 622 (1959), with reference to the extent to which counsel of record during a pending case may attribute error to the judiciary without being subject to professional discipline.

[2] 4 Wall. (71 U.S.) 333 (1867).

[3] Id., 378–380. Although a lawyer is admitted to practice in a federal court by way of admission to practice in a state court, he is not automatically sent out of the federal court by the same route, when "principles of right and justice" require otherwise. A determination of a state court that an accused practitioner should be disbarred is not conclusively binding on the federal courts. *Theard* v. *United States*, 354 U.S. 278 (1957), citing *Selling* v. *Radford*, 243 U.S. 46 (1917). *Cf. In re Isserman*, 345 U.S. 286, 288 (1953), where it was acknowledged that upon disbarment by a state court, Rule 2, par. 5 of the Rules of the Supreme Court imposes upon the attorney the burden of showing cause why he should not be disbarred in the latter, and upon his failure to meet that burden, the Supreme Court will "follow the finding of the state that the character requisite for membership in the bar is lacking." In 348 U.S. 1 (1954), Isserman's disbarment was set aside for reason of noncompliance with Rule 8 requiring concurrence of a majority of the Justices participating in order to sustain a disbarment. *See also In re Disbarment of Crow*, 359 U.S. 1007 (1959). For an extensive treatment of disbarment and American and English precedents thereon, *see Ex parte Wall*, 107 U.S. 265 (1883).

SECTION 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

### JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Late in the Convention a delegate proposed to extend the judicial power to cases arising under the Constitution of the United States as well as under its laws and treaties. Madison's notes continue: "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

"The motion of Docr. Johnson was agreed to *nem* : *con* : it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—".[1]

That the Framers did not intend for federal judges to roam at large in construing the Constitition and laws of the United States but rather preferred and provided for resolution of disputes arising in a "judicial" manner is revealed not only in the language of § 2 and the passage quoted above but as well in the refusal to associate the judges in the extra-judicial functions which some members of the Convention—Madison and Wilson notably—conceived for them. Thus, four times proposals for associating the judges in a council of

[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 430.

revision to pass on laws generally were voted down [2] and similar fates befell suggestions that the Chief Justice be a member of a privy council to assist the President [3] and that the President or either House of Congress be able to request advisory opinions of the Supreme Court.[4]

This intent of the Framers was early effectuated when the Justices declined a request of President Washington to tender him advice respecting legal issues growing out of United States neutrality between England and France in 1793.[5] Moreover, the refusal of the Justices to participate in the congressional plan for awarding veterans' pensions [6] bespoke a similar adherence to the restricted role of courts. These restrictions have been encapsuled in a series of principles or doctrines the application of which determines whether an issue is meet for judicial resolution and whether the parties raising it are entitled to have it judicially resolved. Constitutional restrictions are intertwined with prudential considerations in the expression of these principles and doctrines and it is seldom easy to separate out the two strands.[7]

**The Two Classes of Cases and Controversies**

By the terms of the foregoing section the judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice Marshall in *Cohens* v. *Virginia:* [1] "In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction de-

[2] The proposal was contained in the Virginia Plan. 1 id., 21. For the four rejections, *see* id., 97–104, 108–110, 138–140, 2 id., 73–80, 298.

[3] Id., 328–329, 342–344. Although a truncated version of the proposal was reported by the Committee on Detail, id., 367, the Convention never took it up.

[4] Id., 340–341. The proposal was referred to the Committee on Detail and never heard of again.

[5] 1 C. Warren, *The Supreme Court in United States History* (Boston: rev. ed. 1926), 108–111; 3 *Correspondence and Public Papers of John Jay*, H. Johnston ed. (New York: 1893), 633–635.

[6] *Hayburn's Case*, 2 Dall. (2 U.S.) 409 (1792), discussed *supra*, *pp.* 633–635.

[7] *See*, e.g., Justice Brandeis dissenting in *Ashwander* v. *TVA*, 297 U.S. 288, 341, 345–348 (1936). Cf. *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568–575 (1947).

[1] 6 Wheat. (19 U.S.) 264 (1821).

pends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' and 'between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union." [2]

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." [3] The meaning attached to the terms "cases" and "controversies" [4] determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights "in a form prescribed by law." [5] "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication." [6]

Chief Justice Hughes once essayed a definition which, however, presents a substantial problem of labels. "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical

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[2] Id., 378.

[3] *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911).

[4] The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less comprehensive word and includes only suits of a civil nature. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239 (1937).

[5] *Osborn* v. *United States Bank*, 9 Wheat. (22 U.S.) 738, 819 (1824).

[6] *In re Pacific Ry. Comm.*, 32 F. 241, 255 (C.C. Calif. 1887) (Justice Field). *See also Smith* v. *Adams*, 130 U.S. 167, 173–174 (1889).

state of facts." [7] Of the "case" and "controversy" requirement, Chief Justice Warren admitted that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine." [8] Justice Frankfurter perhaps best captured the flavor of the "case" and "controversy" requirement by noting that it takes the "expert feel of lawyers" often to note it.[9]

From these quotations may be isolated several factors which, in one degree or another, go to make up a "case" and "controversy."

### Adverse Litigants

Adverse litigants with real interests to contend for is a standard which has been stressed in numerous cases [1] and the requirement implicates a number of complementary factors making up a justiciable suit. A concrete example of the requirement being one of the decisive factors, if not the decisive one, is *Muskrat* v. *United States,*[2] a case not now deemed of great importance, in which the Court struck down a statute authorizing certain named Indians to bring a test suit against the United States to determine the validity of a law affecting the allocation of Indian lands. Attorney's fees

[7] *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 229, 240-241 (1937). *Cf. Public Service Comm.* v. *Wycoff Co.,* 344 U.S. 237, 242 (1952).

[8] *Flast* v. *Cohen,* 392 U.S. 83, 94-95 (1968).

[9] "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 149, 150 (1951).

[1] *Lord* v. *Veazie,* 8 How. (49 U.S.) 251 (1850); *Chicago & G.T. Ry. Co.* v. *Wellman,* 143 U.S. 339 (1892); *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.,* 145 U.S. 300 (1892); *California* v. *San Pablo & T.R.R.,* 149 U.S. 308 (1893); *Tregea* v. *Modesto Irrigation District,* 164 U.S. 179 (1896); *Lampasas* v. *Bell,* 180 U.S. 276 (1901); *Smith* v. *Indiana,* 191 U.S. 138 (1903); *Braxton County Court* v. *West Virginia,* 208 U.S. 192 (1908); *Muskrat* v. *United States,* 219 U.S. 346 (1911); *United States* v. *Johnson,* 319 U.S. 302 (1943); *Moore* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 47 (1971).

[2] 219 U.S. 346 (1911).

of both sides were to be paid out of tribal funds deposited in the United States Treasury. "The judicial power," said the Court, ". . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction . . . . It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question." [3]

***Collusive and Feigned Suits.***—Prime among the cases in which adverse litigants are required are those suits in which two parties have gotten together to bring a friendly suit to settle a question of interest to them. Thus, in *Lord* v. *Veazie,*[4] the latter had executed a deed to the former warranting that he had certain rights claimed by a third person and suit was instituted to decide the "dispute". Declaring that "the whole proceeding was in contempt of the court, and highly reprehensible", the Court observed: "The contract set out in the pleadings was made for the purpose of instituting this suit . . . . The plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit . . . . And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed upon between themselves, . . . and upon a judgment *pro forma* entered by their mutual consent, without any actual judicial decision . . . ." [5] "Whenever," said the Court in another case, "in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact,

[3] Id., 361–362. The Indians obtained the sought-after decision the following year by the simple expedient of suing to enjoin the Secretary of the Interior from enforcing the disputed statute. *Gritts* v. *Fisher,* 224 U.S. 640 (1912). The principal effect of *Muskrat* was to put in doubt for several years the validity of any sort of declaratory judgment provision in federal law. *Infra, pp.* 690–694.

[4] 8 How. (49 U.S.) 251 (1850).

[5] Id., 254–255.

the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." [6] Yet several widely known constitutional decisions have been rendered in cases in which friendly parties contrived to have the actions brought and in which the suits were supervised and financed by one side.[7] And there are instances in which there may not be in fact an adverse party at certain stages, that is, some instances when the parties do not actually disagree, but in which the Court and the lower courts are empowered to adjudicate.[8]

***Stockholder Suits.***—Moreover, adversity in parties has often been found in suits by stockholders against their corporation in which the constitutionality of a statute or a government action is drawn in question, even though one may suspect that the interests of plaintiffs and defendant are not all that dissimilar. Thus, in *Pollock* v. *Farmers' Loan and Trust Co.*,[9] the Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing a statute which forbade the maintenance in any court of a suit to restrain the collection of any tax.[10] Subsequently, the Court sustained juris-

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[6] *Chicago & G.T. Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892).

[7] E.g., *Hylton* v. *United States*, 3 Dall. (3 U.S.) 171 (1796); *Fletcher* v. *Peck*, 6 Cr. (10 U.S.) 87 (1810); *Scott* v. *Sandford*, 19 How. (60 U.S.) 393 (1857); *Cf.* 1 C. Warren, *The Supreme Court in United States History* (Boston: 1926), 147, 392-395; 2 id., 279-282. In *Powell* v. *Texas*, 392 U.S. 514 (1968), the Court adjudicated on the merits a challenge to the constitutionality of criminal treatment of chronic alcoholics although the findings of the trial court, agreed to by the parties, appeared rather to be "the premises of a syllogism transparently designed to bring this case' within the confines of an earlier enunciated constitutional principle. But adversity arguably still existed.

[8] Examples are naturalization cases, *Tutun* v. *United States*, 270 U.S. 568 (1926), entry of judgment by default or on a plea of guilty, *In re Metropolitan Ry. Receivership*, 208 U.S. 90 (1908), and consideration by the Court of cases in which the Solicitor General confesses error below. *Cf. Young* v. *United States*, 315 U.S. 257, 258-259 (1942); *Casey* v. *United States*, 343 U.S. 808 (1952); *Rosengart* v. *Laird*, 404 U.S. 908 (1972) (Justice White dissenting). *See also Sibron* v. *New York*, 392 U.S. 40, 58-59 (1968).

[9] 157 U.S. 429 (1895). The first injunction suit by a stockholder to restrain a corporation from paying a tax was apparently *Dodge* v. *Woolsey*, 18 How. (59 U.S.) 331 (1856). *See also Brushaber* v. *Union Pacific R. Co.*, 240 U.S. 1 (1916).

[10] *Cf. Cheatham* v. *United States*, 92 U.S. 85 (1875); *Snyder* v. *Marks*, 109 U.S. 189 (1883).

diction in cases brought by a stockholder to restrain a company from investing its funds in farm loan bonds issued by federal land banks [11] and by preferred stockholders against a utility company and the TVA to enjoin the performance of contracts between the company and TVA on the ground that the statute creating it was unconstitutional.[12] Perhaps most notorious was *Carter* v. *Carter Coal Co.*[13] in which the president of the company brought suit against the company and its officials, among whom was Carter's father, a vice president of the company, and in which the Court entertained the suit and decided the case on the merits.[14]

**Substantial Interest: Standing**

Perhaps the most important element of the requirement of adverse parties may be found in the "complexities and vagaries" of the standing doctrine. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." [1] The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [2] Standing as a doctrine is composed of both constitutional and prudential restraints on the power of the federal courts to render decisions,[3] and

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[11] *Smith* v. *Kansas City Title Co.*, 255 U.S. 180 (1921).

[12] *Ashwander* v. *TVA*, 297 U.S. 288 (1936). *See* id., 341 (Justice Brandeis dissenting in part).

[13] 298 U.S. 238 (1936).

[14] Stern, "The Commerce Clause and the National Economy," 59 Harv. L. Rev. 645, 667–668 (1948) (detailing the framing of the suit).

[1] *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). In taxpayer suits, it is appropriate to look to the substantive issues to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. Id., 102; *United States* v. *Richardson*, 418 U.S. 166, 174–175 (1974); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 78–79 (1978).

[2] *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). That persons or organizations have a personal, ideological interest sufficiently strong to create adverseness is not alone enough to confer standing; rather, the adverseness is the consequence of one being able to satisfy the Article III requisite of injury in fact. *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 482–486 (1982); *Schlesinger* v. *Reservists Com. to Stop the War*, 418 U.S. 208, 225–226 (1974). Nor is the fact that if plaintiffs have no standing to sue, no one would have standing, a sufficient basis for finding standing. Id., 227.

[3] E.g., *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 471–476 (1982).

is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action.[4] As such, it is often interpreted according to the prevailing philosophies of judicial activism and restraint and narrowly or broadly in terms of the viewed desirability of access to the courts by persons seeking to challenge legislation or other governmental action. The trend in the 1960s was to broaden access; in the 1970s and 1980s it was to stiffen the requirements of standing, although Court majorities were not entirely consistent.[5] The major difficulty in setting forth the standards is that the Court's generalizations and the results it achieves are often at variance.[6]

***Citizen Suits.***—Persons do not have standing to sue to enforce a constitutional provision when all they can show or claim is that they have an interest or have suffered an injury that is shared by all members of the public. Thus, a group of persons suing as citizens to litigate a contention that membership of Members of Congress in the military reserves constituted a violation of Article I, § 6, cl. 2, was denied standing.[7] "The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract. . . . [The] claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance." [8]

***Taxpayer Suits.***—Save for a narrowly cabined exception, standing is also lacking when a litigant attempts to sue to contest governmental action which he claims injures him as a taxpayer. In *Frothingham* v. *Mellon,*[9] the Court denied standing to a taxpayer

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[4] C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), 60.

[5] *Compare Baker* v. *Carr,* 369 U.S. 186 (1962); *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Assn. of Data Processing Service Org.* v. *Camp,* 397 U.S. 150 (1970), with *Warth* v. *Seldin,* 422 U.S. 490 (1975); *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26 (1976); *Valley Forge Christian College* v. *Americans United,* 454 U.S. 464 (1982). The more recent emphasis is upon a separation of powers concept restricting the role of federal courts in passing upon the actions of the political branches. Id., 473–474; *United States* v. *Richardson,* 418 U.S. 166, 188–192 (1974) (Justice Powell concurring).

[6] "[T]he concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . [and] this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition." *Valley Forge Christian College* v. *Americans United,* 454 U.S. 464, 475 (1982). "Generalizations about standing to sue are largely worthless as such." *Assn. of Data Processing Service Org.* v. *Camp,* 397 U.S. 150, 151 (1970).

[7] *Schlesinger* v. *Reservists Com. to Stop the War,* 418 U.S. 208 (1974).

[8] Id., 217. *See also Tyler* v. *Judges of Court of Registration,* 179 U.S. 405 (1900); *Ex parte Levitt,* 302 U.S. 633 (1937). *Cf. Laird* v. *Tatum,* 408 U.S. 1 (1972).

[9] Usually cited as *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923), the two suits being consolidated.

suing to restrain disbursements of federal money to those States which chose to participate in a program to reduce maternal and infant mortality; her claim was that Congress lacked power to appropriate funds for those purposes and that the appropriations would increase her taxes in future years in an unconstitutional manner. Noting that a federal taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminate" and that "the effect upon future taxation, of any payment out of the funds . . . [is] remote, fluctuating and uncertain," the Court ruled that plaintiff had failed to allege the type of "direct injury" necessary to confer standing.[10]

Taxpayers were found to have standing, however, in *Flast* v. *Cohen*,[11] to contest the expenditure of federal moneys to assist religious-affiliated organizations. The Court asserted that the answer to the question whether taxpayers have standing depends on whether the circumstances of each case demonstrate that there is a logical nexus between the status asserted and the claim sought to be adjudicated. First, there must be a logical link between the status of taxpayer and the type of legislative enactment attacked; this means, a taxpayer must allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8, rather than also of incidental expenditure of funds in the administration of an essentially regulatory statute. Second, there must be a logical nexus between the status of taxpayer and the precise nature of the constitutional infringement alleged; this means, the taxpayer must show the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power, rather than simply to argue the enactment is generally beyond the powers delegated to Congress. Both Frothingham and Flast met the first test, because they attacked a spending program. Flast met the second test, because the establishment clause of the First Amendment operates as a specific limitation upon the exercise of the taxing and spending power, while Frothingham had alleged only that the Tenth Amendment had been exceeded. Reserved was the question whether other specific limitations constrained the taxing and spending clause in the same manner as the establishment clause.[12]

[10] Id., 487, 488.
[11] 392 U.S. 83 (1968).
[12] Id., 105.

Since *Flast*, the Court has refused to expand it. Litigants seeking standing as taxpayers to challenge legislation permitting the CIA to withhold from the public detailed information about its expenditures as a violation of Article I, § 9, cl. 7, and to challenge certain Members of Congress from holding commissions in the reserves as a violation of Article I, § 6, cl. 2, were denied standing, in the former cases because their challenge was not to an exercise of the taxing and spending power and in the latter because their challenge was not to legislation enacted under Article I, § 8, but rather was to executive action in permitting Members to maintain their reserve status.[13] An organization promoting church-state separation was denied standing to challenge an executive decision to donate surplus federal property to a church-related college, both because the contest was to executive action under a valid piece of legislation and because the property transfer was not pursuant to a taxing and spending clause exercise but was taken under the property clause of Article IV, § 3, cl. 2.[14] It seems evident that for at least the foreseeable future taxpayer standing will be restricted to establishment clause limitations on spending programs.

Local taxpayers attacking local expenditures have generally been permitted more leeway than federal taxpayers insofar as standing is concerned. Thus, in *Everson* v. *Board of Education*,[15] such a taxpayer was found to have standing to challenge the use of public funds for transportation of pupils to parochial schools.[16] But in *Doremus* v. *Board of Education*,[17] the Court refused an appeal

[13] *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Com. to Stop the War*, 418 U.S. 208, 227–228 (1974).

[14] *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464 (1982). Justices Brennan, Marshall, Blackmun, and Stevens in dissent argued that the establishment clause was such a fundamental provision that persons objecting to any governmental expenditure in favor of religion would have standing to object, whatever the nature of the governmental action. Id., 490, 513.

[15] 330 U.S. 1 (1947).

[16] *See Bradfield* v. *Roberts*, 175 U.S. 291, 295 (1899); *Crampton* v. *Zabriskie*, 101 U.S. 601 (1880); *Heim* v. *McCall*, 239 U.S. 175 (1915). *See also Illinois ex rel. McCollom* v. *Board of Education*, 333 U.S. 203 (1948); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (plaintiffs suing as parents and taxpayers). In *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), the Court without discussing standing heard an appeal from a state court decision in a taxpayer's suit challenging a state statute prescribing a loyalty oath. This was the first case in the Court recognizing standing by a taxpayer merely as taxpayer to challenge a state statute. *Cf. Coyle* v. *Smith*, 221 U.S. 559 (1911); *Smiley* v. *Holm*, 285 U.S. 355 (1932); *but see McCandless* v. *Pratt*, 211 U.S. 437 (1908).

[17] 342 U.S. 429 (1952). *Compare Alder* v. *Board of Education*, 342 U.S. 485 (1952). *See also Richardson* v. *Ramirez*, 418 U.S. 24 (1974).

from a state court for lack of standing of a taxpayer challenging Bible reading in the classroom. No measurable disbursement of public funds was involved in this type of activity, so that there was no direct injury to the taxpayer, a rationale similar to the spending program-regulatory program distinction of *Flast.*

***Constitutional Standards: Injury in Fact and Causation.***—While the Court has been inconsistent over time, it has now settled upon the rule that, "at an irreducible minimum," the constitutional requisites under Article III for the existence of standing are that the party seeking to sue must personally have suffered some actual or threatened injury that can fairly be traced to the challenged action of defendant and that the injury is likely to be redressed by a favorable decision.[18]

For some time, injury alone was not sufficient; rather, the injury had to be "a wrong which directly results in the violation of a legal right,"[19] that is, one of property, one arising out of contract, one protected against tortious invasion, or one founded in a statute which confers a privilege."[20] The problem was that the "legal right" language was "demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected."[21] The observable tendency of the Court, however, was to find standing frequently in cases distinctly not grounded in property rights.[22]

In any event, the "legal rights" language has now been dispensed with. Rejection occurred in two administrative law cases in which the Court announced that parties had standing when they suffered "injury in fact" to some interest, "economic or otherwise,"

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[18] *Valley Forge Christian College* v. *Americans United,* 454 U.S. 464, 472 (1982). *See,* however, *United States Parole Comm.* v. *Geraghty,* 445 U.S. 388 (1980), a class action case, in which the majority opinion appears to reduce the significance of the personal stake requirement. Id., 404 n. 11, reserving full consideration of the dissent's argument at id., 401 n. 1, 420–421.

[19] *Alabama Power Co.* v. *Ickes,* 302 U.S. 464, 479 (1938). *Cf. Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 151–152 (1951) (Justice Frankfurter concurring). But see *Frost* v. *Corporation Comm.,* 278 U.S. 515 (1929); *City of Chicago* v. *Atchison, T. & S.F Ry.,* 357 U.S. 77 (1958).

[20] *Tennessee Power Co.* v. *TVA,* 306 U.S. 118, 137–138 (1939).

[21] C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), 65–66.

[22] E.g., *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951) (indirect injury to organization and members by governmental maintenance of list of subversive organizations); *NAACP* v. *Alabama ex rel Patterson,* 357 U.S. 449 (1958) (same); *Abington School District* v. *Schempp,* 374 U.S. 203, 224 n. 9 (1963) (parents and school children challenging school prayers); *McGowan* v. *Maryland,* 366 U.S. 420, 430–431 (1961) (merchants challenging Sunday closing laws); *Baker* v. *Carr* 369 U.S. 186, 204–208 (1962) (voting rights).

that is arguably within the zone of interest to be protected or regulated by the statute or constitutional provision in question.[23] Now, environmental, aesthetic, and social interests, when impaired, afford a basis for making constitutional attacks upon governmental action.[24] The breadth of the injury in fact concept may be discerned in a series of cases involving the right of private parties to bring actions under the Fair Housing Act to challenge alleged discriminatory practices. The subjective and intangible interests of persons in enjoying the benefits of living in integrated communities were found sufficient to permit them to attack actions which threatened or harmed those interests even though the actions were not directed at them.[25] Similarly, the interests of individuals and associations of individuals in using the environment afforded them the standing to challenge actions which threatened those environmental conditions.[1] Nonetheless, the Court has also in constitutional cases been wary of granting standing to persons who alleged threats or harm to interests which they shared with the larger community of people at large, a rule against airing "generalized grievances" through the courts,[2] although it is unclear whether this rule (or subrule) has a constitutional or a prudential basis.[3]

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[23] *Assn. of Data Processing Service Org.* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970). The "zone of interest" test is a prudential rather than constitutional standard. *See infra, pp.* 679–680.

[24] E.g., *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72–74 (1978); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261–263 (1977); *Singleton* v. *Wulff*, 428 U.S. 106, 112–113 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498–499 (1975); *Shea* v. *Littleton*, 414 U.S. 488, 493–494 (1974); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617–618 (1973). The "legal right" language, however, seemed to reappear in *Warth* v. *Seldin*, *supra*, 500–501, in the context of prudential rules.

[25] *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982). While Congress had provided for standing in the Act, thus removing prudential considerations affecting standing, it could not abrogate constitutional constraints. *Gladstone, Realtors, supra*, 100. Thus, the injury alleged satisfied Article III.

[1] *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972); *United States* v. *SCRAP*, 412 U.S. 669, 687–688 (1973); *Duke Power Co.*, v. *Carolina Environmental Study Group*, 438 U.S. 59, 72–74 (1978). Moreover, unlike the situation in taxpayer suits, there is no requirement of a nexus between the injuries claimed and the constitutional rights asserted. In *Duke Power, supra*, 78–81, claimed environmental and health injuries grew out of construction and operation of nuclear power plants but were not directly related to the governmental action challenged, the limitation of liability and indemnification in cases of nuclear accident.

[2] E.g., *United States* v. *Richardson*, 418 U.S. 166, 174 (1974); *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 482–487 (1982).

[3] *Compare Warth* v. *Seldin*, 422 U.S. 490, 499–500 (1975) (prudential), with *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 485, 490 (1982) (apparently constitutional).

And in a number of cases, the Court has refused standing apparently in the belief that the assertion of harm is too speculative or too remote to credit.[4]

Of increasing importance is the second element of standing, recently developed and held to be of constitutional requisite, to the effect that the injury alleged to have been suffered must be fairly traced to the action challenged, that "but for" the action, the plaintiff would not have been injured. The Court has otherwise expressed the test to be that there must be a "substantial likelihood" that the relief sought from the court if granted would remedy the harm.[5] Thus, poor people who had been denied service at certain hospitals were held to lack standing to challenge IRS policy of extending tax benefits to hospitals that did not serve indigents, since they could not show that alteration of the tax policy would cause the hospitals to alter their policies and treat them.[6] Low-income persons seeking the invalidation of a town's restrictive zoning ordinance were held to lack standing, because they had failed to allege with sufficient particularity that the complained-of injury, inability to obtain adequate housing within their means, was fairly attributable to the ordinance instead of to other factors, so that voiding of the ordinance might not have any effect upon their ability to find affordable housing.[7] But the Court did permit plaintiffs to attack the constitutionality of a law limiting the liability of private utilities in the event of nuclear accidents and providing for indemnification, on a showing that "but for" the passage of the law there was a "substantial likelihood," based upon industry testimony and other material in the legislative history, that the nuclear power plants would not be constructed and that therefore the environmental and aesthetic harm alleged by plaintiffs would not occur;

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[4] E.g. *Laird* v. *Tatum*, 408 U.S. 1 (1972) ("allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). *See also O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974); *Rizzo* v. *Goode*, 423 U.S. 362, 371–373 (1976).

[5] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72, 74–78 (1978); *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 161 (1981).

[6] *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). *See also Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973) (mother of illegitimate child lacked standing to contest prosecutorial policy of utilizing child support laws to coerce support of legitimate children only, since it was "only speculative" that prosecution of father would result in support rather than jailing).

[7] *Warth* v. *Seldin*, 422 U.S. 490 (1975). But in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1974), a person who alleged he was seeking housing in the community and that he would qualify if the organizational plaintiff were not inhibited by allegedly racially discriminatory zoning laws from constructing housing for low-income persons like himself was held to have shown a "substantial probability" that voiding of the ordinance would benefit him.

thus, a voiding of the law would likely relieve the plaintiffs of the complained of injuries.[8] Operation of this causation requirement, in its insistence on showing likelihood of relief, makes difficult but not impossible the establishment of standing by persons indirectly injured by governmental action, that is, action taken as to third parties that is alleged to have as a consequence injured the claimants.[9]

***Prudential Standing Rules.***—Even when Article III constitutional standing rules have been satisfied, the Court has held that principles of prudence may counsel the judiciary to refuse to adjudicate some claims.[10] With respect to the prudential rules, it is clear that the Court feels free to disregard any of these principles in cases in which it thinks exceptionable circumstances exists,[11] and Congress is free to legislate away prudential restraints upon the Court's jurisdiction and confer standing to the furtherest extent permitted by Article III.[12] The Court has identified three rules as prudential ones,[13] only one of which has been a significant

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[8] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72–78 1978). The likelihood of relief in some cases appears to be rather speculative at best. E.g., *Bryant* v. *Yellen*, 447 U.S. 352, 366–368 (1980); *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160–162 (1981). *And see Orr* v. *Orr*, 440 U.S. 268, 271–273 (1979).

[9] *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975). For examples of cases likely to be affected, see *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974); *Norwood* v. *Harrison*, 413 U.S. 455 (1973).

[10] *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99–100 (1979) ("a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").

[11] *Warth* v. *Seldin*, 422 U.S. 490, 500–501 (1975); *Craig* v. *Boren*, 429 U.S. 190, 193–194 (1976).

[12] "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). That is, the actual or threatened injury required may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 493 n. 2 (1974). Examples include *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979). *See also Buckley* v. *Valeo*, 424 U.S. 1, 8 n. 4, 11–12 (1976). For a good example of the congressionally-created interest and the injury to it, *see Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373–375 (1982) (Fair Housing Act created right to truthful information on availability of housing; black tester's right injured through false information, but white tester not injured because he received truthful information).

[13] *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 474–475 (1982).

factor in the jurisprudence of standing. The first two rules are that the plaintiff's interest, to which he asserts an injury, must come within the "zone of interest" arguably protected by the constitutional provision or statute in question [14] and that plaintiffs may not air "generalized grievances" shared by all or a large class of citizens.[15] The important rule concerns the ability of a plaintiff to represent the constitutional rights of third parties not before the court.

***Standing to Assert the Constitutional Rights of Others.***—Usually, one may assert only one's interest in the litigation and not challenge the constitutionality of a statute or a governmental action because it infringes the protectable rights of someone else.[16] In *Tileston* v. *Ullman,*[17] an early round in the attack on a state anticontraceptive law, a doctor sued, charging that he was prevented from giving his patients needed birth control advice. The Court held he had no standing; no right of his was infringed and he could not represent the interests of his patients. But there are several exceptions to this part of the standing doctrine that make generalization misleading. Many cases allow standing to third parties if they demonstrate a requisite degree of injury to themselves and if under the circumstances the injured parties whom they seek to represent would likely not be able to assert their rights. Thus, in *Barrows* v. *Jackson,*[18] a white defendant who was being sued for damages for breach of a restrictive covenant directed against Negroes—and therefore able to show injury in liability for damages—was held to have standing to assert the rights of the class of persons whose constitutional rights were infringed.[19] Similarly, the Court has permit-

[14] *Assn. of Data Processing Service Orgs.* v. *Camp,* 397 U.S. 150, 153 (1970); *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 39 n. 19 (1976); *Valley Forge Christian College* v. *Americans United,* 454 U.S. 464, 475 (1982).

[15] *United States* v. *Richardson,* 418 U.S. 166, 173, 174–176 (1974); *Duke Power Co* v. *Carolina Environmental Study Group,* 438 U.S. 59, 80 (1978). In *United States* v. *SCRAP,* 412 U.S. 669, 687–688 (1973), a congressional conferral case, the Court agreed that the interest asserted was one shared by all.

[16] *United States* v. *Raines,* 362 U.S. 17, 21–23 (1960); *Yazoo & M.V.R. Co.* v. *Jackson Vinegar Co.,* 226 U.S. 217 (1912).

[17] 318 U.S. 44 (1943). *See Warth* v. *Seldin,* 422 U.S. 490, 508–510 (1975) (challenged law did not adversely affect plaintiffs and did not adversely affect a relationship between them and persons they sought to represent).

[18] 346 U.S. 249 (1953).

[19] *See also Buchanan* v. *Warley,* 245 U.S. 60 (1917) (white plaintiff suing for specific performance of a contract to convey property to a Negro had standing to contest constitutionality of ordinance barring sale of property to Negroes, inasmuch as black defendant was relying on ordinance as his defense); *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969) (white assignor of membership in discriminatory private club could raise rights of black assignee in seeking injunction against expulsion from club).

ted defendants who have been convicted under state law—giving them the requisite injury—to assert the rights of those persons not before the Court whose rights would be adversely affected through enforcement of the law in question.[20] In fact, the Court has permitted persons who would be subject to future prosecution or future legal action—thus satisfying the injury requirement—to represent the rights of third parties with whom the challenged law has interfered with a relationship.[21] A substantial dispute was occasioned in *Singleton* v. *Wulff*,[22] over the standing of doctors who were denied Medicaid funds for the performance of abortions not "medically indicated" to assert the rights of absent women to compensated abortions. All the Justices thought the Court should be hesitant to resolve a controversy on the basis of the rights of third parties, but they divided with respect to the standards exceptions. Four Justices favored a lenient standard, permitting third party representation when there is a close, perhaps confidential, relationship between the litigant and the third parties and when there is some genuine obstacle to third party assertion of their rights; four Justices would have permitted a litigant to assert the rights of third parties only when government directly interdicted the relationship between the litigant and the third parties through the criminal process and when litigation by the third parties is in all practicable terms impossible.[23]

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[20] E.g., *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (persons convicted of prescribing contraceptives for married persons and as accessories to crime of using contraceptives have standing to raise constitutional rights of patients with whom they had a professional relationship; while use of contraceptives was a crime, it was doubtful any married couple would be prosecuted so that they could challenge the statute); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (advocate of contraception convicted of giving device to unmarried woman had standing to assert rights of unmarried persons denied access; unmarried persons not subject to prosecution and were thus impaired in ability to obtain them or gain forum to assert rights).

[21] E.g., *Doe* v. *Bolton*, 410 U.S. 179, 188–189 (1973) (doctors have standing to challenge abortion statute since it operates directly against them and they should not have to await criminal prosecution in order to determine their validity); *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 62 (1976) (same); *Craig* v. *Boren*, 429 U.S. 190, 192–197 (1976) (licensed beer distributor could contest sex discriminatory alcohol laws because it operated on him, he suffered injury in fact, and was "obvious claimant" to raise issue); *Carey* v. *Population Services Intl.*, 431 U.S. 678, 682–684 (1977) (vendor of contraceptives had standing to bring action to challenge law limiting distribution). Older cases support the proposition. *See*, e.g., *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963).

[22] 428 U.S. 106 (1976).

[23] *Compare* id., 112–118 (Justices Blackmun, Brennan, White, and Marshall), *with* id., 123–131 (Justices Powell, Stewart, and Rehnquist, and Chief Justice Burger). Justice Stevens concurred with the former four Justices on narrower grounds limited to this case.

A variant of the general rule is that one may not assert the unconstitutionality of a statute in other respects when the statute is constitutional as to him.[24] Again, the exceptions may be more important than the rule. Thus, an overly broad statute, especially one that regulates speech and press, may be considered on its face rather than as applied, and a defendant to whom the statute constitutionally applies may be enabled to assert its unconstitutionality thereby.[25]

***Organizational Standing.***—Organizations do not have standing as such to represent their particular concept of the public interest,[1] but organizations have been permitted to assert the rights of their members.[2] In *Hunt* v. *Washington State Apple Advertising Comm.*,[3] the Court promulgated elaborate standards, holding that an organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." Similar considerations arise in the context of class actions, in which the Court holds that a named representative with a justiciable claim for relief is necessary when the action is filed and when the class is certified, but that following class certification there need be only a live controversy with the class, provided the adequacy of the representation is sufficient.[4]

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[24] *United States* v. *Raines*, 362 U.S. 17, 21–24 (1960).

[25] *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Winters* v. *New York*, 333 U.S. 507 (1948); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486–487 (1965); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974). The Court appears to have narrowed its overbreadth doctrine, though not consistently, in recent years, *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *Young* v. *American Mini Theatres*, 427 U.S. 50, 59–60 (1976), and id., 73 (Justice Powell concurring); *New York* v. *Ferber*, 458 U.S. 747, 771–773 (1982).

[1] *Sierra Club* v. *Morton*, 401 U.S. 727 (1972).

[2] E.g., *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *NAACP* v. *Alabama ex rel Patterson*, 357 U.S. 449 (1958); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967); *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971).

[3] 432 U.S. 333, 343 (1977). The organization here was not a voluntary membership entity but a state agency charged with furthering the interests of apple growers who were assessed annual sums to support the Commission. Id., 341–345. *See also Warth* v. *Seldin*, 422 U.S. 490, 510–517 (1975); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39–40 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263–264 (1977); *Harris* v. *McRae*, 448 U.S. 297, 321 (1980).

[4] *United States Parole Comm.* v. *Geraghty*, 445 U.S. 388 (1980). *Geraghty* was a mootness case. *See infra*, *pp.* 699–700.

***Standing of States to Represent Their Citizens.***—The right of a State to sue as *parens patriae*, in behalf of its citizens, has long been recognized.[5] No State, however, may be *parens patriae* of her citizens "as against the Federal Government." [6] But a State may sue on behalf of the economic welfare of its citizens to protect them from environmental harm [7] and to enjoin other States and private parties from engaging in actions harmful to the economic or other well being of it citizens.[8] The State must be more than a nominal party without a real interest of its own, merely representing the interests of particular citizens who cannot represent themselves; [9] it must articulate an interest apart from those of private parties that partakes of a "quasi-sovereign interest" in the health and well-being, both physical and economic, of its residents in general, although there are suggestions that the restrictive definition grows out of the Court's wish to constrain its original jurisdiction and may not fit such suits brought in the lower federal courts.[10]

***Standing of Members of Congress.***—The lower federal courts have recently developed a body of law with respect to the standing of Members of Congress, as Members, to bring court actions, usually to challenge actions of the executive branch. Most of the law has

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[5] *Louisiana* v. *Texas*, 176 U.S. 1 (1900) (recognizing the propriety of *parens patriae* suits but denying it in this particular suit.

[6] *Massachusetts* v. *Mellon*, 262 U.S. 447, 485–486 (1923). *But see South Carolina* v. *Katsenbach*, 383 U.S. 301 (1966) (denying such standing to raise two constitutional claims against the United States but deciding a third); *Oregon* v. *Mitchell*, 400 U.S. 112, 117 n. 1 (1970) (no question raised about standing or jurisdiction; claims adjudicated).

[7] *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *Kansas* v. *Colorado*, 206 U.S. 46 (1907); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *New York* v. *New Jersey*, 256 U.S. 296 (1921); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923).

[8] *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945) (antitrust); *Maryland* v. *Louisiana*, 451 U.S. 725, 737–739 (1981) (discriminatory state taxation of natural gas shipped to out-of-state customers); *Alfred L. Snapp & Son* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (discrimination by growers against Puerto Rican migrant workers and denial of Commonwealth's opportunity to participate in federal employment service laws).

[9] *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938); *Oklahoma* v. *Atchison, T. & S.F.Ry.*, 220 U.S. 277 (1911); *North Dakota* v. *Minnesota*, 263 U.S. 365, 376 (1923); *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976).

[10] *Alfred L. Snapp & Son* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607–608 (1982). Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that the Court's standards should apply only in original actions and not in actions filed in federal district courts, where, they contended, the prerogative of a State to bring suit on behalf of its citizens should be commensurate with the ability of private organizations to do so. Id., 610. The Court admitted that different considerations might apply between original actions and district court suits. Id., 603 n. 12.

developed in the District of Columbia Circuit,[11] and the Supreme Court has yet to consider the issue on the merits.[12] It seems clear that a legislator "receives no special consideration in the standing inquiry," [13] and that he, along with every other person attempting to invoke the aid of a federal court, must show "injury in fact" as a predicate to standing. What that injury in fact may consist of, however, is the basis of the controversy.

A suit by Members for an injunction against continued prosecution of the Indochina war was held maintainable on the theory that if the court found the President's actions to be beyond his constitutional authority, the holding would have a distinct and significant bearing upon the Members' duties to vote appropriations and other supportive legislation and to consider impeachment.[14] The breadth of this rationale was disapproved in subsequent cases. The leading decision is *Kennedy* v. *Sampson*,[15] in which a Member was held to have standing to contest the alleged improper use of a pocket veto to prevent from becoming law a bill the Senator had voted for. Thus, Congressmen were held to have a derivative rather than direct interest in protecting their votes, which was sufficient for standing purposes, when some "legislative disenfranchisement" occurred.[16] In a comprehensive assessment of its position, the Cir-

[11] Member standing has not fared well in other Circuits. *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (C.A.2, 1973), *cert. den.*, 416 U.S. 936 (1974); *Harrington* v. *Schlesinger*, 528 F. 2d 455 (C.A. 4, 1975).

[12] In *Coleman* v. *Miller*, 307 U.S. 433, 438 (1939), the Court recognized that legislators can in some instances suffer an injury in respect to the effectiveness of their votes that will confer standing. In *Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978), *aff'g.* 428 F. Supp. 302 (D.C.D.C. 1976) (three-judge court), the Court affirmed a decision in which the lower court had found Member standing but had then decided against the Member on the merits. The "unexplicated affirmance" could have reflected disagreement with the lower court on standing or agreement with it on the merits. Note Justice Rehnquist's appended statement. Ibid. In *Goldwater* v. *Carter*, 444 U.S. 996 (1979), the Court vacated a decision, in which the lower Court had found Member standing, and directed dismissal, but none of the Justices who set forth reasons addressed the question of standing.

[13] *Reuss* v. *Balles*, 584 F. 2d 461, 466 (C.A.D.C.), *cert. den.*, 439 U.S. 997 (1978).

[14] *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C. 1973).

[15] 511 F. 2d 430 (C.A.D.C. 1974). Whether the injury was the nullification of the past vote on passage only or whether it was also the nullification of an opportunity to vote to override the veto has divided the Circuit, with the majority favoring the broader interpretation. *Goldwater* v. *Carter*, 617 F. 2d 697, 702 n. 12 (C.A.D.C.), and id., 711–712 (Judge Wright), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979)

[16] *Kennedy* v. *Sampson*, 511 F. 2d 430, 435–436 (C.A.D.C. 1974). *See Harrington* v. *Bush*, 553 F. 2d 190, 199 n. 41 (C.A.D.C. 1977). *Harrington* found no standing in a Member's suit challenging CIA failure to report certain actions to Congress, in order that Members could intelligently vote on certain issues. *See also Reuss* v. *Balles*, 584 F. 2d 461 (C.A.D.C.), *cert. den.*, 439 U.S. 997 (1978).

cuit distinguished between (1) a diminution in congressional influence resulting from executive action that nullifies a specific congressional vote or opportunity to vote in an objectively verifiable manner, which will constitute injury in fact, and (2) a diminution in a legislator's effectiveness, subjectively judged by him, resulting from executive action, such a failing to obey a statute, where the plaintiff legislator has power to act through the legislative process, in which injury in fact does not exist.[17] Having thus established a fairly broad concept of Member standing, the Circuit then proceeded to curtail it by holding that the equitable discretion of the court to deny relief should be exercised in many cases in which a Member had standing but in which issues of separation of powers, political questions, and other justiciability considerations counseled restraint.[18] The status of this issue thus remains in confusion.

***Standing to Challenge Nonconstitutional Governmental Action.***—Standing in this sense has a constitutional content to the degree that Article III requires a "case" or "controversy", necessitating a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution." [19] Liberalization of the law of standing in this field has been notable. The "old law" required that in order to sue to contest the lawfulness of agency administrative action, one must have suffered a "legal wrong," that is, "the right invaded must be a legal right," [20] requiring some resolution of the merits preliminarily. An injury-in-fact was insufficient.

A "legal right" could be established in one of two ways. It could be a common-law right, such that if the injury were adminis-

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[17] *Goldwater* v. *Carter*, 617 F.2d 697, 702, 703 (C.A.D.C.) *(en banc)*, *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979). The failure of the Justices to remark on standing is somewhat puzzling, since it has been stated that courts "turn initially, although not invariably, to the question of standing to sue." *Schlesinger* v. *Reservists Com. to Stop the War*, 418 U.S. 208, 215 (1974). *But see Harrington* v. *Bush*, 553 F. 2d 190, 207 (C.A.D.C. 1977). In any event, the Supreme Court's decision vacating *Goldwater* deprives the Circuit's language of precedential effect. *United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950); *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n. 12 (1975).

[18] *Riegle* v. *FOMC*, 656 F. 2d 873 (C.A.D.C.), *cert. den.*, 454 U.S. 1082 (1981).

[19] *Assn. of Data Processing Service Org.* v. *Camp*, 397 U.S. 150, 151-152 (1970), citing *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). "But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' [quoting *Flast*, *supra*, 100], is one within the power of Congress to determine." *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n. 3 (1972).

[20] *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 137-138 (1939). *See also Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940).

tered by a private party, one could sue on it;[21] or it could be a right created by the Constitution or a statute.[22] The statutory right most relied on was the judicial review section of the Administrative Procedure Act, which provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[23] Early decisions under this statute interpreted the language as adopting the "legal interest" and "legal wrong" standard then prevailing as constitutional requirements of standing, which generally had the effect of limiting the type of injury cognizable in federal court to economic ones.[24]

More recently, however, the Court has promulgated a two-pronged standing test: if the litigant (1) has suffered injury-in-fact and if he (2) shows that the interest he seeks to protect is arguably within the zone of interests to be protected or regulated by the statutory guarantee in question, he has standing.[25] Of even greater

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[21] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). This was apparently the point of the definition of "legal right" as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 137–138 (1939).

[22] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). The Court approached this concept in two interrelated ways. (1) It might be that a plaintiff had an interest which it was one of the purposes of the statute in question to protect in some degree. *Chicago Junction Case*, 264 U.S. 258 (1924); *Alexander Sprunt & Son* v. *United States*, 281 U.S. 249 (1930); *Alton R.R.* v. *United States*, 315 U.S. 15 (1942). Thus, in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968), a private utility was held to have standing to contest allegedly illegal competition by TVA on the ground that the statute was meant to give private utilities some protection from certain forms of TVA competition. (2) It might be that a plaintiff was a "person aggrieved" within the terms of a judicial review section of an administrative or regulatory statute. Injury to an economic interest was sufficient to "aggrieve" a litigant. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Associated Industries* v. *Ickes*, 134 F.2d 694 (C.A. 2), *cert. dismd. as moot*, 320 U.S. 707 (1943).

[23] 5 U.S.C. § 702. *See also* 47 U.S.C. § 202(b)(6)(FCC); 15 U.S.C. § 77i(a) (SEC); 16 U.S.C. § 825a(b)(FPC).

[24] *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477 (1940); *City of Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83 (1958); *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 7 (1968).

[25] *Assn. of Data Processing Service Org.* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970). Justices Brennan and White argued that only injury-in-fact should be requisite for standing. Id., 167. In applying these standards, the Court, once it has determined that the litigant's interests were "arguably protected" by the statute in question, has proceeded to the merits without thereafter pausing to inquire whether in fact the interests asserted were among those protected. *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970); *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971); *Boston Stock Exchange* v. *State Tax Comm.*, 429 U.S. 318, 320 n. 3 (1977). Almost contemporaneously, the Court also liberalized the ripeness requirement in review of administrative actions. *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167 (1967); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

importance was the expansion of the nature of the injury required beyond economic injury, which followed logically to some extent from the revision of the standard, to encompass "aesthetic, conservational, and recreational" interests as well.[1] "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." [2] Thus, plaintiffs, who had pleaded that they used the natural resources of the Washington area, that rail freight rates would deter the recycling of used goods, and that their use of natural resources would be disturbed by the adverse environmental impact caused by the nonuse of recyclable goods, had standing as "persons aggrieved" to challenge the rates set. Neither the large numbers of persons allegedly injured nor the indirect and less perceptible harm to the environment was justification to deny standing. The Court granted that the plaintiffs might never be able to establish the "attenuated line of causation" from rate setting to injury, but that was a matter for proof at trial, whereas in the instant case the Court dealt only with the pleadings.[3]

Much debate has occurred in recent years with respect to the validity of "citizen suit" provisions in the environmental laws, especially in light of the Court's retrenchment in constitutional standing cases, but the matter is open.[4]

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[1] *Assn. of Data Processing Service Org.* v. *Camp*, 397 U.S. 150, 154 (1970).

[2] *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972). Moreover, said the Court, once a person establishes that he has standing to seek judicial review of an action because of particularized injury to him, he may argue the public interest as a "representative of the public interest," as a "private attorney general," so that he may contest not only the action which injures him but the entire complex of actions of which his injury-inducing action is a part. Id., 737–738, noting *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4 (1942); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. (1940). *See also Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103 n. (1979); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 376 n.16 (1982) (noting ability of such party to represent interests of third parties).

[3] *United States* v. *SCRAP*, 412 U.S. 669, 683–690 (1973). Justices White and Rehnquist and Chief Justice Burger dissented on the ground the alleged injury was too remote, speculative, and insubstantial in fact. Id., 722. It is still unclear how the Court's constitutionalization of the causation/redressability standard, *supra*, *pp.* 678–679, will affect this line of cases. *See Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), and see id., 64 (Justice Brennan concurring and dissenting), which was brought under the APA. *But see Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160–162 (1981); *Bryant* v. *Yellen*, 447 U.S. 352, 366–368 (1980) (satisfying redressability on highly speculative bases).

[4] Typical citizen suit provisions authorize any person to commence an action in his own behalf against any person, including the United States or a government agency, to enforce a statute or regulations issued under it, though more recently

**The Requirement of a Real Interest**

Almost inseparable from the requirements of adverse parties and substantial enough interests to confer standing is the requirement that a *real* issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions." [1] A party cannot maintain a suit "for a mere declaration in the air." [2] In *Texas* v. *ICC*,[3] the State attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power." [4] And in *Ashwander* v. *TVA*,[5] the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining." [6]

Concepts of real interest and abstract questions appeared prominently in *United Public Workers* v. *Mitchell*,[7] an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no

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there is a tendency to define "citizen" in somewhat more restrictive terms. E.g., Clean Air Act, § 304, 42 U.S.C. § 7604; Federal Water Pollution Control Act, §505, 33 U.S.C. § 1365.

[1] *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945).

[2] *Giles* v. *Harris*, 189 U.S. 475, 486 (1903).

[3] 258 U.S. 158 (1922).

[4] Id., 162.

[5] 297 U.S. 288 (1936).

[6] Id., 324. Chief Justice Hughes cited *New York* v. *Illinois*, 274 U.S. 488 (1927), in which the Court dismissed as presenting abstract questions a suit about the possible effects of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future, and *Arizona* v. *California*, 283 U.S. 423 (1931), in which it was held that claims based merely upon assumed potential invasions of rights were insufficient to warrant judicial intervention. *See also Massachussetts* v. *Mellon*, 262 U.S. 447, 484–485 (1923); *New Jersey* v. *Sargent*, 269 U.S. 328, 338–340 (1926); *Georgia* v. *Stanton*, 6 Wall. (73 U.S.) 50, 76 (1868).

[7] 330 U.S. 75 (1947).

justiciable controversy except in regard to the one, calling for "concrete legal issues, presented in actual cases, not abstractions", and seeing the suit as really an attack on the political expediency of the Act.[8]

***Advisory Opinion.***—In 1793, the Court unanimously refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of international law arising out of the wars of the French Revolution.[9] Noting the constitutional separation of powers and functions in his reply, Chief Justice Jay said: "These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seem to have been purposely as well as expressly united to the Executive departments." [10] Although the Court has generally adhered to its refusal, Justice Jackson was not quite correct when he termed the policy a "firm and unvarying practice. . . ." [11] The Justices in response to a letter calling for suggestions on improvements in the operation of the courts drafted a letter suggesting that circuit duty for the Justices was unconstitutional but apparently never sent it; [12] Justice Johnson communicated to President Monroe, apparently with the knowledge and approval of the other Justices, the views of the Justices on the constitutionality of internal improvements legislation; [13] and Chief Justice Hughes in a letter to Senator Wheeler on President Roosevelt's Court Plan questioned the constitutionality of a proposal to increase the membership and have the Court sit in divisions.[14] Other

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[8] Id., 89–91. Justices Black and Douglas dissented, contending that the controversy was justiciable. Justice Douglas could not agree that the plaintiffs should have to violate the act and lose their jobs in order to test their rights. *Compare Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

[9] 1 C. Warren, *The Supreme Court in United States History* (Boston: rev. ed. 1926), 108–111. The full text of the exchange appears in 3 *Correspondence and Public Papers of John Jay*, H. Johnston ed. (New York: 1893), 486–489.

[10] Id., 488.

[11] *Chicago & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948).

[12] *See supra*, p. 617 n. 3.

[13] 1 C. Warren, *The Supreme Court in United States History* (Boston: rev. ed. 1926), 595–597.

[14] Hearings Before the Senate Judiciary Committee on S. 1392, *Reorganization of the Judiciary*, 75th Congress, 1st sess. (1937), pt. 3, 491. *See also* Chief Justice Taney's private advisory opinion to the Secretary of the Treasury that a tax levied on the salaries of federal judges violated the Constitution. S. Tyler, *Memoirs of Roger B. Taney* (Baltimore: 1876), 432–435.

Justices have individually served as advisers and confidants of Presidents in one degree or another.[15]

Nonetheless, the Court has generally adhered to the early precedent and would no doubt have developed the rule in any event, as a logical application of the case and controversy doctrine. As stated by Justice Jackson, when the Court refused to review an order of the Civil Aeronautics Board, which in effect was a mere recommendation to the President for his final action: "To revise or review an administrative decision which as only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." [16] The early refusal of the Court to render advisory opinions has discouraged direct requests for advice so that the advisory opinion has appeared only collaterally in cases where there was a lack of adverse parties,[17] or where the judgment of the Court was subject to later review or action by the executive or legislative branches of Government,[18] or where the issues involved were abstract or contingent.[19]

***Declaratory Judgments.***—Rigid emphasis upon such elements of judicial power as finality of judgment and award of execution [20] coupled with equally rigid emphasis upon adverse parties and real interests as essential elements of a case and controversy [21] created serious doubts about the validity of any federal declaratory judgment procedure.[22] These doubts were largely dispelled by Court de-

[15] E.g., Acheson, "Removing the Shadow Cast on the Courts," 55 A.B.A.J. 919 (1969); Jaffe, "Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship," 83 Harv. L. Rev. 366 (1969).

[16] *Chicago & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113–114 (1948).

[17] *Muskrat* v. *United States*, 219 U.S. 346 (1911).

[18] *United States* v. *Ferreira*, 13 How. (54 U.S.) 40 (1852).

[19] *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947).

[20] E.g., *United States* v. *Ferreira*, 13 How. (54 U.S.) 40 (1852); *Gordon* v. *United States*, opinion at 117 U.S. 697 (1864); *Liberty Warehouse Co.* v. *Grannis*, 273 U.S. 70 (1927). *See supra, pp.* 633–636.

[21] E.g., *Muskrat* v. *United States*, 219 U.S. 346 (1911).

[22] *Cf. Willing* v. *Chicago Auditorium Assn.*, 277 U.S. 274 (1928).

cisions in the late 1920's and early 1930's [23] and Congress quickly responded with the Federal Declaratory Judgment Act of 1934.[24] Quickly tested, the Act was unanimously sustained.[25] "The principle involved in this form of procedure," the House Report said, "is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts." [1] Said the Senate Report: "The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice." [2]

The 1934 Act provided that "[i]n cases of actual controversy" federal courts could "declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, . . ." [3] Upholding the Act, the Court said: "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy', manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish." [4] Finding that the issue in the case presented a definite and concrete controversy, the Court held that a declaration should have been issued.[5]

It has insistently been maintained by the Court that "the requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." [6] As Justice Douglas has written: "The difference between an

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[23] *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U.S. 123 (1927); *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1963).

[24] 48 Stat. 955, as amended, 28 U.S.C. §§ 2201-2202.

[25] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

[1] H. Rept. No. 1264, 73d Congress, 2d sess. (1934), 2.

[2] S. Rept. No. 1005, 73d Congress, 2d sess. (1934), 2.

[3] 48 Stat. 955. The language remains quite similar. 28 U.S.C. § 2201.

[4] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-240 (1937).

[5] Id., 242-244.

[6] *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945).

abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." [7] It remains, therefore, for the courts to determine in each case the degree of controversy necessary to establish a case for purposes of jurisdiction. Even then, however, the Court is under no compulsion to exercise its jurisdiction.[8]

Utilization of declaratory judgments to settle disputes and identify rights in many private areas, like insurance and patents in particular but extending into all areas of civil litigation, except taxes,[9] is common. The Court has, however, at various times demonstrated a substantial reluctance to have important questions of public law, especially regarding the validity of legislation, resolved by such a procedure.[10] In part, this has been accomplished by a strict insistence upon concreteness, ripeness, and the like.[11] Nonetheless, even at such times, several noteworthy constitutional decisions were rendered in declaratory judgment actions.[12]

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[7] *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

[8] *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942); *Public Service Comm.* v. *Wycoff Co.*, 344 U.S. 237, 243 (1952); *Public Affairs Associates* v. *Rickover*, 369 U.S. 111, 112 (1962). This discretion would appear to be qualified and limited by *Zwickler* v. *Koota*, 389 U.S. 241, 248–252 (1967). *Cf. Turner* v. *City of Memphis*, 369 U.S. 350 (1962).

[9] An exception "with respect to Federal taxes" was added in 1935. 49 Stat. 1027. The Tax Injunction Act of 1937, 50 Stat. 738, U.S.C. § 1341, prohibited federal injunctive relief directed at state taxes but said nothing about declaratory relief. It was held to apply, however, in *California* v. *Grace Brethren Church*, 457 U.S. 393 (1982). Earlier, in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), the Court had reserved the issue but held that considerations of comity should preclude federal courts from giving declaratory relief in such cases. *Cf. Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U.S. 100 (1981).

[10] E.g., *Ashwander* v. *TVA*, 297 U.S. 288 (1936); *Electric Bond & Share, Co.* v. *SEC*, 303 U.S. 419 (1938); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 572–573 (1947).

[11] *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *Poe* v. *Ullman*, 367 U.S. 497 (1961); *Altvater* v. *Freeman*, 319 U.S. 359 (1943); *International Longshoremen's Union* v. *Boyd*, 347 U.S. 222 (1954); *Public Service Comm.* v. *Wycoff*, 344 U.S. 237 (1952).

[12] E.g., *Currin* v. *Wallace*, 306 U.S. 1 (1939); *Perkins* v. *Elg*, 307 U.S. 325 (1939); *Ashwander* v. *TVA*, 297 U.S. 288 (1936); *Evers* v. *Dwyer*, 358 U.S. 202 (1958).

More recently, the Court has exhibited a greater hospitality to declaratory judgments in constitutional litigation, especially cases involving civil liberties issues.[13] The doctrinal underpinnings of this hospitality were sketched out by Justice Brennan in his opinion for the Court in *Zwickler* v. *Koota*,[14] in which the relevance to declaratory judgments of the *Dombrowski* v. *Pfister*[15] line of cases involving federal injunctive relief against the enforcement of state criminal statutes was in issue. First, it was held that the vesting of "federal question" jurisdiction in the federal courts by Congress following the Civil War, as well as the enactment of more specific civil rights jurisdictional statutes, "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."[16]

Escape from that duty may be found only in "narrow circumstances," such as an appropriate application of the abstention doctrine,[17] which is not proper where a statute affecting civil liberties is so broad as to reach protected activities as well as unprotected activities. Second, the judicially-developed doctrine that a litigant must show "special circumstances" to justify the issuance of a federal injunction against the enforcement of state criminal laws is not applicable to requests for federal declaratory relief; "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."[18] This language was qualified subsequently, so that declaratory and injunctive relief were equated in cases in which a criminal prosecution is pending in state court at the time the federal action is filed[19] or is

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[13] E.g., *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Turner* v. *City of Memphis*, 369 U.S. 350 (1962); *Powell* v. *McCormack*, 395 U.S. 486 (1969). *But see Golden* v. *Zwickler*, 394 U.S. 103 (1969), in which the Court held that no justiciable controversy continued to exist when a Congressman against whom Zwickler wished to distribute handbills not complying with a state statute had been elected to a judgeship, thus removing him from the political arena, so that plaintiff could no longer show a sufficient threat entitling him to declaratory relief, citing *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), which seemed to indicate the Court was influenced by ripeness consideration rather than by mootness.

[14] 389 U.S. 241 (1968).

[15] 380 U.S. 479 (1965). *See infra, pp.* 815–820.

[16] *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

[17] *See infra, pp. 809–811.*

[18] *Zwickler* v. *Koota*, 389 U.S. 241, 254 (1967).

[19] *Samuels* v. *Mackell*, 401 U.S. 66 (1971). The case and its companion, *Younger* v. *Harris*, 401 U.S. 37 (1971), substantially undercut much of the *Dombrowski* language, and not only in the context of federalism and comity, but presumably much of *Zwickler* remains valid.

begun in state court after the filing of the federal action but before any proceedings of substance have taken place in federal court,[20] and federal courts were instructed not to issue declaratory judgments in the absence of the factors permitting issuance of injunctions under the same circumstances. But in the absence of a pending state action or the subsequent and timely filing of one, a request for a declaratory judgment that a statute or ordinance is unconstitutional does not have to meet the stricter requirements justifying the issuance of an injunction.[21]

***Ripeness.***—Just as standing historically has concerned *who* may bring an action in federal court, the ripeness doctrine concerns *when* it may be brought. Formerly, it was a wholly constitutional principle requiring a determination that the events bearing on the substantive issue have happened or are sufficiently certain to occur so as to make necessary adjudication and so as to assure that the issues are sufficiently defined to permit intelligent resolution; the focus was on the harm to the rights claimed rather than on the harm to the plaintiff that gave him standing to bring the action,[22] although, to be sure, in most cases the harm is the same. But in liberalizing the doctrine of ripeness in recent years the Court has subdivided it into constitutional and prudential parts [23] and has conflated standing and ripeness considerations.[24]

The early cases generally required potential plaintiffs to expose themselves to possibly irreparable injury in order to invoke federal judicial review. Thus, in *United Public Workers* v. *Mitchell*,[25] government employees alleged that they wished to engage in

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[20] *Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975). It should be noted, also, that the *Younger* principles have been extended beyond criminal proceedings to at least some civil proceedings, *infra*, *p.* 819, which will also affect the the availability of declaratory judgments.

[21] *Steffel* v. *Thompson*, 415 U.S. 452 (1974). In cases covered by *Steffel*, the federal court may issue preliminary or permanent injunctions to protect its judgments, without satisfying the *Younger* tests. *Doran* v. *Salem Inn*, 422 U.S. 922, 930–931 (1975); *Wooley* v. *Maynard*, 430 U.S. 705, 712 (1977).

[22] *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *International Longshoremen's Union* v. *Boyd*, 347 U.S. 222 (1954).

[23] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974) (certainty of injury a constitutional limitation, factual adequacy element a prudential one).

[24] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 81–82 (1978) (that plaintiffs suffer injury-in-fact and such injury would be redressed by granting requested relief satisfies Article III ripeness requirement; prudential element satisfied by determination that Court would not be better prepared to render a decision later than now).

[25] 330 U.S. 75 (1947).

various political activities and that they were deterred from their desires by the Hatch Act prohibitions on political activities. As to all but one plaintiff, who had himself actually engaged in forbidden activity, the Court held itself unable to adjudicate because the plaintiffs were not threatened with "actual interference" with their interests. The Justices viewed the threat to plaintiffs' rights as hypothetical and refused to speculate about the kinds of political activity they might engage in or the Government's response to it. "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations." [1] Similarly, resident aliens planning to work in the Territory of Alaska for the summer and then return to the United States were denied a request for an interpretation of the immigration laws that they would not be treated on their return as excludable aliens entering the United States for the first time, or alternatively, for a ruling that the laws so interpreted would be unconstitutional, inasmuch as they had not gone and attempted to return, although other alien workers had gone and been denied reentry and the immigration authorities were on record as intending to enforce the laws as they construed them.[2] Of course, the Court was not entirely consistent in applying the doctrine.[3]

It remains good general law that pre-enforcement challenges to criminal and regulatory legislation will often be unripe for judicial consideration because of uncertainty of enforcement,[4] because the

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[1] Id., 90 In *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), without discussing ripeness, the Court decided on the merits anticipatory attacks on the Hatch Act. Plaintiffs had, however, alleged a variety of more concrete infringements upon their desires and intentions than the UPW plaintiffs had.

[2] *International Longshoremen's Union* v. *Boyd*, 347 U.S. 222 (1954). *See also Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419 (1938); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945); *Public Service Comm.* v. *Wycoff Co.*, 344 U.S. 237 (1952); *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972).

[3] In *Adler* v. *Board of Education*, 342 U.S. 485 (1952), without discussing ripeness, the Court decided on the merits a suit about a state law requiring dismissal of teachers advocating violent overthrow of the government, over a strong dissent arguing the case was indistinguishable from *Mitchell*. Id., 504 (Justice Frankfurter dissenting). In *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961), a state employee was permitted to attack a non-Communist oath, although he alleged he believed he could take the oath in good faith and could prevail if prosecuted, because the oath was so vague as to subject plaintiff to the "risk of unfair prosecution and the potential deterrence of constitutionally protected conduct." Id., 283–284. *See also Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

[4] E.g., *Poe* v. *Ullman*, 367 U.S. 497 (1961)(no adjudication of challenge to law barring use of contraceptives because in 80 years of the statute's existence the State had never instituted a prosecution). *But compare Epperson* v. *Arkansas*, 393 U.S. 97 (1987) (merits reached in absence of enforcement and fair indication State would not enforce it); *Vance* v. *Amusement Co.*, 445 U.S. 308 (1980) (reaching merits, although

plaintiffs can allege only a subjective feeling of inhibition or fear arising from the legislation or from enforcement of it,[5] or because the courts need before them the details of a concrete factual situation arising from enforcement in order to engage in a reasoned balancing of individual rights and governmental interests.[6] But one who challenges a statute or possible administrative action need demonstrate only a realistic danger of sustaining an injury to his rights as a result of the statute's operation and enforcement and need not await the consummation of the threatened injury in order to obtain preventive relief, such as exposing himself to actual arrest or prosecution. When one alleges an intention to engage in conduct arguably affected with a constitutional interest but proscribed by statute and there exists a credible threat of prosecution thereunder, he may bring an action for declaratory or injuctive relief.[7] Similarly, the reasonable certainty of the occurrence of the perceived threat to a constitutional interest is sufficient to afford a basis for bringing a challenge, provided the court has sufficient facts before it to enable it to intelligently adjudicate the issues.[8] Of considerable uncertainty in the law of ripeness is the *Duke Power* case in which the Court held ripe for decision on the merits a challenge to a federal law limiting liability for nuclear accidents at nuclear power plants, on the basis that because plaintiffs had sustained injury-in-fact and had standing the Article III requisite of ripeness was satisfied and no additional facts arising out of the occurrence of the claimed harm would enable the court better to decide the issues.[9] Should this analysis prevail, ripeness as a limitation on justiciability will decline in importance.

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State asserted law would not be used, although local prosecutor had so threatened; no discussion of ripeness, but dissent relied on *Poe*, id., 317–318).

[5] E.g., *Younger* v. *Harris*, 401 U.S. 37, 41–42 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Spomer* v. *Littleton*, 414 U.S. 514 (1974); *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

[6] E.g., *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974); *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 294–297 (1981).

[7] *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Wooley* v. *Maynard*, 430 U.S. 705, 707–708, 710 (1977); *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 297–305 (1979) (finding some claims ripe, others not). *Compare Doe* v. *Bolton*, 410 U.S. 179, 188–189 (1973), *with Roe* v. *Wade*, 410 U.S. 113, 127–128 (1973). *See also Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

[8] *Buckley* v. *Valeo*, 424 U.S. 1, 113–118 (1976); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974) (holding some but not all the claims ripe). *See also Goldwater* v. *Carter*, 444 U.S. 996, 997 (Justice Powell concurring) (parties had not put themselves in opposition).

[9] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 81–82 (1978). The injury giving standing to plaintiffs was the environmental harm arising from the plant's routine operation; the injury to their legal rights was alleged to be the harm caused by the limitation of liability in the event of a nuclear accident. The standing injury had occurred, the ripeness injury was conjectural and speculative

***Mootness.***—It may be that a case presenting all the attributes necessary for federal court litigation will at some point lose some attribute of justiciability, will, in other words, become "moot." The usual rule is that an actual controversy must exist at all stages of trial and appellate consideration and not simply at the date the action is initiated.[10] The Court has variously explained that it will not decide moot cases because "there is no subject matter on which the judgment of the court can operate,"[11] and because in regard to moot cases a court's order could not be effective," "conclusive," or "final."[12] Since, with the advent of declaratory judgments, it is open to the federal courts to "declare the rights and other legal relations" of the parties with *res judicata* effect,[13] the question in cases alleged to be moot now seems largely if not exclusively to be decided in terms whether an actual controversy continues to exist between the parties rather than some additional older concepts.[14]

Cases may become moot because of a change in the law,[15] or in the status of the parties,[16] or because of some act of one of the

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and might never occur. *See* id., 102 (Justice Stevens concurring in the result). It is evident on the face of the opinion and expressly stated by the objecting Justices that the Court utilized its standing/ripeness analyses in order to reach the merits, so as to remove the constitutional cloud cast upon the federal law by the district court decision. Id., 95, 103 (Justices Rehnquist and Stevens concurring in the result).

[10] E.g., *United States* v. *Munsingwear*, 340 U.S. 36 (1950); *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969); *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Sosna* v. *Iowa*, 419 U.S. 393, 398–399 (1975); *United States Parole Comm.* v. *Geraghty*, 445 U.S. 388, 397 (1980), and id., 411 (Justice Powell dissenting).

[11] *Ex parte Baez*, 177 U.S. 378, 390 (1900).

[12] *California* v. *San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893); *Mills* v. *Green*, 159 U.S. 651, 653 (1895); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). That the principle against entertaining moot controversies is a "constitutional rule" is clear. *Sibron* v. *New York*, 392 U.S. 40, 57 (1968); *Liner* v. *Jafco*, 375 U.S. 301, 306 n. 3 (1964); *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974).

[13] *But see Steffel* v. *Thompson*, 415 U.S. 452, 470–472 (1974); id., 477 (Justice White concurring), 482 n. 3 (Justice Rehnquist concurring) (on *res judicata* effect in state court in subsequent prosecution). In any event, the statute authorizes the federal court to grant "[f]urther necessary or proper relief" which could include enjoining state prosecutions.

[14] Award of process and execution are no longer essential to the concept of judicial power. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

[15] E.g., *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. (54 U.S.) 518 (1852); *United States* v. *Alaska Steamship Co.*, 253 U.S. 113 (1920); *Hall* v. *Beals*, 396 U.S. 45 (1969); *Sanks* v. *Georgia*, 401 U.S. 144 (1971); *Richardson* v. *Wright*, 405 U.S. 208 (1972); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972).

[16] *Atherton Mills* v. *Johnston*, 259 U.S. 13 (1922) (in challenge to laws regulating labor of youths 14 to 16, Court held case two-and-one-half years after argument and dismissed as moot since certainly none of the challengers were now in the age bracket); *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Dove* v. *United States*, 423 U.S. 325 (1976); *Lane* v. *Williams*, 455 U.S. 624 (1982).

parties which dissolves the controversy.[17] But the Court has developed several exceptions which operate to prevent many of the cases in which mootness is alleged from being in law moot. Thus, in criminal cases, although the sentence of the convicted appellant has been served, the case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." [18] The "mere possibility" of such a consequence, even a "remote" one, is enough to find that one who has served his sentence has retained the requisite personal stake giving his case "an adversary cast and making it justiciable." [19] This exception has its counterpart in civil litigation in which a lower court judgment may still have certain present or future adverse effects on the challenging party.[20]

A second exception, the "voluntary cessation" doctrine, focuses on whether challenged conduct which has lapsed or the utilization of a statute which has been superseded is likely to recur.[21] Thus, cessation of the challenged activity by the voluntary choice of the person engaging in it, especially if he contends that he was properly engaging in it, will moot the case only if it can be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.' " [22] Otherwise, "[t]he defendant is free to return

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[17] E.g. *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360 (1919); *Oil Workers Local 8-6* v. *Missouri*, 361 U.S. 363 (1960); *A.L. Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961); *Preiser* v. *Newkirk*, 422 U.S. 395 (1975); *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979).

[18] *Sibron* v. *New York*, 395 U.S. 40, 57 (1968).

[19] *Benton* v. *Maryland*, 395 U.S. 784, 790–791 (1969). The cases have progressed from leaning toward mootness to leaning strongly against. E.g., *St. Pierre* v. *United States*, 319 U.S. 41 (1943); *Fiswick* v. *United States*, 329 U.S. 211 (1946); *United States* v. *Morgan*, 346 U.S. 502 (1954); *Pollard* v. *United States*, 352 U.S. 354 (1957); *Ginsberg* v. *New York*, 390 U.S. 629, 633–634 n. 2 (1968); *Sibron* v. *New York*, 392 U.S. 40, 49–58 (1968); *but see Lane* v. *Williams*, 455 U.S. 624 (1982). The exception permits review at the instance of the prosecution as well as defendant. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). When a convicted defendant dies while his case is on direct review, the Court's present practice is to dismiss the petition for *certiorari*. *Dove* v. *United States*, 423 U.S. 325 (1976), *overruling Durham* v. *United States*, 401 U.S. 481 (1971).

[20] *Southern Pacific Co.* v. *ICC*, 219 U.S. 433, 452 (1911); *Carroll* v. *President & Comrs. of Princess Anne*, 393 U.S. 175 (1968). *See Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974) (holding that expiration of strike did not moot employer challenge to state regulations entitling strikers to state welfare assistance since the consequences of the regulations would continue).

[21] *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897); *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *Porter* v. *Lee*, 328 U.S. 246 (1946); *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *United States* v. *Concentrated Phosphate Export Assn.*, 393 U.S. 199, 202–204 (1969); *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631–634 (1979), and id., 641–646 (Justice Powell dissenting); *Vitek* v. *Jones*, 445 U.S. 480, 486–487 (1980), and id., 500–501 (Justice Stewart dissenting).

[22] *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (quoting *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 448 (C.A. 2, 1945)).

to his old ways" and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." [23]

Still a third exception concerns the ability to challenge short-term conduct which may recur in the future, which has been denominated as disputes "capable of repetition, yet evading review." [24] Thus, in cases in which (1) the challenged action is too short in its duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again, mootness will not be found when the complained-of conduct ends.[25] The imposition of short sentences in criminal cases,[1] the issuance of injunctions to expire in a brief period,[2] and the short-term factual context of certain events, such as elections [3] or pregnancies,[4] are all instances in which this exception is frequently invoked.

An interesting and potentially significant liberalization of the law of mootness, perhaps as part of a continuing circumstances exception, is occurring in the context of class action litigation. It is clearly established that when the controversy becomes moot as to the plaintiff in a certified class action it still remains alive for the class he represents so long as an adversary relationship sufficient to constitute a live controversy between the class members and the other party exists.[5] The Court is closely divided, however, with re-

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[23] *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). *But see A.L. Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961).

[24] *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

[25] *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). *See Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125–126 (1974), and id., 130–132 (Justice Powell dissenting). The degree of expectation or likelihood that the issue will recur has frequently divided the Court. *Compare Murphy* v. *Hunt*, 455 U.S. 478 (1982) with *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976).

[1] *Sibron* v. *New York*, 392 U.S. 40, 49–58 (1968). *See Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[2] *Carroll* v. *President & Comrs. of Princess Anne*, 393 U.S. 175 (1968). *See Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976) (short-term court order restricting press coverage).

[3] E.g., *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n. 5 (1973); *Storer* v. *Brown*, 415 U.S. 724, 737 n. 8 (1974). *Compare Mills* v. *Green*, 159 U.S. 651 (1895); *Ray* v. *Blair*, 343 U.S. 154 (1952).

[4] *Roe* v. *Wade*, 410 U.S. 113, 124–125 (1973).

[5] *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 752–757 (1976). A suit which proceeds as a class action but without formal certification may not receive the benefits of this rule. *Board of School Comrs.* v. *Jacobs*, 420 U.S. 128 (1975). *See also Weinstein* v. *Bradford*, 423 U.S. 147 (1975); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 430 (1976). But see the characterization of these cases in *United States Parole Comm.* v. *Geraghty*, 445 U.S. 388, 400 n. 7 (1980). Mootness is not necessarily avoided in properly certified cases, but the standards of determination are unclear. *See Kremens* v. *Bartley*, 431 U.S. 119 (1977).

spect to the right of the named party, when the substantive controversy becomes moot as to him, to appeal as error the denial of a motion to certify the class which he sought to represent and which he still seeks to represent. The Court held that in the class action setting there are two aspects of the Article III mootness question, the existence of a live controversy and the existence of a personal stake in the outcome for the named class representative.[6] Finding a live controversy, the Court determined that the named plaintiff retained a sufficient interest, "a personal stake," in his claimed right to represent the class in order to satisfy the "imperatives of a dispute capable of judicial resolution;" that is, his continuing interest adequately assures that "sharply presented issues" are placed before the court "in a concrete factual setting" with "self-interested parties vigorously advocating opposing positions." [7]

The immediate effect of the decision is that litigation in which class actions are properly certified or in which they should have been certified will rarely ever be mooted if the named plaintiff (or in effect his attorney) chooses to pursue the matter, even though the named plaintiff can no longer obtain any personal relief from the decision sought.[8] Of much greater potential significance is the possible extension of the weakening of the "personal stake" requirement in other areas, such as the representation of third-party claims in non-class actions and the initiation of some litigation in the form of a "private attorneys general" pursuit of adjudication.[9] It may be that the evolution in this area will be confined to the class action context, but cabining of a "flexible" doctrine of standing may be difficult.[10]

***Retroactivity Versus Prospectivity.***—One of the distinguishing features of an advisory opinion is that it lays down a rule to be applied to future cases, much as does legislation generally. It should therefore follow that an Article III court could not decide purely

[6] *United States Parole Comm.* v. *Geraghty*, 445 U.S. 388, 396 (1980).

[7] Id., 403. Justices Powell, Stewart, Rehnquist, and Chief Justice Burger dissented, Id., 409, arguing there could be no Article III personal stake in a procedural decision separate from the outcome of the case. In *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), in an opinion by Chief Justice Burger, the Court held that a class action was not mooted when defendant tendered to the named plaintiffs the full amount of recovery they had individually asked for and could hope to retain. Plaintiffs' interest in shifting part of the share of costs of litigation to those who would share in its benefits if the class were certified was deemed to be a sufficient "personal stake", although the value of this interest was at best speculative.

[8] The named plaintiff must still satisfy the class action requirement of adequacy of representation. *United States Parole Comm.* v. *Geraghty*, U.S. 388, 405–407 (1980).

[9] Id. 404 and n. 11.

[10] Id., 419–424 (Justice Powell dissenting).

prospective cases, cases which do not govern the rights and disabilities of the parties to the cases, and the Court has asserted that this is true.[11] Yet, occasionally, the Court has not applied its holding to the parties before it [12] and in a series of cases since the mid-1960s has become embroiled in attempts to limit the retroactive effect of its—primarily but not exclusively [13]—constitutional-criminal law decisions.[14] The results have been confusing and unpredictable.[15]

Prior to 1965, "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions." [16] Statutory and judge-made law have consequences, at

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[11] *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). Holding that its rulings requiring counsel at line-ups should apply only prospectively, save for the claimants in the case, the Court acknowledged that they were the only "victims" to receive the benefits of the rule for cases arising before the decision. "That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying *Wade* and *Gilbert* the benefit of today's decisions." *Cf. Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Justice Holmes dissenting). In *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), the Court divined no federal constitutional objections to a state court decision applied purely prospectively.

[12] *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964); *James* v. *United States*, 366 U.S. 213 (1961). *See also Morrissey* v. *Brewer*, 408 U.S. 471, 490 (1972).

[13] Noncriminal constitutional cases include *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969). *See also Gelpcke* v. *City of Dubuque*, 1 Wall. (68 U.S.) 175 (1865); *Railroad Co.* v. *McClure*, 10 Wall. (77 U.S.) 511 (1871). Noncriminal, nonconstitutional cases include *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). A nonconstitutional criminal law decision denied retroactive effect was *McCarthy* v. *United States*, 394 U.S. 459 (1969), in *Halliday* v. *United States*, 394 U.S. 831 (1969), but the *McCarthy* rule was constitutionalized in *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

[14] The case law moves between *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and *United States* v. *Johnson*, 457 U.S. 537 (1982).

[15] Because of shifting coalitions of Justices, Justice Harlan complained, the course of retroactivity decisions "became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Mackey* v. *United States*, 401 U.S. 667, 676 (1971) (separate opinion).

[16] *Robinson* v. *Neil*, 409 U.S. 505, 507 (1973). The older rule of retroactivity derived from the Blackstonian notion "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter* v. *Walker*, 381 U.S. 618, 622-623 (1965).

least to the extent that people must rely on them in making decisions and shaping their conduct. Therefore, the Court has recognized that there must be a reconciling of constitutional interests reflected in a new rule of law with reliance interests founded upon the old.[17]

When in the 1960s the Court began its expansion of the Bill of Rights and applied the rulings to the States, a necessity arose to determine the application of the rulings to criminal defendants who had exhausted all direct appeals but could still resort to *habeas corpus*, to those who had been convicted but still were on direct appeal, and to those who had allegedly engaged in conduct but who had not gone to trial. At first, the Court drew the line at cases in which judgments of conviction were not yet final, so that all persons in those situations obtained retrospective use of decisions,[18] but the Court then promulgated standards for a balancing process that resulted in different degrees of retroactivity in different cases.[19] At least with respect to cases in which a new rule has a major purpose of overcoming an impairment of the truth-finding function of a criminal trial [20] or to cases in which the Court found that a constitutional doctrine barred the trial court from convicting or punishing,[21] full retroactivity, even to *habeas* claimants, was the rule. Generally, in cases in which the Court has declared a rule which is "a clear break with the past," it has denied retroactivity to all defendants, with the sometime exception of the appellant himself.[22] A strongly argued, and yet minority position, is that the Court should sweep away its confusing balancing rules and hold that all defendants whose cases are still pending on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule.[23] While in its most recent decision, the Court pur-

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[17] *Lemon* v. *Kurtzman*, 411 U.S. 192, 198–199 (1973).

[18] *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966).

[19] *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Adams* v. *Illinois*, 405 U.S. 278 (1972). The criteria are (1) the purpose to be served by the new standards, (2) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standard. *Stovall*, *supra*, 297.

[20] *Williams* v. *United States*, 401 U.S. 646, 653 (1971) (plurality opinion); *Brown* v. *Louisiana*, 447 U.S. 323, 328–330 (1980) (plurality opinion); *Hankerson* v. *North Carolina*, 432 U.S. 233, 243 (1977).

[21] *United States* v. *United States Coin & Currency*, 401 U.S. 715, 724 (1971); *Moore* v. *Illinois*, 408 U.S. 786, 800 (1972); *Robinson* v. *Neil*, 409 U.S. 505, 509 (1973).

[22] *Desist* v. *United States*, 394 U.S. 224, 248 (1969); *United States* v. *Peltier*, 422 U.S. 531 (1975); *Brown* v. *Louisiana*, 447 U.S. 323, 335–336 (1980) (plurality opinion); *Michigan* v. *Payne*, 412 U.S. 47, 55 (1973); *United States* v. *Johnson*, 457 U.S. 537, 549–550, 551–552 (1982).

[23] Justice Harlan made the most detailed doctrinal argument for the rule. *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (separate opinion); *Desist* v. *United*

ports to adopt that rule in search and seizure cases,[24] the record of the 20 preceding years should not offer confidence that a less confusing jurisprudence of retroactivity is about to emerge.[25]

Prospectivity of the Court's rulings has doctrinal ramifications beyond the question whether Article III imposes any limitations on the choice between retroactivity and limited or full prospectivity.[26] In particular, it rather starkly illustrates the "law-making" function of the Court and raises questions about the effect of *stare decisis* in future cases in which the essentially legislative pronouncements of the Court in a past case applied prospectively is brought to bear.

**Political Questions**

It may be that there will be a case assuredly within the Court's jurisdiction presented by parties with standing in which adverseness and ripeness will exist, a case in other words presenting all the qualifications we have considered making it a justiciable controversy, which the Court will nonetheless refuse to adjudicate. The "label" for such a case is that it presents a "political question." Although the Court has referred to the political question doctrine as "one of the rules basic to the federal system and this Court's appropriate place within that structure",[1] a commentator has remarked that "[i]t is, measured by any of the normal responsibilities of a phrase of definition, one of the least satisfactory terms known to the law. The origin, scope, and purpose of the concept have eluded all attempts at precise statements." [2] That the concept

*States*, 394 U.S. 244, 256 (1969) (dissenting). Justice Powell has also strongly supported the proposed rule. *Hankerson* v. *North Carolina*, 432 U.S. 233, 246–248 (1977) (concurring in judgment); *Brown* v. *Louisiana*, 447 U.S. 323, 337 (1980) (concurring in judgment). *See United States* v. *Johnson*, 457 U.S. 537, 545 n. 9 (1982).

[24] *United States* v. *Johnson*, 457 U.S. 537 (1982).

[25] Thus, some decisions have been applied only to defendants whose convictions were not yet final when the new rule was established, *United States* v. *Johnson*, 457 U.S. 537 (1982); *Linkletter* v. *Walker*, 381 U.S. 618 (1965), some only to those defendants whose trials had not yet begun at that point, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *DeStefano* v. *Woods*, 392 U.S. 631 (1968), some only to those whose constitutional rights were violated after the law-changing decision was handed down, *United States* v. *Peltier*, 422 U.S. 531 (1975); *Desist* v. *United States*, 394 U.S. 244 (1969); *Stovall* v. *Denno*, 388 U.S. 293 (1967), and some only to those cases where the prosecution sought to introduce into evidence after the date of the decision making the evidence inadmissible. *Fuller* v. *Alaska*, 393 U.S. 80 (1968).

[26] "[W]e believe that the Constitution neither prohibits nor requires retrospective effect." *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1985).

[1] *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 570 (1947); *cf. Baker* v. *Carr*, 369 U.S. 186, 278 (1962) (Justice Frankfurter dissenting). The most successful effort at conceptualization of the doctrine is Scharpf, "Judicial Review and the Political Question: A Functional Analysis," 75 Yale L.J. 517 (1966).

[2] Frank, "Political Questions," in E. Cahn (ed.), *Supreme Court and Supreme Law* (Bloomington: 1954), 36.

of political questions may be "more amenable to description by infinite itemization than by generalization" [3] is generally true, although the Court's development of rationale in *Baker* v. *Carr* [4] has changed this fact radically, but the doctrine may be approached in two ways, by itemization of the kinds of questions which have been labeled political and by isolation of the factors which have led to the labeling.

***Origins and Development.***—In *Marbury* v. *Madison,*[5] Chief Justice Marshall stated: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court." [6]

But the doctrine was asserted even earlier as the Court in *Ware* v. *Hylton* [7] refused to pass on the question whether a treaty had been broken. And in *Martin* v. *Mott,*[8] the Court held that the President acting under congressional authorization had exclusive and unreviewable power to determine when the militia should be called out. But it was in *Luther* v. *Borden* [9] that the concept was first enunciated as a doctrine separate from considerations of interference with executive functions. This case presented the question of the claims of two competing factions to be the only lawful government of Rhode Island during a period of unrest in 1842.[10] Chief Justice Taney began by saying that the answer was primarily a matter of state law which had been decided in favor of one faction by the state courts.[11]

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[3] Ibid.

[4] *Baker* v. *Carr,* 369 U.S. 186, 208-232 (1962).

[5] 1 Cr. (5 U.S.) 137, 170 (1803).

[6] In *Decatur* v. *Paulding,* 14 Pet. (39 U.S.) 497, 516 (1840), the Court, refusing an effort by mandamus to compel the Secretary of the Navy to pay a pension, said: "The interference of the co[illegible]with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." It therefore follows that mandamus will lie against an executive official only to compel the performance of a ministerial duty which admits of no discretion and may not be invoked to control executive or political duties which admit of discretion. *See Georgia* v. *Stanton,* 6 Wall. (73 U.S.) 50 (1867); *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475 (1867); *Kendall* v. *United States ex rel. Stokes,* 12 Pet. (37 U.S.) 524 (1838).

[7] 3 Dall. (3 U.S.) 199 (1796).

[8] 12 Wheat. (25 U.S.) 19 (1827).

[9] 7 How. (48 U.S.) 1 (1849).

[10] *Cf. Baker* v. *Carr,* 369 U.S. 186, 218-222 (1962); id., 292-297 (Justice Frankfurter dissenting).

[11] *Luther* v. *Borden,* 7 How. (48 U.S.) 1, 40 (1849).

Insofar as the Federal Constitution had anything to say on the subject, the Chief Justice continued, that was embodied in the clause empowering the United States to guarantee to every State a republican form of government,[12] and this clause committed determination of the issue to the political branches of the Federal Government. "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must neccessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." [13] Here, the contest had not proceeded to a point where Congress had made a decision, "[y]et the right to decide is placed there, and not in the courts." [14]

Moreover, in effectuating the provision in the same clause that the United States should protect them against domestic violence, Congress had vested discretion in the President to use troops to protect a state government upon the application of the legislature or the governor. Before he could act upon the application of a legislature or a governor, the President "must determine what body of men constitute the legislature, and who is the governor . . . ." No court could review the President's exercise of discretion in this respect; no court could recognize as legitimate a group vying against the group recognized by the President as the lawful government.[15] Although the President had not actually called out the militia in Rhode Island, he had pledged support to one of the competing governments and this pledge of military assistance if it were needed had in fact led to the capitulation of the other faction, thus making an effectual and authoritative determination not reviewable by the Court.[16]

***The Doctrine Before Baker v. Carr.***—Over the years, the political question doctrine has been applied to preclude adjudication of a variety of issues. Certain factors appear more or less consistently

[12] Id., 42, citing Article IV, § 4. *Infra, pp.* 893–895.
[13] Ibid.
[14] Ibid.
[15] Id., 43.
[16] Id., 44.

through most but not all of these cases, and it is perhaps best to indicate the cases and issues deemed political before attempting to isolate these factors.

(1) By far the most consistent application of the doctrine has been in cases in which litigants asserted claims under the republican form of government clause,[17] whether the attack was on the government of the State itself[18] or on some manner in which it had acted,[19] but there have been cases in which the Court has reached the merits.[20]

(2) Although there is language in the cases which would if applied make all questions touching on foreign affairs and foreign policy political,[21] whether the courts have adjudicated a dispute in this area has often depended on the context in which it arises. Thus, the determination by the President whether to recognize the government of a foreign state[22] or who is the *de jure* or *de facto* ruler of a foreign state[23] is conclusive on the courts, but in the ab-

[17] Article IV, § 4, *infra*, pp. 893-895.

[18] As it was on the established government of Rhode Island in *Luther* v. *Borden*, 7 How. (48 U.S.) 1 (1849). *See also Texas* v. *White*, 7 Wall. (74 U.S.) 700 (1869); *Taylor* v. *Beckham*, 178 U.S. 548 (1900).

[19] *Pacific States Tel. Co.* v. *Oregon*, 223 U.S. 118 (1912); *Kiernan* v. *City of Portland*, 223 U.S. 151 (1912) (attacks on initiative and referendum); *Marshall* v. *Dye*, 231 U.S. 250 (1913) (state constitutional amendment procedure); *O'Neill* v. *Leamer*, 239 U.S. 244 (1915) (delegation to court to form drainage districts); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916) (submission of legislation to referendum); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917) (workmen's compensation); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U.S. 74 (1930) (concurrence of all but one justice of state high court required to invalidate statute); *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937) (delegation of legislative powers).

[20] All the cases, however, predate the application of the doctrine in *Pacific States Tel. Co.* v. *Oregon*, 223 U.S. 118 (1912). *See Attorney General of the State of Michigan ex rel. Kies* v. *Lowrey*, 199 U.S. 233, 239 (1905) (legislative creation and alteration of school districts "compatible" with a republican form of government); *Forsyth* v. *City of Hammond*, 166 U.S. 506, 519 (1897) (delegation of power to court to determine municipal boundaries does not infringe republican form of government); *Minor* v. *Happersett*, 21 Wall. (88 U.S.) 162, 175-176 (1875) (denial of suffrage to women no violation of republican form of government).

[21] "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). *See also Chicago & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

[22] *United States* v. *Palmer*, 3 Wheat. (16 U.S.) 610 (1818); *Kennett* v. *Chambers*, 14 How. (55 U.S.) 38 (1852).

[23] *Jones* v. *United States*, 137 U.S. 202 (1890); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *See Ex parte Hitz*, 111 U.S. 766 (1884).

sence of a definitive executive action the courts will review the record to determine whether the United States has accorded a sufficient degree of recognition to allow the courts to take judicial notice of the existence of the state.[24] Moreover, the courts have often determined for themselves what effect, if any, should be accorded the acts of foreign powers, recognized or unrecognized.[25] Similarly, the Court when dealing with treaties and the treaty power has treated as political questions relating to whether the foreign party had constitutional authority to assume a particular obligation [1] and whether a treaty has lapsed because of the foreign state's loss of independence [2] or because of changes in the territorial sovereignty of the foreign state,[3] but the Court will not only interpret the domestic effects of treaties,[4] it will at times interpret the effects bearing on international matters.[5] The Court has deferred to the President and Congress with regard to the existence of a state of war and the dates of the beginning and ending and of states of belligerency between foreign powers but the deference has sometimes been forced.[6]

(3) Ordinarily, the Court will not look behind the fact of certification that the standards requisite for the enactment of legislation [7] or ratification of a constitutional amendment [8] have in fact

[24] *United States* v. *The Three Friends*, 166 U.S. 1 (1897); *In re Baiz*, 135 U.S. 403 (1890). *Cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

[25] *United States* v. *Reynes*, 9 How. (50 U.S.) 127 (1850); *Garcia* v. *Lee*, 12 Pet. (37 U.S.) 511 (1838); *Keene* v. *McDonough*, 8 Pet. (33 U.S.) 308 (1834). *See also Williams* v. *Suffolk Ins. Co.*, 13 Pet. (38 U.S.) 415 (1839); *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). *But see United States* v. *Belmont*, 301 U.S. 324 (1937). On the "act of State" doctrine, *compare Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), *with First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972).

[1] *Doe* v. *Braden*, 16 How. (57 U.S.) 635 (1853).

[2] *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Clark* v. *Allen*, 331 U.S. 503 (1947).

[3] *Kennett* v. *Chambers*, 14 How. (55 U.S.) 38 (1852). On the effect of a violation by a foreign state on the continuing effectiveness of the treaty, *see Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199 (1796); *Charlton* v. *Kelly*, 229 U.S. 447 (1913).

[4] *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199 (1796). *Cf. Chinese Exclusion Cases*, 130 U.S. 581 (1889) (conflict of treaty with federal law).

[5] *Perkins* v. *Elg*, 307 U.S. 325 (1939); *United States* v. *Rauscher*, 119 U.S. 407 (1886).

[6] *Commercial Trust Co.* v. *Miller*, 262 U.S. 51 (1923); *Woods* v. *Miller Co.*, 333 U.S. 138 (1948); *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924); *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); *Lee* v. *Madigan*, 358 U.S. 228 (1959); *The Divina Pastora*, 4 Wheat. (17 U.S.) 52 (1819). The cases involving the status of Indian tribes as foreign states usually have presented political questions but not always. *The Cherokee Nation* v. *Georgia*, 5 Pet. (30 U.S.) 1 (1831); *United States* v. *Sandoval*, 231 U.S. 28 (1913); *Worcester* v. *Georgia*, 6 Pet. (31 U.S.) 515 (1832).

[7] *Field* v. *Clark*, 143 U.S. 649 (1892); *Harwood* v. *Wentworth*, 162 U.S. 547 (1896); *cf. Gardner* v. *The Collector*, 6 Wall. (73 U.S.) 499 (1868).

[8] *Coleman* v. *Miller*, 307 U.S. 433 (1939) (Congress' discretion to determine what passage of time will cause an amendment to lapse and effect of previous rejection by legislature).

been met, although it will interpret the Constitution to determine what the basic standards are [9] and it will decide certain questions if the political branches are in disagreement.[10]

(4) Prior to *Baker* v. *Carr*,[11] cases challenging the distribution of political power through apportionment and districting,[12] weighed voting,[13] and restrictions on political action [14] were held to present nonjusticiable political questions.

From this limited review of the principal areas in which the political question doctrine seemed most established, it is possible to extract some factors which seemingly convinced the courts that the issues presented went beyond the judicial responsibility. These factors, necessarily stated baldly in so summary a fashion, would appear to be the lack of requisite information and the difficulty of obtaining it,[15] the necessity for uniformity of decision and to defer to the wider responsibilities of the political departments,[16] and the

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[9] *Missouri Pacific Ry.* v. *Kansas*, 248 U.S. 276 (1919); *Rainey* v. *United States*, 232 U.S. 310 (1914); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911); *Twin City Bank* v. *Nebeker*, 167 U.S. 196 (1897); *Lyons* v. *Woods*, 153 U.S. 649 (1894); *United States* v. *Ballin*, 144 U.S. 1 (1892) (statutes); *United States* v. *Sprague*, 282 U.S. 716 (1931); *Leser* v. *Garnett*, 258 U.S. 130 (1922); *Dillon* v. *Gloss*, 256 U.S. 368 (1921); *Hawke* v *Smith*, 253 U.S. 221 (1920); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hollingsworth* v. *Virginia*, 3 Dall. (3 U.S.) 378 (1798) (constitutional amendments).

[10] *Pocket Veto Case*, 279 U.S. 655 (1929); *Wright* v. *United States*, 302 U.S. 583 (1938).

[11] 369 U.S. 186 (1962).

[12] *Colegrove* v. *Green*, 328 U.S. 549 (1946); *Colegrove* v. *Barrett*, 330 U.S. 804 (1947).

[13] *South* v. *Peters*, 339 U.S. 276 (1950) (county unit system for election of statewide officers with vote heavily weighed in favor of rural, lightly-populated counties).

[14] *MacDougall* v. *Green*, 335 U.S. 281 (1948) (signatures on nominating petitions must be spread among counties of unequal population).

[15] Thus, *Chicago & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948): "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences." And in holding that it was for Congress to determine what length of time a constitutional amendment may pend before becoming no longer viable, Chief Justice Hughes emphasized: "[T]he question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified." *Coleman* v. *Miller*, 307 U.S. 433, 453, (1939).

[16] Thus, *Williams* v. *Suffolk Ins. Co.*, 13 Pet. (38 U.S.) 415, 420 (1839): "If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconciliable difference between the executive and judicial departments. By one of these departments a foreign island or

lack of adequate standards to resolve a dispute.[17] But present in all the political cases is the most important factor, a "prudential" attitude about the exercise of judicial review which emphasizes that courts should be wary of deciding on the merits any issue in which claims of principle as to the issue and of expediency as to the power and prestige of courts are in sharp conflict. The political question doctrine is thus a way of avoiding a principled decision damaging to the Court or an expedient decision damaging to the principle.[18]

***Baker v. Carr.***—In *Baker* v. *Carr*,[19] the Court undertook a major rationalization and formulation of the political question doctrine which has considerably narrowed its application. Following *Baker*, the whole of the apportionment-districting-election restriction controversy previously immune to federal-court adjudication was considered and decided on the merits[20] and the Court's most recent rejection of the doctrine discloses the narrowing in other areas as well.[21]

According to Justice Brennan who delivered the opinion of the Court,[22] "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' "[23] Thus, the "nonjusticiability of a political question

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country might be considered as at peace with the United States: whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character." Similar considerations underlay the opinion in *Luther* v. *Borden*, 7 How. (48 U.S.) 1 (1849), in which Chief Justice Taney wondered how a court decision in favor of one faction would be received with Congress seating the representatives of the other faction and the President supporting that faction with military force.

[17] *Baker* v. *Carr*, 369 U.S. 186, 217, 226 (1962) (opinion of the Court); id., 268, 287, 295, (Justice Frankfurter dissenting.)

[18] For a statement of the "prudential" view, *see* generally A. Bickel, *The Least Dangerous Branch—The Supreme Court at the Bar of Politics* (New York: 1962), *but see* esp. 23-28, 69-71, 183-198. *See also Baker* v. *Carr*, 369 U.S. 186, 267 (1962) (Justice Frankfurter dissenting.) The opposing view, which has been called the "classicist" view, is that courts are duty bound to decide all cases properly before them. *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 404 (1821). *See also* H. Wechsler, *Principles, Politics, and Fundamental Law—Selected Essays* (Cambridge: 1961), 11-15. And *see infra*, p. 720.

[19] 369 U.S. 186 (1962).

[20] *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970) (apportionment and districting, congressional, legislative, and local); *Gray* v. *Sanders*, 372 U.S. 368 (1963) (county unit system weighing statewide elections); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969) (geographic dispersion of persons signing nominating petitions).

[21] *Powell* v. *McCormack*, 395 U.S. 486 (1969).

[22] There were concurrences by Justices Douglas, Clark, and Stewart. Justices Frankfurter and Harlan dissented.

[23] *Baker* v. *Carr*, 369 U.S. 186, 210 (1962). This formulation fails to explain cases like *Moyer* v. *Peabody*, 212 U.S. 78 (1909), in which the conclusion of the Governor of

is primarily a function of the separation of powers." [24] "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." [25] Following a discussion of several areas in which the doctrine had been used, Justice Brennan continued: "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers.

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." [1]

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a State that insurrection existed or was imminent justifying suspension of constitutional rights was deemed binding on the Court. *Cf. Sterling* v. *Constantin*, 287 U.S. 378 (1932). The political question doctrine was applied in cases challenging the regularity of enactments of territorial legislatures. *Harwood* v. *Wentworth*, 162 U.S. 547 (1896); *Lyons* v. *Woods*, 153 U.S. 649 (1894); *Clough* v. *Curtis*, 134 U.S. 361 (1890). *See also In re Sawyer*, 124 U.S. 200 (1888); *Walton* v. *House of Representatives*, 265 U.S. 487 (1924).

[24] *Baker* v. *Carr*, 369 U.S. 186, 210 (1962).

[25] Id., 211.

[1] Id., 217. It remains unclear after *Baker* whether the political question doctrine is applicable *solely* to intrafederal issues or only *primarily*, so that the existence of one or more of these factors in a case involving, say, a State, might still give rise to nonjusticiability. At one point, id., 210, Justice Brennan says that nonjusticiability of a political question is "primarily" a function of separation of powers but in the immediately preceding paragraph he states that "it is" the intrafederal aspect "and not the federal judiciary's relationship to the States" that raises political questions. But subsequently, id., 226, he balances the present case, which involves a State and not a branch of the Federal Government, against each of the factors listed in the instant quotation and notes that none apply. His discussion of why guarantee clause cases are political presents much the same difficulty, id., 222–226, inasmuch as he joins the conclusion that the clause commits resolution of such issues to Congress with the assertion that the clause contains no "criteria by which a court could determine which form of government was republican," id., 222, a factor not present when the equal protection clause is relied on. Id., 226.

***Powell v. McCormack.***—Because *Baker* had apparently restricted the political question doctrine to intrafederal issues, there was no discussion of the doctrine when the Court held that it had power to review and overturn a state legislature's refusal to seat a member-elect because of his expressed views.[2] But in *Powell* v. *McCormack*,[3] the Court was confronted with a challenge to the exclusion of a member-elect by the United States House of Representatives. Its determination that the political question doctrine did not bar its review of the challenge indicates the narrowness of application of the doctrine in its present state. Taking Justice Brennan's formulation in *Baker* of the factors which go to make up a political question,[4] Chief Justice Warren determined that the only critical one in this case was whether there was a "textually demonstrable constitutional commitment" to the House to determine in its sole discretion the qualifications of members.[5] In order to determine whether there was a textual commitment, the Court reviewed the Constitution, the Convention proceedings, and English and United States legislative practice to ascertain what power had been conferred on the House to judge the qualifications of its members; finding that the Constitution vested the House with power only to look at the qualifications of age, residency, and citizenship, the Court thus decided that in passing on Powell's conduct and character the House had exceeded the powers committed to it and thus judicial review was not barred by this factor of the political question doctrine.[6] Although this approach accords with the "classicist" theory of judicial review,[7] it circumscribes the political question

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[2] *Bond* v. *Floyd*, 385 U.S. 116 (1966).

[3] 395 U.S. 486 (1969).

[4] *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

[5] *Powell* v. *McCormack*, 395 U.S. 486, 519 (1969).

[6] Id., 519–547. The Court concluded, however, by noting that even if this conclusion had not been reached from unambiguous evidence, the result would have followed from other considerations. Id., 547–548.

[7] *Supra, p.* 709 n. 18. "[A]ll the [political question] doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation." H. Wechsler, *Principles, Politics, and Fundamental Law—Selected Essays* (Cambridge: 1961), 11–12. But Professor Wechsler believed that congressional decisions about seating members were immune to review. Ibid. Chief Justice Warren noted that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution." *Powell* v. *McCormack*, 395 U.S. 486, 521 n. 42 (1969). And *see* id., 507 n. 27 (reservation on limitations which might exist on Congress' power to expel or otherwise punish a sitting member).

doctrine severely, inasmuch as all constitutional questions turn on whether a governmental body has exceeded its specified powers, a determination the Court traditionally makes, whereas traditionally the doctrine precluded the Court from inquiring whether the governmental body had exceeded its powers. In short, the political question consideration is now one on the merits rather than a decision not to decide.

Chief Justice Warren disposed of the other factors present in political question cases in slightly more than a page. Since resolution of the question turned on an interpretation of the Constitution, a judicial function which must sometimes be exercised "at variance with the construction given the document by another branch," there was no lack of respect shown another branch, nor, because the Court is the "ultimate interpreter of the Constitution," will there be "multifarious pronouncements by various departments on one question," nor, since the Court is merely interpreting the Constitution, is there an "initial policy determination" not suitable for courts. Finally, "judicially . . . manageable standards" are present in the text of the Constitution.[8] The effect of *Powell* is to discard all the *Baker* factors inhering in a political question with the exception of the textual commitment factor and that was interpreted in such a manner as seldom if ever to preclude a judicial decision on the merits.

***The Doctrine Reappears.***—Reversing a lower federal court ruling subjecting the training and discipline of National Guard troops to court review and supervision, the Court held that under Article I, § 8, cl. 16, the organizing, arming, and disciplining of such troops are committed to Congress and by congressional enactment to the Executive Branch. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." [9] The suggestion of the

[8] Id., 548–549. With the formulation of Chief Justice Warren, compare that of then-Judge Burger in the lower court, 395 F.2d 577, 591–596 (C.A.D.C. 1968).

[9] *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). Similar prudential concerns seem to underlay, though they did not provide the formal basis for, decisions in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), and *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974).

infirmity of the political question doctrine was rejected, since "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise." [10] In staying a grant of remedial relief in another case, the Court strongly suggested that the actions of political parties in national nominating conventions may also present issues not meet for judicial resolution.[11]

## JUDICIAL REVIEW

### The Establishment of Judicial Review

Judicial review is one of the distinctive features of United States constitutional law. It is no small wonder, then, to find that the power of the federal courts to test federal and state legislative enactments and other actions by the standards of what the Constitution grants and withholds is nowhere expressly conveyed, but it is hardly noteworthy that its legitimacy has been challenged from the first and while now accepted generally it still has detractors and its supporters disagree about its doctrinal basis and its application.[1] Although it was first asserted in *Marbury* v. *Madison* [2] to strike down an act of Congress as inconsistent with the Constitution, judicial review did not spring full-blown from the brain of Chief Justice Marshall. The concept had been long known, having been utilized in a much more limited form by Privy Council review

[10] 413 U.S., 11. Other considerations of justiciability, however, id., 10, preclude using the case as square precedent on political questions. Justices Douglas, Brennan, Stewart, and Marshall dissented on mootness grounds. Id., 12.

[11] *O'Brien* v. *Brown*, 409 U.S. 1 (1972) (granting stay). The issue was mooted by the passage of time and was not thereafter considered on the merits by the Court. Id., 816 (remanding to dismiss as moot). It was also not before the Court in *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), but it was alluded to there. *See* id., 483 n. 4, and id., 491 (Justice Rehnquist concurring). *See also Goldwater* v. *Carter*, 444 U.S. 996, 1002 (1979) (Justices Rehnquist, Stewart, and Stevens, and Chief Justice Burger using political question analysis to dismiss a challenge to presidential action). *But see* id. 997, 998 (Justice Powell rejecting analysis for this type of case).

[1] For expositions on the legitimacy of judicial review, *see* L. Hand, *The Bill of Rights* (Cambridge: 1958); H. Wechsler, *Principles, Politics, and Fundamental Law—Selected Essays* (Cambridge: 1961), 1–15; A. Bickel, *The Least Dangerous Branch—The Supreme Court at the Bar of Politics* (New York: 1962) 1–33. For an extensive historical attack on judicial review, *see* 2 W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: 1953), chs. 27–29. A brief review of the ongoing debate on the subject is Westin, "Introduction: Charles Beard and American Debate over Judicial Review, 1790–1961," in C. Beard, *The Supreme Court and the Constitution* (Englewood Cliffs: 1962 reissue of 1938 ed.), 1–34, and bibliography at 133–149. While much of the debate focuses on judicial review of acts of Congress, the similar review of state acts has occasioned much controversy as well.

[2] 1 Cr. (5 U.S.) 137 (1803). A state act was held inconsistent with a treaty in *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199 (1796).

of colonial legislation and its validity under the colonial charters [3] and there were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.[4]

Practically all of the framers who expressed an opinon on the issue in the Convention appear to have assumed and welcomed the existence of court review of the constitutionality [5] and prior to

[3] J. Goebel, *History of the Supreme Court of the United States: Vol. 1, Antecedents and Beginnings to 1801* (New York: 1971), 60–95.

[4] Id., 96–142.

[5] M. Farrand. *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 97–98 (Gerry), 109 (King), 2 id., 28 (Morris and perhaps Sherman). 73 (Wilson), 75 (Strong, but the remark is ambiguous). 76 (Martin), 78 (Mason), 79 (Gorham, but ambiguous), 80 (Rutledge), 92–93 (Madison), 248 (Pinckney), 299 (Morris), 376 (Williamson), 391 (Wilson), 428 (Rutledge), 430 (Madison), 440 (Madison), 589 (Madison); 3 id., 220 (Martin). The only expressed opposition to judicial review came from Mercer with a weak seconding from Dickinson. "Mr. Mercer . . . disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable." 2 id., 298. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." Id., 299. Of course, the debates in the Convention were not available when the state ratifying conventions acted, so that the delegates could not have known these views about judicial review in order to have acted knowingly about them. Views, were, however, expressed in the ratifying conventions recognizing judicial review, some of them being uttered by Framers. 2 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: 1836). 131 (Samuel Adams, Massachusetts), 196–197 (Ellsworth, Connecticut). 348, 362 (Hamilton, New York): 445–446. 478 (Wilson, Pennsylvania), 3 id., 324–325, 539, 541 (Henry, Virginia), 480 (Mason, Virginia), 532 (Madison, Virginia), 570 (Randolph, Virginia); 4 id., 71 (Steele, North Carolina), 156–157 (Davie, North Carolina). In the Virginia convention, John Marshall observed if Congress "were to make a law not warranted by any of the powers enumerated, it would be considered by the judge as an infringement of the Constitution which they are to guard . . . They would declare it void . . . . To what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 id., 553–554. Both Madison and Hamilton similarly asserted the power of judicial review in their campaign for ratification. *The Federalist* (Modern Library ed. 1937), Nos. 39 and 44 (Madison), Nos. 78 and 81 (Hamilton). The persons supporting or at least indicating they thought judicial review existed did not constitute a majority of the Framers, but in light of the absence of controverting statements, with the exception of the Mercer-Dickinson comments, indicates at least acquiesence if not agreements by the other Framers.

To be sure, subsequent comments of some of the Framers indicate an understanding contrary to those cited in the convention. *See, e.g.*, Charles Pinckney in 1799: "On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." F. Wharton (ed.),

*Marbury* the power seems very generally to have been assumed to exist by the Justices themselves.[6] In enacting the Judiciary Act of 1789, Congress explicitly made provision for the exercise of the power [7] and in other debates questions of constitutionality and of

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*State Trials of the United States During the Administrations of Washington and Adams* (Philadelphia: 1849), 412.

Madison's subsequent changes of position are striking. His remarks in the Philadelphia Convention, in the Virginia ratifying convention, and in *The Federalist*, cited above, all unequivocally favor the existence of judicial review. And in Congress arguing in support of the constitutional amendments providing a bill of rights, he observed: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," 1 *Annals of Congress* 457 (1789); 5 *Writings of James Madison*, G. Hunt ed. (Philadelphia: 1904), 385. Yet in a private letter in 1788, he wrote: "In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with the final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper." Id., 294. At the height of the dispute over the Alien and Sedition Acts, Madison authored a resolution ultimately passed by the Virginia legislature which, though milder, and more restrained than one authored by Jefferson and passed by the Kentucky legislature, asserting the power of the States, though not of one State or of the state legislatures alone, to "interpose" themselves to halt the application of an unconstitutional law. 3 I. Brant *James Madison—Father of the Constitution*, 1787–1800 (New York: 1950), 460–464. 467–471; "Report on the Resolutions of 1798," 6 *Writing of James Madison*, G. Hunt ed. (Philadelphia: 1904). 341–406. Embarrassed by the claim of the nullificationists in later years that his resolution supported their position, Madison distinguished his and their positions and again asserted his belief in judicial review. 6 I. Brant. *op. cit.*, 481–485, 488–489.

The various statements made and positions taken by the Framers have been culled and categorized and argued over many times. For the most recent compilation reviewing the previous efforts, *see R. Berger, Congress* v. *The Supreme Court* (Cambridge: 1969), chs. 3–4.

[6] Thus, the Justices on circuit refused to adminster a pension act on grounds of its unconstitutionally, *see Hayburn's Case*, 2 Dall. (2 U.S.) 409 (1792), and *supra, pp.* 621–623. Chief Justice Jay and other Justices wrote that the imposition of circuit duty on Justices was unconstitutional, although they never mailed the letter, *supra, p.* 605 n. 3, in *Hylton* v. *United States*, 3 Dall. (3 U.S.) 171 (1796), a feigned suit, the constitutionality of a federal law was argued before the Justices and upheld on the merits, in *Ware* v. *Hylton*. 3 Dall. (3 U.S.) 199 (1797), a state law was overturned, and dicta in several opinions asserted the principle. *See Calder v. Bull*. 3 Dall. (3 U.S.) 386, 399 (1798) (Justice Iredell), and several Justices on circuit, quoted in J. Goebel, *History of the Supreme Court of the United States: Vol. 1, Antecedents and Beginnings to 1801* (New York: 1971), 589–592.

[7] In enacting the Judiciary Act of 1789, 1 Stat. 73, Congress chose not to vest "federal question" jurisdiction in the federal courts but to leave to the state courts the enforcement of claims under the Constitution and federal laws. In § 25, 1 Stat. 85, Congress provided for review by the Supreme Court of final judgments in state courts (1) ". . . where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity"; (2) ". . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the

judicial review were prominent.[8] Nonetheless, although judicial review is consistent with several provisions of the Constitution and the argument for its existence may be derived from these provisions, they do not compel the conclusion that the Framers intended judicial review nor that it must exist. It was Chief Justice Marshall's achievement that in doubtful circumstances and an awkward position he carried the day for the device which, though questioned, has expanded and become solidified at the core of constitutional jurisprudence.

***Marbury* v. *Madison*.**—Chief Justice Marshall's argument for judicial review of congressional acts in *Marbury* v. *Madison* [9] had been largely anticipated by Hamilton.[10] For example, he had written: "The interpretation of the laws is the proper and peculiar province of the courts. A Constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." [11]

At the time of the change of Administration from Adams to Jefferson, several commissions of appointment to office had been signed but not delivered and were withheld on Jefferson's express instruction. Marbury sought to compel the delivery of his commission by seeking a writ of mandamus in the Supreme Court in the exercise of its original jurisdiction against Secretary of State Madison. Jurisdiction was based on § 13 of the Judiciary Act of 1789 [12]

constitution, treaties or laws of the United States, and the decision is in favor of their validity"; or (3) ". . . where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed" thereunder. The ruling below was to be "re-examined and reversed or affirmed in the Supreme Court . . ."

[8] *See* in particular the debate on the President's removal powers, discussed *supra*, pp. 546–552, with statements excerpted in R. Berger, *Congress* v. *The Supreme Court* (Cambridge: 1969), 144–150. Debates on the Alien and Sedition Acts and on the power of Congress to repeal the Judiciary Act of 1801 similarly saw recognition of judicial review of acts of Congress. C. Warren, *Congress, the Constitution and the Supreme Court* (Boston: 1925), 107–124.

[9] 1 Cr. (5 U.S.) 137 (1803).

[10] *The Federalist* Nos. 78 and 81 (Modern Library ed. 1937), 505–511, 522–527.

[11] Id., No. 78, at 506.

[12] 1 Stat. 73, 80.

which Marbury, and ultimately the Supreme Court, interpreted to authorize the Court to issue writs of mandamus in suits in its original jurisdiction.[13] Though deciding all the other issues in Marbury's favor, the Chief Justice wound up concluding that the § 13 authorization was an attempt by Congress to expand the Court's original jurisdiction beyond the constitutional prescription and was therefore void.[14]

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States"; Marshall began his discussion of this final phase of the case, "but, happily, not of an intricacy proportioned to its interest."[15] First, certain fundamental principles warranting judicial review were noticed. The people had come together to establish a government. They provided for its organization and assigned to its various departments their powers and established certain limits not to be transgressed by those departments. The limits were expressed in a written constitution, which would serve no purpose "if these limits may, at any time, be passed by those intended to be restrained." Because the Constitution is "a superior paramount law," it is unchangeable by ordinary legislative means and "a legislative act contrary to the constitution is not law."[16] "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" The answer, thought the Chief Justice, was obvious. "It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each.

[13] The section first denominated the original jurisdiction of the Court and then described the Court's appellate jurisdiction. Following and indeed attached to the sentence on appellate jurisdiction, being separated by a semi-colon, is the language saying "and shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The Chief Justice could easily have interpreted the authority to have been granted only in cases under appellate jurisdiction or as authority conferred in cases under both original and appellate jurisdiction when the cases are otherwise appropriate for one jurisdiction or the other. Textually, the section does not compel a reading that Congress was conferring on the Court an original jurisdiction to issue writs of mandamus *per se*.

[14] *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137, 173–180 (1803).

[15] Id., 176. One critic has written that by this question Marshall "had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant." A Bickel, *The Least Dangerous Branch—The Supreme Court at the Bar of Politics* (Cambridge: 1962), 3. Marshall, however, soon reached this question, though more by way of assertion than argument. 1 Cr. (5 U.S.), 177–178.

[16] Id., 176–177.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply." [17] To declare otherwise, Chief Justice Marshall said, would be to permit a legislative body to pass at pleasure the limits imposed on its powers by the Constitution.[18]

Turning, then, from the philosophical justification for judicial review as arising from the very concept of a written constitution, the Chief Justice turned to specific clauses of the Constitution. The judicial power, he observed, was extended to "all cases arising under the constitution." [19] It was "too extravagant to be maintained that the Framers had intended that a case arising under the constitution should be decided without examining the instrument under which it arises." [20] Suppose, he said, that Congress laid a duty on an article exported from a State or passed a bill of attainder or an *ex post facto* law or provided that treason should be proved by the testimony of one witness. Would the courts enforce such a law in the face of an express constitutional provision? They would not, he continued, because their oath required by the Constitution obligated them to support the Constitution and to enforce such laws would violate the oath.[21] Finally, the Chief Justice noticed the supremacy clause which gave the Constitution precedence over laws and treaties and provided that only laws "which shall be made in pursuance of the constitution" are to be the supreme laws of the land.[22]

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[17] Id. 177-178.

[18] Id. 178.

[19] Ibid. The reference is, of course, to the first part of clause 1, § 2, Art. III: "The judicial power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." Compare A. Bickel, *The Least Dangerous Branch—The Supreme Court at the Bar of Politics* (Cambridge: 1962), 5–6, with R. Berger, *Congress* v. *The Supreme Court* (Cambridge: 1969), 189–222.

[20] 1 Cr. (5 U.S.), 179.

[21] Id., 179–180. The oath provision is contained in Art. VI, cl. 3. Compare A. Bickel, *The Least Dangerous Branch—The Supreme Court at the Bar of Politics* (Cambridge: 1962), 7–8, with R. Berger, *Congress* v. *The Supreme Court* (Cambridge: 1969), 237–244.

[22] 1. Cr. (5 U.S.), 180. Compare A. Bickel, *The Least Dangerous Branch—The Supreme Court at the Bar of Politics* (Cambridge: 1962), 8–12, with R. Berger, *Congress* v. *The Supreme Court* (Cambridge: 1969), 223–284.

The decision in *Marbury* v. *Madison* has never been disturbed, although it has been criticized and has had opponents throughout our history. It not only carried the day in the federal courts, but from its announcement judicial review of state courts of local legislation under local constitutions made rapid progress and was securely established in all States by 1850.[23]

***Judicial Review and National Supremacy.***—Even many persons who have criticized the concept of judicial review of congressional acts by the federal courts have thought that review of state acts under federal constitutional standards is soundly based in the supremacy clause which makes the Constitution and constitutional laws and treaties the supreme law of the land,[24] to effectuate which Congress enacted the famous § 25 of the Judiciary Act of 1789.[25] Five years before *Marbury* v. *Madison*, the Court held invalid a state law as conflicting with the terms of a treaty,[1] and seven years after Chief Justice Marshall's opinion a state law was voided as conflicting with the Constitution.[2]

Virginia provided a states' rights challenge to a broad reading of the supremacy clause and to the validity of § 25 in *Martin* v. *Hunter's Lessee* [3] and in *Cohens* v. *Virginia.*[4] In both cases, it was argued that while the courts of Virginia were constitutionally obliged to prefer "the supreme law of the land" as set out in the supremacy clause over conflicting state constitutional provisions and laws, it was only by their own interpretation of the supreme law that they as courts of a sovereign State were bound. Furthermore, it was contended that cases did not "arise" under the Constitution unless they were brought in the first instance by someone claiming such a right, from which it followed that "the judicial power of the United States" did not "extend" to such cases unless they were brought in the first instance in the courts of the United

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[23] E. Corwin, *The Doctrine of Judicial Review* (Princeton: 1914), 75–78.

[24] 2. W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: 1953), 989. *See* the famous remark of Holmes: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States." O. Holmes, *Collected Legal Papers* (Boston: 1921), 295–296.

[25] 1 Stat. 73, 85, quoted *supra, p.* 715 n. 7.

[1] *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 190 (1796).

[2] *Fletcher* v. *Peck*, 6 Cr. (10 U.S.) 87 (1810). The case came to the Court by appeal from a circuit court and not from a state court under § 25. Famous early cases coming to the Court under § 25 in which state laws were voided included *Sturges* v. *Crowninshield*, 4 Wheat. (17 U.S.) 122 (1819); *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (19819).

[3] 1 Wheat (14 U.S.) 304 (1816).

[4] 6 Wheat. (19 U.S.) 264 (1821).

States. But answered Chief Justice Marshall: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either." [5] Passing on to the power of the Supreme Court to review such decisions of the state courts, he said: "Let the nature and objects of our Union be considered: let the great fundamental principles on which the fabric stands, be examined: and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the Court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction." [6]

### Limitations on the Exercise of Judicial Review

Implicit in the argument of *Marbury* v. *Madison* [7] is the thought that with regard to cases meeting jurisdictional standards the Court is obligated to take and decide them. Chief Justice Marshall expressly spelled the thought out in *Cohens* v. *Virginia*. [8] "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." As the comment recognizes, because judicial review grows out of the fiction that courts only declare what the law is in specific cases [9] and

[5] Id., 379.

[6] Id., 422–423. Justice Story traversed much of the same ground in *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816). In *Ableman* v. *Booth*, 21 How. (62 U.S.) 506 (1859), the Wisconsin Supreme Court had declared an act of Congress invalid and disregarded a writ of error from the Supreme Court, raising again the Virginia arguments. Chief Justice Taney emphatically rebuked the assertions on grounds both of dual sovereignty and national supremacy. His emphasis on the indispensability of the federal judicial power to maintain national supremacy, to protect the States from national encroachments, and to make the Constitution and laws of the United States uniform all combine to enhance the federal judicial power to a degree perhaps beyond that envisaged even by Story and Marshall. As late as *Williams* v. *Bruffy*, 102 U.S. 248 (1880), the concepts were again thrashed out with the refusal of a Virginia court to enforce a mandate of the Supreme Court. *And see* *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

[7] 1 Cr. (5 U.S.) 137 (1803).

[8] 6 Wheat. (19 U.S.) 264, 404, (1821).

[9] See, e.g., Justice Sutherland in *Adkins* v. *Children's Hospital*, 261 U.S. 525, 544 (1923), and Justice Roberts in *United States* v. *Butler*, 297 U.S. 1, 62 (1936).

are without will or discretion,[4] its exercise is surrounded by the inherent limitations of the judicial process, most basically, of course, by the necessity of a case or controversy and the strands of the doctrine comprising the concept of justiciability.[5] But, although there are hints of Chief Justice Marshall's activism in recent cases,[6] the Court has always adhered, at times more strictly than at other times, to several discretionary rules or concepts of restraint in the exercise of judicial review, the practice of which is very much contrary to the quoted dicta from *Cohens*. These rules, it should be noted, are in addition to the vast discretionary power which the Supreme Court has to grant or deny review of judgements in lower courts, a discretion fully authorized with *certiorari* jurisdiction but in effect in practice as well with regard to appeals.[7]

***The Doctrine of "Strict Necessity."***—The Court has repeatedly declared that it will decide constitutional issues only if strict necessity compels it to do so. Thus, constitutional questions will not be decided in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case, nor at the instance of one who has availed himself of the benefit of a statute or who fails to show he is injured by its operation, nor if a construction of the statute is fairly possible by which the question may be fairly avoided.[8]

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[4] "Judicial power, as contradistinguished from the powers of the law, has no existence. Courts are the mere instruments of the law, and can will nothing." *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738, 866 (1824) (Chief Justice Marshall). *See also* Justice Roberts in *United States* v. *Butler*, 297 U.S. 1, 62–63 (1936).

[5] *Supra*, *pp.* 669–700. The political question doctrine, *supra pp.* 701–713 is another limitation arising in part out of inherent restrictions and in part from prudential considerations. For a discussion of limitations utilizing both stands *see Ashwander* v. *TVA* 297 U.S. 288, 346–356 (1936) (Justice Brandeis).

[6] *Powell* v. *McCormack*, 395 U.S. 486, 548–549 (1969); *Baker* v. *Carr*, 369 U.S. 186, 211 (1962); *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

[7] 28 U.S.C. §§ 1254–1257. *See* F. Frankfurter & J. Landis, *The Business of the Supreme Court* (New York: 1928), ch. 7. "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . . If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Chief Justice Vinson, "Address on the Work of the Federal Court," in 69 Sup. Ct. v, vi. It "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on *certiorari*." Chief Justice Warren, quoted in Wiener, "The Supreme Court's New Rules," 68 Harv. L. Rev. 20, 51 (1954).

[8] *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568–575 (1947). *See also Berea College* v. *Kentucky*, 211 U.S. 45, 53 (1908); *Siler* v. *Louisville & N.R.R. Co.*, 213 U.S.

Speaking of the policy of avoiding the decision of constitutional issues except when necessary, Justice Rutledge wrote: "The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system." [9]

***The Doctrine of Clear Mistake.***—A precautionary rule early formulated and at the base of the traditional concept of judicial restraint was expressed by Professor James Bradley Thayer to the effect that a statute could be voided as unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." [10] Whether phrased this way or phrased so that a statute is not to be voided unless it is unconstitutional beyond all reasonable doubt, the rule is of ancient origin [11] and of modern adherence.[12] In operation, however, the rule is subject to two influences which seriously impair its efficacy as a limitation. First, the conclusion that there has been a clear mistake or that there is no reasonable doubt is that drawn by five Justices if a full Court sits. If five Justices of learning and detachment to the Constitution are convinced that a statute is invalid and if four others of equal learning and attachment are convinced it is valid, the convictions of the five prevail over the convictions or doubts of the four. Second, the Court has at times made exceptions to the

175, 191 (1909); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 325 (1936); *Coffman* v. *Breeze Corp.*, 323 U.S. 316, 324–325 (1945); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944); *Alma Motor* v. *Timken Co.*, 329 U.S. 129 (1946). Judicial restraint as well as considerations of comity underlie the Court's abstention doctrine when the constitutionality of state laws is challenged. *Infra*, pp. 808–814.

[9] *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 571 (1947).

[10] "The Origin and Scope of the American Doctrine of Constitutional Law," in J. Thayer, *Legal Essays* (Boston: 1908), 1, 21.

[11] *See* Justices Chase and Iredell in *Calder* v. *Bull*, 3 Dall. (3 U.S.) 386, 395, 399 (1798).

[12] E.g., *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960).

rule in certain categories of cases. Statutory interferences with "liberty of contract" were once presumed to be unconstitutional until proved to be valid; [13] more recently, presumptions of invalidity have expressly or impliedly been applied against statutes alleged to interfere with freedom of expression and of religious freedom, which have been said to occupy a preferred position in the constitutional scheme of things.[14]

***Exclusion of Extra-Constitutional Tests.***—Another maxim of constitutional interpretation is that courts are concerned only with the constitutionality of legislation and not with its motives, policy, or wisdom,[15] or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution.[16] In various forms this maxim has been repeated to such an

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[13] "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." *Adkins* v. *Children's Hospital*, 261 U.S. 525, 546 (1923).

[14] *Kovacs* v. *Cooper*, 336 U.S. 77, 88 (1949). Justice Frankfurter's concurrence, id., 89–97, is a lengthy critique and review of the "preferred position" cases up to that time. The Court has not used the expression in recent years but the worth it attributes to the values of free expression probably approaches the same result. *Infra*, *pp.* 958–959. Today, the Court's insistence on a "compelling state interest" to justify a governmental decision to classify persons by "suspect" categories, such as race, *Loving* v. *Virginia*, 388 U.S. 1 (1967), or to restrict the exercise of a "fundamental" interest, such as the right to vote, *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), or the right to travel, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), clearly imports presumption of unconstitutionality.

[15] "We fully understand . . . the powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern." *Noble State Bank* v. *Haskell*, 219 U.S. 575, 580 (1911) (Justice Holmes for the Court). "[I]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observation of the judicial oath, for the Constitution has not authorized the justices to sit in judgment on the wisdom of what Congress and the Executive Branch do . . . ." *Trop* v. *Dulles*, 356 U.S. 86, 120 (1958) (Justice Frankfurter dissenting).

A supposedly hallowed tenet is that the Court will not look to the motives of legislators in determining the validity of a statute. *Fletcher* v. *Peck*, 6 Cr. (10 U.S.) 87 (1810); *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Palmer* v. *Thompson*, 403 U.S. 217 (1971). Yet an intent to discriminate is a requisite to finding at least some equal protection violations, *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and a secular or religious purpose is one of the parts of the tripartite test under the establishment clause. *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980), and id., 665 (dissent). Other constitutional decisions as well have turned upon the Court's assessment of purpose or motive. E.g., *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Child Labor Tax Case*, 259 U.S. 20 (1922).

[16] *Cf. Griswold* v. *Connecticut*, 381 U.S. 479, 522 (1965) (Justice Black dissenting).

extent that it has become trite and has increasingly come to be incorporated in cases in which a finding of unconstitutionality has been made as a reassurance of the Court's limited review. And it should be noted that at times the Court has absorbed natural rights doctrines into the text of the Constitution, so that it was able to reject natural law *per se* and still partake of its fruits and the same thing is true of the *laissez faire* principles incorporated in judicial decisions from about 1890 to 1937.[17]

***Presumption of Constitutionality.***—"It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed," wrote Justice Bushrod Washington, "to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt." [18] A corollary of this maxim is that if the constitutional question turns upon circumstances, courts will presume the existence of a state of facts which would justify the legislation which is challenged.[19] It seems apparent, however, that with regard to laws which trench upon First Amendment freedoms and perhaps other rights guaranteed by the Bill of Rights such deference is far less than it would be toward statutory regulation of economic matters.[20]

***Disallowance by Statutory Interpretation.***—If it is possible to construe a statute so that its validity can be sustained against a constitutional attack, a rule of prudence is that it should be so construed,[21] even though in some instances this maxim has caused the Court to read a statute in a manner which defeats or impairs the legislative purpose.[22] Closely related to this principle is the maxim

[17] E.g., *Lochner* v. *New York*, 198 U.S. 45 (1905); *United States* v. *Butler*, 297 U.S. 1 (1936).

[18] *Ogden* v. *Saunders*, 12 Wheat. (25 U.S.) 213, 270 (1827). *See also Fletcher* v. *Peck*, 6 Cr. (10 U.S.) 87, 128 (1810); *Legal Tender Cases*, 12 Wall. (79 U.S.) 457, 531 (1871).

[19] *Munn* v. *Illinois*, 94 U.S. 113, 132 (1877); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911); *Metropolitan Cas. Ins. Co.* v. *Brownell*, 294 U.S. 580, 584 (1935).

[20] E.g., *United States* v. *Robel*, 389 U.S. 258 (1967); *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967). *But see McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). The development of the "compelling state interest" test in certain areas of equal protection litigation also bespeaks less deference to the legislative judgment. *Supra*. p. 723 n. 14 and *infra*, pp. 1701-1707.

[21] "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933) (Justice Cardozo). *See also Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

[22] E.g., *Michaelson* v. *United States*, 266 U.S. 42 (1924) (narrow construction of Clayton Act contempt provisions to avoid constitutional questions); *United States* v. *Harriss*, 347 U.S. 612 (1954) (lobbying act); *United States* v. *Seeger*, 380 U.S. 163 (1965); *Welsh* v. *United States*, 398 U.S. 333 (1970) (both involving conscientious objection statute).

that when part of a statute is valid and part is void, the courts will separate the valid from the invalid and save as much as possible.[23] Statutes today ordinarily expressly provide for separability, but it remains for the courts in the last resort to determine whether the provisions are separable.[24]

***Stare Decisis in Constitutional Law.***—Adherence to precedent ordinarily limits and shapes the approach of courts to decision of a presented question. "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error so fruitful in the physical sciences, is appropriate also in the judicial function."[25] *Stare decisis* is a principle of policy, not a mechanical formula of adherence to the latest decision "however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."[1] The limitation of *stare decisis* seems to have been progressively weakened since the Court proceeded to correct "a century of error" in *Pollock* v. *Farmers' Loan & Trust Co.*[2] Since then, some 175 decisions have seen one or more

[23] *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 635 (1895); *but see Baldwin* v. *Franks*, 120 U.S. 678, 685 (1887), now repudiated. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971).

[24] *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312–316 (1936). *See also*, id., 321–324 (Chief Justice Hughes dissenting).

[25] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406–408 (1932). For recent arguments with respect to overruling or not overruling previous decisions, *see Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), overruling *Low* v. *Austin*, 13 Wall. (80 U.S. 29 (1872)), the divided opinion in *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), overruling *Geer* v. *Connecticut*, 161 U.S. 519 (1896), and the sharply divided opinion in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). *Note United States* v. *Scott*, 437 U.S. 82 (1978), citing the "lessons of experience" in overruling a 3-year-old precedent, *United States* v. *Jenkins*, 420 U.S. 358 (1975), and *United States* v. *Ross*, 456 U.S. 798 (1982), overruling *Robbins* v. *California*, 453 U.S. 420 (1981).

[1] *Helvering* v. *Hallock*, 309 U.S. 106, 110 (1940) (Justice Frankfurter for Court). "I do not acquiesce in prior holdings that purportedly, but nonetheless erroneously, are based on the Constitution. That approach simply is an acknowledgement that the Court having previously amended the Sixth Amendment now feels bound by its action." *Coleman* v. *Alabama*, 399 U.S. 1, 22 (1970) (Chief Justice Burger dissenting). *But see* id., 19 (Justice Harlan concurring in part and dissenting in part); *Williams* v. *Florida*, 399 U.S. 78, 117–119 (1970) (Justice Harlan concurring in part and dissenting in part).

[2] 157 U.S. 429, 574–579 (1895).

earlier decisions of constitutional questions overturned [3] and the merits of *stare decisis* seems more often celebrated in dissents than in majority opinions.[4] Of lesser formal effect than outright overruling but with roughly the same result is a Court practice of "distinguishing" precedents which often leads to an overturning of the principle enunciated in the case while leaving the actual case more or less alive.[5]

***Conclusion.***—The common denominator of all these maxims of prudence is the concept of judicial restraint, of judge's restraint. "We do not sit," said Justice Frankfurter, "like kadi under a tree, dispensing justice according to considerations of individual expediency." [6] "[A] jurist is not to innovate at pleasure," wrote Jutice Cardozo. "He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life." [7] All Justices will, of course, claim adherence to proper restraint,[8] but in some cases at least, such as Justice Frankfurter's dissent in the *Flag Salute Case*,[9] the practice can be readily observed. The degree, however, of restraint, the degree to which legislative enactments should be subjected to judicial scrutiny, is a matter of uncertain and shifting opinion.

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[3] *Infra, pp.* 2117-2127. In *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944), Justice Roberts, dissenting, observed that frequent reversals of earlier decisions tended to bring adjudications of the Supreme Court "into the same class as a restricted railroad ticket, good for this day and train only."

[4] E.g., *United States* v. *Rabinowitz*, 339 U.S. 56, 86 (1950) (Justice Frankfurter dissenting); *Baker* v. *Carr*, 369 U.S. 186, 339-340 (1962) (Justice Harlan dissenting); *Gray* v. *Sanders*, 372 U.S. 368, 383 (1963) (Justice Harlan dissenting). *But see Green* v. *United States*, 356 U.S. 165, 195 (1958) (Justice Black dissenting). And compare Justice Harlan's views in *Mapp* v. *Ohio*, 367 U.S.643, 674-675 (1961) (dissenting), with *Glidden* v. *Zdanok*, 370 U.S. 530, 543 (1962) (opinion of the Court).

[5] E.g., the Court's treatment of *Pope* v. *Williams*, 193 U.S. 621 (1904), in *Dunn* v. *Blumstein*, 405 U.S. 330, 337, n. 7 (1972). *And see* id., 361 (Justice Blackmun concurring.)

[6] *Terminiello* v. *City of Chicago*, 337 U.S. 1, 11 (1949) (dissenting).

[7] B. Cardozo, *The Nature of the Judicial Process* (New Haven: 1921), 141.

[8] Compare *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) (Justice Douglas), with id., 507 (Justice Black).

[9] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 646 (1943) (Dissenting).

## JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

### Cases Arising Under the Constitution, Laws, and Treaties of the United States

Cases arising under the Constitution are cases which require an interpretation of the Constitution for their correct decision.[1] They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority, usually an act of Congress or of a state legislature, and asks for judicial relief. The clause furnishes the principal textual basis for the implied power of judicial review of the constitutionality of legislation and other official acts.[2]

***Development of Federal Question Jurisdiction.***—Almost from the beginning, the Convention demonstrated an intent to create "federal question" jurisdiction in the federal courts with regard to federal laws;[3] such cases involving the Constitution and treaties were added fairly late in the Convention as floor amendments.[4] But when Congress enacted the Judiciary Act of 1789, it did not confer general federal question jurisdiction on the inferior federal courts but left litigants to remedies in state courts with appeals to the United States Supreme Court if judgment went against federal constitutional claims.[5] Although there were a few jurisdictional provisions enacted in the early years,[6] it was not until the period following the Civil War that Congress, in order to protect newly created federal civil rights and in the flush of nationalist sentiment, first created federal jurisdiction in civil rights cases[7] and

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[1] *Cohens* v. *Virginia*, 6 Wheat, (19 U.S.) 264, 378 (1821).

[2] *Supra, pp.* 713-720.

[3] M. Farrand, *Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 22, 211-212, 220, 244; 2 id., 146-147, 186-187.

[4] Id., 423-424, 430, 431.

[5] 1 Stat. 73. The district courts were given cognizance of "suits for penalties and forfeitures incurred, under the laws of the United States" and "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States . . . ." Id., 77, Plenary federal question jurisdiction was conferred by the Act of February 13, 1801, § 11, 2 Stat. 92, but this law was repealed by the Act of March 8, 1802, 2 Stat. 132. On § 25 of the 1789 Act, providing for appeals to the Supreme Court from state court constitutional decisions, *see supra, pp.* 718-720.

[6] Act of April 10, 1790, § 5, 1 Stat. 111, as amended, Act of February 21, 1793, § 6, 1 Stat. 322 (suits relating to patents). Limited removal provisions were also enacted. *Infra, pp.* 729-731.

[7] Act of April 9, 1866, § 3, 14 Stat, 27; Act of May 31, 1870, § 8,16 Stat. 142; Act of February 28, 1871, § 15, 16 Stat. 438; Act of April 20, 1871, §§ 2, 6, 17 Stat. 14, 15.

then in 1875 conferred general federal question jurisdiction on the lower federal courts.[8] Since that time, the trend generally has been toward conferral of ever-increasing grants of jurisdiction to enforce the guarantees recognized and enacted by Congress.[9]

***When a Case Arises Under.***—The 1875 statute and its present form both spoke of civil suits "arising under the Constitution, laws, or treaties of the United States," [10] the language of the Constitution. Thus, many of the early cases relied heavily upon Chief Justice Marshall's construction of the constitutional language to interpret the statutory language.[11] The result was probably to accept more jurisdiction than Congress had intended to convey.[12] Later cases take a somewhat more restrictive course.

Determination whether there is federal question jurisdiction is made on the basis of the plaintiff's pleadings and not upon the response or the facts as they may develop.[13] Plaintiffs seeking access to federal courts on this ground must set out a federal claim which is "well-pleaded" and the claim must be real and substantial and may not be without color of merit.[14] Plaintiffs may not anticipate that defendants will raise a federal question in answer to the action.[15] But what exactly must be pleaded to establish a federal question is a matter of considerable uncertainty in many cases. It is no longer the rule that when federal law is an ingredient of the claim there is a federal question.[16]

[8] Act of March 3, 1875, § 1, 18 Stat. 470, now 28 U.S.C. § 1331(a). The classic treatment of the subject and its history is F. Frankfurter & J. Landis, *The Business of the Supreme Court* (New York: 1928).

[9] For a brief summary, *see* H. Hart & H. Wechsler, *The Federal Courts and the Federal System* (Brooklyn: 1973), 844-850.

[10] 28 U.S.C. § 1331(a). The original Act was worded slightly differently.

[11] *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824). *See also Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 379 (1821).

[12] C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), § 17.

[13] *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199 (1877); *Mosher* v. *City of Phoenix*, 287 U.S. 29, 30 (1932); *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933).

[14] *Newburyport Water Co.* v. *City of Newburyport*, 193 U.S. 561, 576 (1904); *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933); *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 305-308 (1923). If the complaint states a case arising under the Constitution or federal law, federal jurisdiction exists even though on the merits the party may have no federal right. In such a case, the proper course for the court is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction. *Bell* v. *Hood*, 327, U.S. 678 (1946). Of course, dismissal for lack of jurisdiction is proper if the federal claim is frivolous or obviously insubstantial. *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933).

[15] *Louisville & N.R. Co.* v. *Mottley*, 211 U.S. 149 (1908). *See Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950).

[16] Such was the rule derived from *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824).

Many suits will present federal questions because a federal law creates the action.[17] Perhaps Justice Cardozo presented the most understandable line of definition, while cautioning that "[t]o define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards [approaching futility]." [18] "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . ." [19]

***Removal From State Court to Federal Court.***—A limited right to "remove" certain cases from state courts to federal courts was granted to defendants in the Judiciary Act of 1789,[20] and from then to 1872 Congress enacted several specific removal statutes, most of them prompted by instances of state resistance to the enforcement of federal laws through harassment of federal officers.[21] The 1875 Act conferring general federal question jurisdiction on the federal courts provided for removal of such cases by either party, subject only to the jurisdictional amount limitation.[22] The present statute provides for the removal by a defendant of any civil action which could have been brought originally in a federal district court, with no diversity of citizenship required in "federal question" cases.[23] A special civil rights removal statute permits re-

[17] *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). *Compare Albright* v. *Teas*, 106 U.S. 613 (1883), and *People of Puerto Rico* v. *Russell & Co.*, 288 U.S. 476 (1933), with *Feibelman* v. *Packard*, 109 U.S. 421 (1883), and *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22 (1913).

[18] *Gully* v. *First National Bank in Meridian*, 299 U.S. 109, 117 (1936).

[19] Id., 112-113. *Compare Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963), *with Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See also J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

[20] § 12, 1 Stat. 79.

[21] The first was the Act of February 4, 1815, § 8, 3 Stat. 198. The series of statutes is briefly reviewed in *Willingham* v. *Morgan*, 395 U.S. 402, 405-406 (1969), and in H. Hart & H. Wechsler, *The Federal Courts and the Federal System* (Brooklyn: 1973), 1192-1194. *See* 28 U.S.C. §§ 1442, 1442a.

[22] Act of March 3, 1875, § 2, 18 Stat. 471. The present pattern of removal jurisdiction was established by the Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

[23] 28 U.S.C. § 1441.

moval of any civil or criminal action by a defendant who is denied or cannot enforce in the state court a right under any law providing for equal civil rights of persons or who is being proceeded against for any act under color of authority derived from any law providing for equal rights.[24]

The constitutionality of congressional provisions for removal was challenged and readily sustained. Justice Story analogized removal to a form of exercise of appellate jurisdiction [25] and a later Court saw it as an indirect mode of exercising original jurisdiction and upheld its constitutionality.[1] In *Tennessee* v. *Davis*,[2] which involved a state attempt to prosecute a federal internal revenue agent who had killed a man while seeking to seize an illicit distilling apparatus, the Court invoked the right of the National Government to defend itself against state harassment and restraint. The power to provide for removal was discerned in the necessary and proper clause authorization to Congress to pass laws to carry into execution the powers vested in any other department or officer, here the judiciary.[3] The judicial power of the United States, said the Court, embraces alike civil and criminal cases arising under the Constitution and laws and the power asserted in civil cases may be asserted in criminal cases. A case arising under the Constitution and laws "is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. . . .

"The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the

[24] 28 U.S.C. § 1443. *See infra*, pp. 822–823.

[25] *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 347–351 (1816). Story was not here concerned with the constitutionality of removal but with the constitutionality of Supreme Court review of state judgments.

[1] *Chicago & Nw. Ry. Co.* v. *Whitton's Administrator*, 13 Wall. (80 U.S.) 270 (1872). Removal here was based on diversity of citizenship. *See also The Moses Taylor*, 4 Wall. (71 U.S.) 411, 429–430 (1867); *The Mayor* v. *Cooper*, 6 Wall. (73 U.S.) 247 (1868).

[2] 100 U.S. 257 (1880).

[3] Id., 263–264.

power has been in constant use ever since. The Judiciary Act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared." [4] The Court has broadly construed the modern version of the removal statute at issue in this case so that it covers all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.[5] Other removal statutes, notably the civil rights removal statute, have not been so broadly interpreted.[6]

***Corporations Chartered by Congress.***—In *Osborn* v. *Bank of the United States*,[7] Chief Justice Marshall seized upon the authorization for the Bank to sue and be sued as a grant by Congress to the federal courts of jurisdiction in all cases to which the bank was a party.[8] Consequently, upon enactment of the 1875 law, the door was open to other federally chartered corporations to seek relief in federal courts. This opportunity was made actual when the Court in the *Pacific Railroad Removal Cases* [9] held that tort actions against railroads with federal charters could be removed to federal courts solely on the basis of federal incorporation. In a series of acts, Congress deprived national banks of the right to sue in federal court solely on the basis of federal incorporation in 1882,[10] deprived railroads holding federal charters of this right in 1915,[11] and finally in 1925 removed from federal jurisdiction all suits brought by federally chartered corporations on the sole basis of such incorporation, except where the United States holds at least half of the stock.[12]

***Federal Questions Resulting from Special Jurisdictional Grants.***—In the Labor-Management Relations Act of 1947, Congress authorized federal courts to entertain suits for violation of collec-

[4] Id., 264–265.

[5] *Willingham* v. *Morgan*, 395 U.S. 402 (1969). *See also Maryland* v. *Soper*, 270 U.S. 9 (1926).

[6] *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966); *Johnson* v. *Mississippi*, 421 U.S. 213 (1975). *See infra*, pp. 822–823.

[7] 9 Wheat. (22 U.S.) 738 (1824).

[8] The First Bank could not sue because it was not so authorized. *Bank of the United States* v. *Deveaux*, 5 Cr. (9 U.S.) 61 (1809). The language which Marshall interpreted as conveying jurisdiction is now construed simply to give a party the right to sue and be sued without itself creating jurisdiction. *Bankers Trust Co.* v. *Texas & P. Ry. Co.*, 241 U.S. 295 (1916).

[9] 115 U.S. 1 (1885).

[10] § 4, 22 Stat. 162.

[11] § 5, 38 Stat. 803.

[12] *See* 28 U.S.C. § 1349.

tive bargaining agreements without respect to the amount in controversy or the citizenship of the parties.[13] Although it is likely that Congress meant no more than that labor unions could be suable in law or equity, in distinction from the usual rule, the Court construed the grant of jurisdiction to be more than procedural and to empower federal courts to apply substantive federal law, divined and fashioned from the policy of national labor laws, in such suits.[14] State courts are not disabled from hearing actions brought under the section,[15] but they must apply federal law.[16] Developments under this section illustrate the substantive importance of many jurisdictional grants and indicate how the workload of the federal courts may be increased by unexpected interpretations of such grants.[17]

[13] § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185.

[14] *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Earlier the Court had given the section a restricted reading in *Assn. of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955), at least in part because of constitutional doubts that § 301 cases in the absence of diversity of citizenship presented a federal question sufficient for federal jurisdiction. Id., 449–452, 459–461 (opinion of Justice Frankfurter). In *Lincoln Mills*, *supra*, the Court resolved this difficulty by ruling that federal law was at issue in § 301 suits and thus cases arising under § 301 presented federal questions. 353 U.S., 457. The particular holding of *Westinghouse*, that no jurisdiction exists under § 301 for suits to enforce personal rights of employees claiming unpaid wages, was overturned in *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962).

[15] *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962).

[16] *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). State law is not, however, to be totally disregarded. "State law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957).

[17] For example, when federal regulatory statutes create new duties without explicitly creating private federal remedies for their violation, the readiness or unreadiness of the federal courts to infer private causes of action is highly significant. While inference is an acceptable means of judicial enforcement of statutes, e.g., *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33 (1916), the Court began broadly to construe statutes to infer private actions only with *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). *See Cort* v. *Ash*, 422 U.S. 66 (1975). More recently, influenced by a separation of powers critique of implication by Justice Powell, the Court has drawn back and asserted it will imply an action only in instances of fairly clear congressional intent. *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U.S. 1 (1981); *Merrill, Lynch* v. *Curran*, 456 U.S. 353 (1982). The Court appears more ready to infer private causes of action for constitutional violations. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Carlson* v. *Green*, 446 U.S. 14 (1980). Also, "federal common law" may exist in a number of areas where federal interests are involved and federal courts may take cognizance of such suits under their "arising under" jurisdiction. E.g., *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972). The Court is, however, somewhat wary of finding "federal common law" in the absence of some congressional authorization to formulate substantive rules, *Texas Industries* v. *Radcliff Materials*, 451 U.S. 630 (1981), and Congress may always statutorily displace the judicially created law. *City of Mil-*

***Civil Rights Act Jurisdiction.***—Perhaps the most important of the special federal question jurisdictional statutes is that conferring jurisdiction on federal district courts to hear suits challenging the deprivation under color of state law or custom of any right, privilege, or immunity secured by the Constitution or by any act of Congress providing for equal rights.[18] Because it contains no jurisdictional amount provision [19] (while the general federal question statute until recently did) [20] and because the Court has held inapplicable the judicially-created requirement that a litigant exhaust his state remedies before bringing federal action,[21] the statute has been heavily utilized, resulting in a formidable caseload, by plaintiffs attacking racial discrimination, malapportionment and suffrage restrictions, illegal and unconstitutional police practices, state restrictions on access to welfare and other public assistance, and a variety of other state and local governmental practices.[22]

*waukee* v. *Illinois*, 451 U.S. 304 (1981). Finally, federal courts have federal question jurisdiction of claims created by state law if there exists an important necessity for an interpretation of an act of Congress. *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

[18] 28 U.S.C. § 1343(3). The cause of action to which this jurisdictional grant applies is 42 U.S.C. § 1983, making liable and subject to other redress any person who, acting under color of state law, deprives any person of any rights, privileges, or immunities secured by the Constitution and laws of the United States. For discussion of the history and development of these two statutes, *see Monroe* v. *Pape*, 365 U.S. 167 (1961); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). Although the two statutes originally had the same wording in respect to "the Constitution and laws of the United States," when the substantive and jurisdictional aspects were separated and codified, § 1983 retained the all-inclusive "laws" provision, while § 1343(3) read "any Act of Congress providing for equal rights." The Court has interpreted the language of the two statutes literally, so that while claims under laws of the United States need not relate to equal rights but may encompass welfare and regulatory laws, *Maine* v. *Thiboutot*, *supra*; *but see Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U.S. 1 (1981), such suits if they do not spring from an act providing for equal rights may not be brought under § 1343(3). *Chapman* v. *Houston Welfare Rights Org.*, *supra*. This was important when there was a jurisdictional amount provision in the federal question statute but is of little significance today.

[19] *See Hague* v. *CIO*, 307 U.S. 496 (1939). Following *Hague*, it was argued that only cases involving personal rights, that could not be valued in dollars, could be brought under § 1343(3), and that cases involving property rights, which could be so valued, had to be brought under the federal question statute. This attempted distinction was rejected in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 546–548 (1972). On the valuation of constitutional rights, *see Carey* v. *Piphus*, 435 U.S. 247 (1978).

[20] 28 U.S.C. § 1331 was amended in 1976 and 1980 to eliminate the jurisdictional amount requirement. P.L. 94-574, 90 Stat. 2721; P.L. 96-486, 94 Stat. 2369.

[21] *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982). This had been the rule since at least *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

[22] Thus, such notable cases as *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Baker* v. *Carr*, 369 U.S. 186 (1962), arose under the statutes.

Congress has encouraged utilization of the two statutes by providing for attorneys' fees under § 1983 [23] and by enacting related and specialized complementary statutes.[24] The Court in recent years has generally interpreted § 1983 and its jurisdictional statute broadly but it has also sought to restrict to some extent the kinds of claims that may be brought in federal courts.[25] It should be noted that § 1983 and § 1343(3) need not always go together, inasmuch as § 1983 actions may be brought in state courts.[1]

***Pendent Jurisdiction.***—Once jurisdiction has been acquired through allegation of a federal question not plainly wanting in substance,[2] a federal court may decide any issue necessary to the disposition of a case, notwithstanding that other non-federal questions of fact and law may be involved therein.[3] "Pendent jurisdiction," as this form is commonly called, exists whenever the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." [4] Ordinarily, it is a rule of prudence that federal courts should not pass on federal constitutional claims if they may avoid it and should rest their conclusions upon principles of state law where possible.[5] But the federal court has discre-

[23] Civil Rights Attorneys' Fees Award Act of 1976, P.L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988. *See Hutto* v. *Finney*, 437 U.S. 678 (1978); *Maine* v. *Thiboutot*, 448 U.S. 1 (1980).

[24] Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349 (1980), 42 U.S.C. § 1997 *et seq.*

[25] E.g., *Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Ingraham* v. *Wright*, 430 U.S. 651 (1977).

[1] *Maine* v. *Thiboutot*, 448 U.S. 1 (1980).

[2] *Levering & Garringues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933); *Hagans* v. *Lavine*, 415 U.S. 528, 534-543 (1974).

[3] *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738, 822-828 (1824); *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909); *Hurn* v. *Oursler*, 289 U.S. 238 (1933); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

[4] Id., 725. This test replaced a difficult-to-apply test of *Hurn* v. *Oursler*, 289 U.S. 238, 245-246 (1933). Whether the similar concept of "pendent parties," that is, whether federal courts may take jurisdiction of a state claim against one party if it is related closely enough to a federal claim against another party, even though there is no independent jurisdictional base for the state claim, is permissible is unclear. C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), 107-109. The Court has observed that the concept presents "a subtle and complex question," *Moor* v. *County of Alameda*, 411 U.S. 693, 713-715 (1973), and has disapproved it in one specific particularistic context. *Aldinger* v. *Howard*, 427 U.S. 1 (1976).

[5] *Siler* v. *Louisville & Nashville R. Co.*, 213 U.S. 175 (1909); *Greene* v. *Louisville & Interurban R. Co.*, 244 U.S. 499 (1917); *Hagans* v. *Lavine*, 415 U.S. 528, 546-550 (1974). In fact, it may be an abuse of discretion for a federal court to fail to decide on an available state law ground instead of reaching the federal constitutional question. *Schmidt* v. *Oakland Unified School Dist.*, 457 U.S. 594 (1982) (*per curiam*).

tion whether to hear the pendent state claims in the proper case. Thus, the trial court should look to "considerations of judicial economy, convenience and fairness to litigants" in exercising its discretion and should avoid needless decisions of state law. If the federal claim, though substantial enough to confer jurisdiction, was dismissed before trial, or if the state claim was substantially predominate, the court would be justified in dismissing the state claim.[6]

A variant of pendent jurisdiction, sometimes called "ancillary jurisdiction," is the doctrine allowing federal courts to acquire jurisdiction entirely of a case presenting two *federal* issues, although it might properly not have had jurisdiction of one of the issues if it had been independently presented.[7] Thus, in an action under a federal statute, a compulsory counterclaim not involving a federal question is properly before the court and should be decided.[8] The concept has been applied to a claim otherwise cognizable only in admiralty when joined with a related claim on the law side of the federal court and in this way to give an injured seaman a right to jury trial on all of his claims when ordinarily the claim cognizable only in admiralty would be tried without a jury.[9] And a colorable constitutional claim has been held to support jurisdiction over a federal statutory claim arguably not within federal jurisdiction.[10]

***Supreme Court Review of State Court Decisions.***—In addition to the constitutional issues presented by § 25 of the Judiciary Act of 1789 and subsequent enactments,[11] questions have continued to arise concerning review of state court judgments which go directly to the nature and extent of the Supreme Court's appellate jurisdiction. Because of the sensitivity of federal-state relations and the delicate nature of the matters presented in litigation touching upon them, jurisdiction to review decisions of a state court is dependent in its exercise not only upon ascertainment of the exist-

[6] *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726–727 (1966).

[7] The initial decision was *Freeman* v. *Howe*, 24 How. (65 U.S.) 450 (1861), in which federal jurisdiction was founded on diversity of citizenship.

[8] *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926).

[9] *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 380–381 (1959); *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963).

[10] *Rosado* v. *Wyman*, 397 U.S. 397, 400-405 (1970).

[11] On § 25, *see supra*, *pp.* 719–720. The present statute is 28 U.S.C. § 1257, which provides that review is by appeal if the state court judgment is against the validity of a law or treaty of the United States or is for the validity of a state law being challenged as in conflict with the United States Constitution or a law or treaty of the United States and is by writ of *certiorari* where the validity of a treaty or law of the United States is unsuccessfully challenged, where a state law is declared in conflict with the Constitution, laws, or treaties of the United States, or where a right, privilege, or immunity is claimed under the Constitution, laws, or treaties of the United States.

ence of a federal question but upon a showing of exhaustion of state remedies and of the finality of the state judgment. Because the application of these standards to concrete facts is neither mechanical nor nondiscretionary, the Justices have often been divided whether these requisites to the exercise of jurisdiction have been met in specific cases submitted for review by the Court.

The Court is empowered to review the judgments of "the highest court of a State in which a decision could be had." [12] This will ordinarily be the State's court of last resort, but it could well be an intermediate appellate court or even a trial court if its judgment is final under state law and cannot be reviewed by any state appellate court.[13] The review is of a final judgment below. "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." [14] The object of this rule is to avoid piecemeal interference with state court proceedings; it promotes harmony by preventing federal assumption of a role in a controversy until the state court efforts are finally resolved.[15] For similar reasons, the Court requires that a party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and he must have raised the issue at the appropriate time below.[16]

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[12] 28 U.S.C. § 1257. *See* R. Stern & E. Gressman, *Supreme Court Practice* (Washington; 5th ed. 1978), ch. 3.

[13] *Grovey* v. *Townsend*, 295 U.S. 45, 47 (1935); *Talley* v. *California*, 362 U.S. 60, 62 (1960); *Thompson* v. *City of Louisville*, 362 U.S. 199, 202 (1960); *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555 (1960); *Powell* v. *Texas*, 392 U.S. 516, 517 (1968)

[14] *Market Street R. Co.*, v. *Railroad Comm.*, 324 U.S. 548, 551 (1945). *See aslo Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72 (1946); *Berman* v. *United States*, 302 U.S. 211 (1937); *Edwards* v. *California*, 314 U.S. 160, 171 (1941); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981); *Flynt* v. *Ohio*, 451 U.S. 619 (1981); *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105 (1981). In recent years, however, the Court has developed a series of exceptions permitting review when the federal issue in the case has been finally determined but there are still proceedings in the lower state courts to come. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-487 (1975); *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 246 (1974); *North Dakota Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, 159-164 (1973).

[15] *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67-69 (1948); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 123-124 (1945).

[16] *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Beck* v. *Washington*, 369 U.S. 541 (1962); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *but see Stanley* v. *Illinois*, 405 U.S. 645 (1972). The same rule applies on *habeas corpus* petitions. E.g., *Picard* v. *Connor*, 404 U.S. 270 (1972).

When the judgment of a state court rests on an adequate, independent determination of state law, the Court will not review the resolution of the federal questions decided, even though the resolution may be in error.[17] "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." [18] The Court is faced with two interrelated decisions: whether the state court judgment is based upon a nonfederal ground and whether the nonfederal ground is adequate to support the state court judgment. It is, of course, the responsibility of the Court to determine for itself the answer to both questions.[19]

The first question may be raised by several factual situations. A state court may have based its decision on two grounds, one federal, one nonfederal.[20] It may have based its decision solely on a nonfederal ground but the federal ground may have been clearly raised.[21] Both federal and nonfederal grounds may have been raised but the state court judgment is ambiguous or is without written opinion stating the ground relied on.[22] Or the state court may have decided the federal question although it could have based its ruling on an adequate, independent nonfederal ground.[23] In any event, it is essential for purposes of review by the Supreme Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, that the federal question was actually decided

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[17] *Murdock* v. *City of Memphis*, 20 Wall. (87 U.S.) 590 (1874); *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956); *Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958).

[18] *Herb* v. *Pitcairn*, 324 U.S. 117, 125–126 (1945).

[19] *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298 (1956); *Staub* v. *Baxley*, 355 U.S. 313, 318 (1958).

[20] *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961).

[21] *Wood* v. *Chesborough*, 228 U.S. 672, 676–680 (1913).

[22] *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54–55 (1934); *Williams* v. *Kaiser*, 323 U.S. 471, 477 (1945); *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956); *Klinger* v. *Missouri*, 13 Wall. (80 U.S.) 257, 263 (1872); *cf. Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194 (1965).

[23] *Poafpybitty* v. *Skelly Oil Co.*, U.S. 365, 375–376 (1968).

or that the judgment could not have been rendered without deciding it.[24]

With regard to the second question, in order to preclude Supreme Court review, the nonfederal ground must be broad enough, without reference to the federal question, to sustain the state court judgment,[25] the nonfederal ground must be independent of the federal question,[26] and the nonfederal ground must be a tenable one.[27] Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude Supreme Court review as an adequate independent state ground,[28] so long as the local procedure does not discriminate against the raising of federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights.[29]

**Suits Affecting Ambassadors, Other Public Ministers, and Consuls**

The earliest interpretation of the grant of original jurisdiction to the Supreme Court came in the Judiciary Act of 1789, which conferred on the federal district courts jurisdiction of suits to which a consul might be a party. This legislative interpretation was sustained in 1793 in a circuit court case in which the judges held the Congress might vest concurrent jurisdiction involving consuls in the inferior courts and sustained an indictment against a consul.[1] Many years later the Supreme Court held that consuls

[24] *Southwestern Bell Tel. Co.* v. *Oklahoma*, 303 U.S. 206 (1938); *Raley* v. *Ohio*, 360 U.S. 423, 434-437 (1959). When there is uncertainty about what the state court did, the usual practice is to remand for clarification. *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940); *California* v. *Krivda*, 409 U.S. 33 (1972). *See California Dept. of Motor Vehicles* v. *Rios*, 410 U.S. 425 (1973).

[25] *Murdock* v. *City of Memphis*, 20 Wall. (87 U.S.) 590, 636 (1874).

[26] *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958).

[27] *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Ward* v. *Love County*, 253 U.S. 17. 22 (1920); *Staub* v. *Baxley*, 355 U.S. 313, 319-320 (1958).

[28] *Nickel* v. *Cole*, 256 U.S. 222, 225 (1921); *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960).

[29] *Davis* v. *Wechsler*, 263 U.S. 22, 24-25 (1923); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 455-458 (1958); *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). This rationale probably explains *Henry* v. *Mississippi*, 379 U.S. 443 (1965). *See also* in the criminal area, *Edelman* v. *Califonia*, 344 U.S. 357, 362 (1953) (dissenting opinion); *Brown* v. *Allen*, 344 U.S. 443, 554 (1953) (dissenting opinion); *Williams* v. *Georgia*, 349 U.S. 375, 383 (1955); *Monger* v. *Florida*, 405 U.S. 958 (1972) (dissenting opinion).

[1] *United States* v. *Ravara*, 2 Dall. (2 U.S.) 297 (C.C. Pa. 1793).

could be sued in the federal courts,[2] and in another case in the same year declared sweepingly that Congress could grant concurrent jurisdiction to the inferior courts in cases where Supreme Court has been invested with original jurisdiction.[3] Nor does the grant of original jurisdiction to the Supreme Court in case affecting ambassadors and consuls of itself preclude suits in state courts against consular officials. The leading case is *Ohio ex rel. Popovici* v. *Agler*[4] in which a Rumanian vice-consul contested an Ohio judgment against him for divorce and alimony.

A number of incidental questions arise in connection with the phrase "affecting ambassadors and consuls." Does the ambassador or consul to be affected have to be a party in interest, or is a mere indirect interest in the outcome of the proceeding sufficient? In *United States* v. *Ortega*,[5] the Court ruled that a prosecution of a person for violating international law and the laws of the United States by offering violence to the person of a foreign minister was not a suit "affecting" the minister but a public prosecution for vindication of the laws of nations and the United States. Another question concerns the official status of a person claiming to be an ambassador or consul.

The Court has refused to review the decision of the Executive with respect to the public character of a person claiming to be a public minister and has laid down the rule that it has the right to accept a certificate from the Department of State on such a question.[6] A third question was whether the clause included ambassadors and consuls accredited by the United States to foreign governments. The Court held that it includes only persons accredited to the United States by foreign governments.[7] However, in matters of especial delicacy, such as suits against ambassadors and public ministers or their servants, where the law of nations permits such suits, and in all controversies of a civil nature in which a State is a party, Congress until recently made the original jurisdiction of the Supreme Court exclusive of that of other courts.[8] By its compliance with the congressional distribution of exclusive and concurrent original jurisdiction, the Court has tacitly sanctioned the power of

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[2] *Bors* v. *Preston*, 111 U.S. 252 (1884).
[3] *Ames* v. *Kansas ex rel. Johnston*, 111 U.S. 449, 469 (1884).
[4] 280 U.S. 379, 383, 384 (1930). Now precluded by 28 U.S.C. § 1351.
[5] 11 Wheat. (24 U.S.) 467 (1826).
[6] *In re Baiz*, 135 U.S. 403, 432 (1890).
[7] *Ex parte Gruber*, 269 U.S. 302 (1925).
[8] 1 Stat. 73 (1789). Jurisdiction in the Supreme Court since 1978 has been original but not exclusive. P.L. 95-393, § 8(b), 92 Stat. 810, 28 U.S.C. § 1251(b)(1).

Congress to make such jurisdiction exclusive or concurrent as it may choose.

**Cases of Admiralty and Maritime Jurisdiction**

The admiralty and maritime jurisdiction of the federal courts had its origins in the jurisdiction vested in the courts of the Admiral of the English Navy. Prior to independence, vice-admiralty courts were created in the Colonies by commissions from the English High Court of Admiralty. After independence, the States established admiralty courts, from which at a later date appeals could be taken to a court of appeals set up by Congress under the Articles of Confederation.[1] Since one of the objectives of the Philadelphia Convention was the promotion of commerce through removal of obstacles occasioned by the diverse local rules of the States, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over admiralty and maritime cases.[2]

The Constitution uses the terms "admiralty and maritime jurisdiction" without defining them. Though closely related the words are not synonyms. In England the word "maritime" referred to the cases arising upon the high seas, whereas "admiralty" meant primarily cases of a local nature involving police regulations of shipping, harbors, fishing, and the like. A long struggle between the admiralty and common law courts had, however, in the course of time resulted in a considerable curtailment of English admiralty jurisdiction. A much broader conception of admiralty and maritime jurisdiction existed in the United States at the time of the framing of the Constitution than in the Mother Country.[3] At the very be-

[1] G. Gilmore & C. Black, *The Law of Admiralty* (Brooklyn: 1957), ch. 1.

[2] Nothing really appears in the records of the Convention which sheds light on the Framers' views about admiralty. The present clause was contained in the draft of the Committee on Detail. 2 M. Farrand, *Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 186–187. None of the plans presented to the Convention, with the exception of an apparently authentic Charles Pinckney plan. 3 id., 601–604, 608, had mentioned an admiralty jurisdiction in national courts. *See* Putnam, "How the Federal Courts Were Given Admiralty Jurisdiction." 10 Corn. L.Q. 460 (1925).

[3] G. Gilmore & C. Black, *The Law of Admiralty* (Brooklyn: 1957), ch 1. In *DeLovio* v. *Boit*, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass 1815), Justice Story delivered a powerful historical and jurisprudential argument against the then-restrictive English system. *See also Waring* v. *Clarke*, 5 How. (46 U.S.) 441, 451–459 (1847); *New Jersey Steam Navigation Co.* v. *Merchants' Bank of Boston*, 6 How. (47 U.S.) 34, 385–390 (1848).

ginning of government under the Constitution, Congress conferred on the federal district courts exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; . . . ." [4] This broad legislative interpretation of admiralty and maritime jurisdiction soon won the approval of the federal circuit courts, which ruled that the extent of admiralty and maritime jurisdiction was not to be determined by English law but by the principles of maritime law as respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe.[5]

Although a number of Supreme Court decisions had earlier sustained the broader admiralty jurisdiction on specific issues,[6] it was not until 1848 that the Court ruled squarely in its favor, which it did by declaring that "whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed." [7] The Court thereupon proceeded to hold that admiralty had jurisdiction *in personam* as well as *in rem* over controversies arising out of contracts of affreightment between New York and Providence.

***Power of Congress To Modify Maritime Law.***—The Constitution does not identify the source of the substantive law to be applied in the federal courts in cases of admiralty and maritime jurisdiction. Nevertheless, the grant of power to the federal courts in Article III necessarily implies the existence of a substantive maritime law which, if they are required to do so, the federal courts can fashion

[4] § 9, 1 Stat. 77 (1789); now 28 U.S.C. § 1333 in only slightly changed fashion. For the classic exposition, *see* Black, "Admiralty Jurisdiction: Critique and Suggestions," 50 Colum. L. Rev. 259 (1950).

[5] E.g., *DeLovio* v. *Boit*, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); *The Seneca*, 21 Fed. Cas. 1801 (No. 12670) C.C.E.D.Pa. 1829) Justice Washington).

[6] *The Vengeance*, 3 Dall. (3U.S.) 297 (1796); *The Schooner Sally*, 2 Cr. (6 U.S.) 406 (1805); *The Schooner Betsy*, 4 Cr. (8 U.S.) 443 (1808); *The Samuel*, 1 Wheat. (14 U.S.) 9 (1816); *The Octavig*, 1 Wheat. (14 U.S.) 20 (1816).

[7] *New Jersey Steam Navigation Co.* v. *Merchants' Bank of Boston*, 6 How. (47 U.S.) 334, 386 (1848); *see also Waring* v. *Clarke*, 5 How. (46 U.S.) 441 (1847).

for themselves.[8] But what of the power of Congress in this area? In *The Lottawanna*,[9] Justice Bradley undertook a definitive exposition of the subject. No doubt, the opinion of the Court notes, there exists "a great mass of maritime law which is the same in all commercial countries," still "the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country." [10] "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it . . . .

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." [11]

"It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed." [12] That Congress' power to enact substantive maritime law was conferred by the commerce clause was assumed in numerous opinions,[13] but later opinions by Justice Bradley firmly established

[8] *Swift & Co. Packers* v. *Compania Columbiana Del Caribe*, 339 U.S. 684, 690, 691 (1950); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360–361 (1959). For a recent example, *see Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). *Compare The Lottawanna*, 21 Wall. (88 U.S.) 558, 576–577 (1875) ("But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department."). States can no more override rules of judicial origin than they can override acts of Congress. *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.*, 348 U.S. 310, 314 (1955).

[9] 21 Wall. (88 U.S.) 558 (1875).

[10] Id., 572.

[11] Id., 574–575.

[12] Id., 577.

[13] E.g., *The Daniel Ball*, 10 Wall. (77 U.S.) 557, 564 (1871); *Moore* v. *American Transp. Co.*, 24 How. (65 U.S.) 1, 39 (1861); *Providence & N.Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578 (1883); *The Robert W. Parsons*, 191 U.S. 17 (1903).

that the source of power was the admiralty grant itself, as supplemented by the second prong of the necessary and proper clause.[14] Thus, "[a]s the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures." [15] Rejecting an attack on a maritime statute as an infringment of intrastate commerce, Justice Bradley wrote: "It is unnecessary to invoke the power given the Congress to regulate commerce in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends." [16]

The law administered by federal courts in admiralty is therefore an amalgam of the general maritime law insofar as it is acceptable to the courts, modifications of that law by congressional amendment, the common law of torts and contracts as modified to the extent constitutionally possible by state legislation, and international prize law. This body of law is at all times subject to modification by the paramount authority of Congress acting in pursuance of its powers under the admiralty and maritime clause and the necessary and proper clause and, no doubt, the commerce clause, now that the Court's interpretation of that clause has become so expansive.[17] Of this power there has been uniform agreement among the Justices of the Court.[18]

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[14] *Butler* v. *Boston & S. S.S. Co.*, 130 U.S. 527 (1889); *In re Garnett*, 141 U.S. 1 (1891). The second prong of the necessary and proper clause is the authorization to Congress to enact laws to carry into execution the powers vested in other departments of the Federal Government. *Supra*, *pp.* 370–375. *See Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 42 (1934).

[15] *Butler* v. *Boston & S. S.S. Co.*, 130 U.S. 527, 557 (1889).

[16] *In re Garnett*, 141 U.S. 1, 12 (1891). *See also Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215 (1917); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 160 (1920); *Crowell* v. *Benson*, 285 U.S. 22, 55 (1932). The Jones Act, under which injured seamen may maintain an action at law for damages, has been reviewed as an exercise of legislative power deducible from the admiralty clause. *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 386, 388, 391 (1924); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360–361 (1959). On the limits to the congressional power, *see Panama R.R. Co.* v. *Johnson*, *supra*, 386–387; *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 43–44 (1934).

[17] On the commerce clause, *see supra*, *pp.* 153ff.

[18] Thus, Justice McReynolds' assertion of the paramountcy of congressional power in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215 (1917), was not disputed by the four dissenters in that case and is confirmed in subsequent cases critical of

***Admiralty and Maritime Cases.***—Admiralty and maritime jurisdiction comprises two types of cases: (1) those involving acts committed on the high seas or other navigable waters, and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first category, which includes prize cases and torts, injuries, and crimes committed on the high seas, jurisdiction is determined by the locality of the act, while in the second category subject matter is the primary determinative factor.[19] Specifically, contract cases include suits by seamen for wages,[20] cases arising out of marine insurance policies,[21] ac-

*Jensen* which in effect invite congressional modification of maritime law. E.g., *Davis* v. *Dept. of Labor and Industries*, 317 U.S. 249 (1942). The nature of maritime law has excited some relevant controversy. In *American Ins. Co.* v. *Canter*, 1 Pet. (26 U.S.) 516, 545 (1828), Chief Justice Marshall declared that admiralty cases do not "arise under the Constitution or laws of the United States" but "are as old as navigation itself; and the law, admiralty and maritime as it has existed for ages, is applied by our Courts to the cases as they arise". In *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959), the plaintiff sought a jury trial in federal court on a seaman's suit for personal injury on an admiralty claim, contending that cases arising under the general maritime law are "civil actions" that arise "under the Constitution, laws, or treaties of the United States", 28 U.S.C. § 1331. Five Justices in an opinion by Justice Frankfurter disagreed. Maritime cases do not arise under the Constitution or laws of the United States for federal question purposes and must, absent diversity, be instituted in admiralty where there is no jury trial. The dissenting four, Justice Brennan for himself and Chief Justice Warren and Justices Black and Douglas, contended that maritime law, although originally derived from international sources, is operative within the United States only by virtue of having been accepted and adopted pursuant to Article III, and accordingly judicially originated rules formulated under authority derived from that Article are "laws" of the United States to the same extent as those enacted by Congress.

[19] *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); *Waring* v. *Clarke*, 5 How. (46 U.S.) 441 (1847).

[20] *Sheppard* v. *Taylor*, 5 Pet. (30 U.S.) 675, 710 (1831). A seaman employed by the Government making a claim for wages cannot proceed in admiralty but must bring his action under the Tucker Act in the Court of Claims or in the district court if his claim does not exceed $10,000. *Amell* v. *United States*, 384 U.S. 158 (1966). In *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961), an oral agreement between a seaman and a shipowner whereby the latter in consideration of the seaman's forbearance to press his maritime right to maintenance and cure promised to assume the consequences of improper treatment of the seaman at a Public Health Service Hospital was held to be a maritime contract. *See also Archawski* v. *Hanioti*, 350 U.S. 532 (1956).

[21] *Insurance Co.* v. *Dunham*, 11 Wall. (78 U.S.) 1, 31 (1871); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). Whether admiralty jurisdiction exists if the vessel is not engaged in navigation or commerce when the insurance claim arises is open to question. *Jeffcott* v. *Aetna Ins. Co.*, 129 F. 2d 582 (C.A. 2), *cert. den.*, 317 U.S. 663 (1942). Contracts and agreements to procure marine insurance are outside the admiralty jurisdiction. *Compagnie Francaise De Navigation A Vapeur* v. *Bonnasse*, 19 F. 2d 777 (C.A. 2, 1927).

tions for towage [22] or pilotage [23] charges, actions on bottomry or respondentia bonds,[24] actions for repairs on a vessel already used in navigation,[25] contracts of affreightment,[1] compensation for temporary wharfage,[2] agreements of consortship between the masters of two vessels engaged in wrecking,[3] and surveys of damaged vessels.[4] That is, admiralty jurisdiction "extends to all contracts, claims and services essentially maritime." [5] But the courts have never enunciated an unambiguous test which would enable one to determine in advance whether a given case is a maritime one or not.[6] "The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract . . . ." [7]

[22] *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638 (1900). For recent Court difficulties with exculpatory features of such contracts, *see Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1955); *Boston Metals Co.* v. *The Winding Gulf*, 349 U.S. 122 (1955); *United States* v. *Nielson*, 349 U.S. 129 (1955); *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 (1959); *Dixilyn Drilling Corp.* v. *Crescent Towage & Salvage Co.*, 372 U.S. 697 (1963).

[23] *Atlee* v. *Packet Co.*, 21 Wall. (88 U.S.) 389 (1875); *Ex parte McNiel*, 13 Wall. (80 U.S.) 236 (1872). *See also Sun Oil* v. *Dalzell Towing Co.*, 287 U.S. 291 (1932).

[24] *The Grapeshot*, 9 Wall. (76 U.S.) 129 (1870); *O'Brien* v. *Miller*, 168 U.S. 287 (1897); *The Aurora*, 1 Wheat. (14 U.S.) 94 (1816); *Delaware Mut. Safety Ins. Co.* v. *Gossler*, 96 U.S. 645 (1877). But ordinary mortgages even though the securing property is a vessel, its gear, or cargo are not considered maritime contracts. *Bogart* v. *The Steamboat John Jay*, 17 How. (58 U.S.) 399 (1854); *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 32 (1934).

[25] *New Bedford Dry Dock Co.* v. *Purdy*, 258 U.S. 96 (1922); *The General Smith*, 4 Wheat. (17 U.S.) 438 (1819). There is admiralty jurisdiction even though the repairs are not be be made in navigable waters but, perhaps, in dry dock. *North Pacific SS. Co.* v. *Hall Brothers Marine R. & S. Co.*, 249 U.S. 119 (1919). But contracts and agreements pertaining to the original construction of vessels are not within admiralty jurisdiction. *Peoples Ferry Co.* v. *Joseph Beers*, 20 How. (61 U.S.) 393 (1858); *North Pacific S.S. Co.* v. *Hall Brothers Marine R. & S. Co.*, *supra*, 127.

[1] *New Jersey Steam Navigation Co.* v. *Merchants' Bank of Boston*, 6 How. (47 U.S.) 344 (1848).

[2] *Ex Parte Easton*, 95 U.S. 68 (1877).

[3] *Andrews* v. *Wall*, 3 How. (44 U.S.) 568 (1845).

[4] *Janney* v. *Columbia Ins. Co.*, 10 Wheat. (23 U.S.) 411, 412, 415, 418 (1825); *The Tilton*, 23 Fed. Cas. 1277 (No. 14054) (C.C.D. Mass. 1830) (Justice Story).

[5] *Ex parte Easton*, 95 U.S. 68, 72 (1877).

[6] E.g., *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); *The Steamboat Orleans* v. *Phoebus*, 11 Pet. (36 U.S.) 175, 183 (1837); *The People's Ferry Co.* v. *Joseph Beers*, 20 How. (61 U.S.) 393, 401 (1858); *New England Marine Ins. Co.* v. *Dunham*, 11 Wall. (78 U.S.) 1, 26 (1870); *Detriot Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 48 (1934).

[7] *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 735 (1961).

Maritime torts include injuries to persons,[8] damages to property arising out of collisions or other negligent acts,[9] and violent dispossession of property.[10] Unlike contract cases, maritime tort jurisdiction historically depended exclusively upon the commission of the wrongful act upon navigable waters, regardless of any connection or lack of connection with shipping or commerce.[11] The Court has now held, however, that in addition to the requisite situs a significant relationship to traditional maritime activity must exist in order for the admiralty jurisdiction of the federal courts to be invoked.[12] Both the Court and Congress have created exceptions to the situs test for maritime tort jurisdiction to extend landward the occasions for certain connected persons or events to come within admiralty, not without a little controversy.[13]

[8] *The City of Panama*, 101 U.S. 453 (1880). Reversing a long-standing rule, the Court has allowed recovery under general maritime law for the wrongful death of a seaman. *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970).

[9] *The Raithmoor*, 241 U.S. 166 (1916); *Erie R.R. Co.* v. *Erie Transportation Co.*, 204 U.S. 220 (1907).

[10] *L'Invincible*, 1 Wheat (14 U.S.) 238 (1816); *In re Fassett*, 142 U.S. 479 (1892).

[11] *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); *Philadelphia, W. & B. R.R.* v. *Philadelphia & Havre De Grace Steam Towboat Co.*, 23 How. (64 U.S.) 209, 215 (1859); *The Plymouth*, 3 Wall. (70 U.S.) 20, 33–34 (1865); *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 476 (1922).

[12] *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249 (1972) (plane crash in which plane landed wholly fortuitously in navigable waters off the airport runway not in admiralty jurisdiction). However, so long as there is maritime activity, there need not be a maritime commercial nexus. *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668 (1982) (collision of two pleasure boats on navigable waters is within admiralty juridiction).

[13] Thus, the courts have enforced seamen's claims for maintenance and cure for injuries incurred on land. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 41–42 (1943). The Court has applied the doctrine of seaworthiness to permit claims by longshoremen injured on land because of some condition of the vessel or its cargo. *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944). *But see Victory Carriers* v. *Law*, 404 U.S. 202 (1971). In the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, Congress gave seamen, or their personal representatives, the right to seek compensation from their employers for personal injuries arising out of their maritime employment. The rights exist even if the injury occurred on land. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, *supra*, 43; *Swanson* v. *Marra Brothers*, 328 U.S. 1, 4 (1946). In the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740, Congress provided an avenue of relief for persons injured in themselves or their property by action of a vessel on navigable water which is consummated on land, as by the collision of a ship with a bridge. By the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1251, amending 33 U.S.C. §§ 901–950, Congress broadened the definition of "navigable waters" to include in certain cases adjoining piers, wharfs, etc., and modified the definition of "employee" to mean any worker "engaged in maritime employment" within the prescribed meanings, thus extending the Act shoreward and changing the test of eligibility from "situs" alone to the "situs" of the injury and the "status" of the injured.

From the earliest days of the Republic, the federal courts sitting in admiralty have been held to have exclusive jurisdiction of prize cases.[14] Also, in contrast to other phases of admiralty jurisdiction, prize law as applied by the British courts continued to provide the basis of American law so far as practicable,[15] and so far as it was not modified by subsequent legislation, treaties, or executive proclamations. Finally, admiralty and maritime jurisdiction comprises the seizure and forfeiture of vessels engaged in activities in violation of the laws of nations or municipal law, such as illicit trade,[16] infraction of revenue laws,[17] and the like.[18]

***Admiralty Proceedings.***—Procedure in admiralty jurisdiction differs in few respects from procedure in actions at law but the differences that do exist are significant.[19] Suits in admiralty traditionally took the form of a proceeding *in rem* against the vessel, and, with exceptions to be noted, such proceedings *in rem* are confined exclusively to federal admiralty courts, because the grant of exclusive jurisdiction to the federal courts by the Judiciary Act of 1789 has been interpreted as referring to the traditional admiralty action, the *in rem* action, which was unknown to the common law.[20] The savings clause in that Act under which a state court may entertain actions by suitors seeking a common-law remedy preserves to the state tribunals the right to hear actions at law where a common-law remedy or a new remedy analogous to a common-law remedy exists.[21] Concurrent jurisdiction thus exists

[14] *Jennings* v. *Carson*, 4 Cr. (8 U.S.) 2 (1807); *Taylor* v. *Carryl*, 20 How. (61 U.S.) 583 (1858).

[15] *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cr. (13 U.S.) 191 (1815); *The Siren*, 13 Wall. (80 U.S.) 389, 393 (1871).

[16] *Hudson* v. *Guestier*, 4 Cr. (8 U.S.) 293 (1808).

[17] *The Vengence*, 3 Dall. (3 U.S.) 297 (1796); *Church* v. *Hubbard*, 2 Cr. (6 U.S.) 187 (1804); *The Schooner Sally*, 2 Cr. (6 U.S.) 406 (1805).

[18] *The Brig Ann*, 9 Cr. (13 U.S.) 289 (1815); *The Sarah*, 8 Wheat. (21 U.S.) 391 (1823); *Maul* v. *United States*, 274 U.S. 501 (1927).

[19] G. Gilmore & C. Black, *The Law of Admiralty* (Brooklyn: 1957), 30-33. There are no longer separate rules of procedure governing admiralty, unification of civil admiralty procedures being achieved in 1966. 7A J. Moore's *Federal Practice* (New York: 1971), § .01 *et seq.*

[20] *The Moses Taylor*, 4 Wall. (71 U.S.) 411 (1866); *The Hine* v. *Trevor*, 4 Wall. (71 U.S.) 555 (1867). *But see Taylor* v. *Carryl*, 20 How. (61 U.S.) 583 (1858). In *Madruga* v. *Superior Court*, 346 U.S. 556 (1954), the jurisdiction of a state court over a partition suit at the instance of the majority shipowners was upheld on the ground that the cause of action affected only the interest of the defendant minority shipowners and therefore was *in personam*. Justice Frankfurter's dissent argued: "If this is not an action against the thing, in the sense which that has meaning in the law, then the concepts of a *res* and an *in rem* proceeding have an esoteric meaning that I do not understand." Id., 564.

[21] After conferring "exclusive" jurisdiction in admiralty and maritime cases on the federal courts, § 9 of the Judiciary Act of 1789, 1 Stat. 77, added "saving to suitors, in all cases the right of a common law remedy, where the common law is com-

for the adjudication of *in personam* maritime causes of action against the owner of the vessel, and a plaintiff may ordinarily choose whether to bring his action in a state court or a federal court.

Forfeiture to the crown for violation of the laws of the sovereign was in English law an exception to the rule that admiralty has exclusive jurisdiction over *in rem* maritime actions and was thus considered a common-law remedy. Although the Supreme Court sometimes has used language that would confine all proceedings *in rem* to admiralty courts,[22] such actions in state courts have been sustained in cases of forfeiture arising out of violations of state law.[23]

Perhaps the most significant admiralty court difference in procedure from civil courts is the absence of a jury trial in admiralty actions, with the admiralty judge trying issues of fact as well as of law.[24] Indeed, the absence of a jury in admiralty proceedings appears to have been one of the principal reasons why the English government vested a broad admiralty jurisdiction in the colonial vice-admiralty courts, since they provided a forum where the English authorities could enforce the Navigation Laws without "the obstinate resistance of American juries." [25]

***Territorial Extent of Admiralty and Maritime Jurisdiction.***—Although he was a vigorous exponent of the expansion of admiralty jurisdiction. Justice Story for the Court in *The Steamboat Thomas Jefferson* [1] adopted a restrictive English rule confining admiralty

petent to give it; . . ." Fixing the concurrent federal-state line has frequently been a source of conflict within the court. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

[22] *The Moses Taylor*, 4 Wall. (71 U.S.) 411, 431 (1867).

[23] *C. J. Henry Co.* v. *Moore*, 318 U.S. 133 (1943).

[24] *The Vengeance*, 3 Dall. (3 U.S.) 297 (1796); *The Schooner Sally*, 2 Cr. (6 U.S.) 406 (1805); *The Schooner Betsy*, 4 Cr. (8 U.S.) 443 (1808); *The Whelan*, 7 Cr. (11 U.S.) 112 (1812); *The Samuel*, 1 Wheat. (14 U.S.) 9 (1816). If diversity of citizenship and the requisite jurisdictional amounts are present, a suitor may sue on the "law side" of the federal court and obtain a jury. *Romero* v. *International Terminal Operating Co.* 358 U.S. 354, 362-363 (1959). Jones Act claims, 41 Stat. 1007 (1920), 46 U.S.C. § 688, may be brought on the "law side" with a jury, *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375 (1924), and other admiralty claims joined with a Jones Act claim may be submitted to a jury. *Romero* v. *International Terminal Operating Co., supra; Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963). There is no constitutional barrier to congressional provision of jury trials in admiralty. *Genessee Chief* v. *Fitzhugh*, 12 How. (53 U.S.) 443 (1851); *Fitzgerald* v. *United States Lines Co., supra*, 20.

[25] *C. J. Henry Co.* v. *Moore*, 318 U.S. 133, 141 (1943).

[1] 10 Wheat. (23 U.S.) 428 (1825). On the political background of this decision, *see* 1 C. Warren, *The Supreme Court in United States History* (Boston: rev. ed. 1926), 633-635.

jurisdiction to the high seas and upon rivers as far as the ebb and flow of the tide extended.[2] The demands of commerce on western waters led Congress to enact a statute extending admiralty jurisdiction over the Great Lakes and connecting waters,[3] and in *The Genessee Chief* v. *Fitzhugh* [4] Chief Justice Taney overruled *The Thomas Jefferson* and dropped the tidal ebb and flow requirement. This ruling laid the basis for subsequent judicial extension of jurisdiction over all waters, salt or fresh, tidal or not, which are navigable in fact.[5] Some of the older cases contain language limiting jurisdiction to navigable waters which form some link in an interstate or international waterway or some link in commerce,[6] but these date from the time when it was thought the commerce power furnished the support for congressional legislation in this field.

***Admiralty and Federalism.***—Extension of admiralty and maritime jurisdiction to navigable waters within a State does not, however, of its own force include general or political powers of government. Thus, in the absence of legislation by Congress, the States through their courts may punish offenses upon their navigable waters and upon the sea within one marine league of the shore.[7]

Determination of the boundaries of admiralty jurisdiction is a judicial function, and "no State law can enlarge it, nor can an act of Congress or a rule of court make it broader than the judicial power may determine to be its true limits." [8] But as with other jurisdictions of the federal courts, admiralty jurisdiction can only be exercised under acts of Congress vesting it in federal courts.[9]

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[2] The tidal ebb and flow limitation was strained in some of its applications. *Peyroux* v. *Howard*, 7, Pet. (32 U.S.) 324 (1833); *Waring* v. *Clarke*, 5 How. (46 U.S.) 441 (1847).

[3] 5 Stat. 726 (1845).

[4] 12 How. (53 U.S.) 443 (1851).

[5] Some of the early cases include *The Magnolia*, 20 How. (61 U.S.) 296 (1857); *The Eagle*, 8 Wall. (75 U.S.) 15 (1868); *The Daniel Ball*, 10 Wall. (77 U.S.) 557 (1871). The fact that the body of water is artificial presents no barrier to admiralty jurisdiction. *Ex parte Boyer*, 109 U.S. 629 (1884); *The Robert W. Parsons*, 191 U.S. 17 (1903). In *United States* v. *Apalachian Power Co.*, 311 U.S. 377 (1940), it was made clear that maritime jurisdiction extends to include waterways which by reasonable improvement can be made navigable. "It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country." *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 41 (1942).

[6] E.g., *The Daniel Ball*, 10 Wall. (77 U.S.) 557, 563 (1870); *The Montello*, 20 Wall. (87 U.S.) 430, 441-442 (1874).

[7] *United States* v. *Bevans*, 3 Wheat. (16 U.S.) 336 (1818); *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891).

[8] *The Steamer St. Lawerence*, 1 Bl. (66 U.S.) 522, 527 (1862).

[9] *Janney* v. *Columbia Ins. Co.*, 10 Wheat. (23 U.S.) 411, 418 (1825); *The Lottawanna*, 21 Wall. (88 U.S.) 558, 576 (1875).

The boundaries of federal and state competence, both legislative and judicial, in this area remain imprecise and federal judicial determinations have notably failed to supply definiteness. During the last century, the Supreme Court generally permitted two overlapping systems of law to coexist in an uneasy relationship. The federal courts in admiralty applied the general maritime law,[10] supplemented in some instances by state law which created and defined certain causes of action.[11] Because the Judiciary Act of 1789 saved to suitors common-law remedies,[12] persons suing in state courts or in federal courts in diversity of citizenship actions could look to common-law and statutory doctrines for relief in maritime-related cases in which the actions were noticeable.[13] In *Southern Pacific Co.* v. *Jensen*,[14] a sharply divided Court held that New York could not constitutionally apply its workmen's compensation system to employees injured or killed on navigable waters. For the Court, Justice McReynolds reasoned "that the general maritime law, as accepted by the federal courts, constituted part of our national law, applicable to matters within the admiralty and maritime jurisdiction." [15] Recognizing that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation," still it was certain that "no such legislation is valid if it works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations." [16]

[10] E.g., *New Jersey Steam Navigation Co.* v. *Merchants' Bank of Boston*, 6 How. (47 U.S.) 344 (1848); *The Steamboat New York* v. *Rea*, 18 How. (59 U.S.) 223 (1856); *The China*, 7 Wall. (74 U.S.) 53 (1868); *Ex parte McNiel*, 13 Wall. (80 U.S.) 236 (1872); *La Bourgogne*, 210 U.S. 95 (1908).

[11] *The General Smith*, 4 Wheat. (17 U.S.) 438 (1819); *The Lottawanna*, 21 Wall. (88 U.S.) 558 (1875) (enforcing state laws giving suppliers and repairmen liens on ships supplied and repaired). Another example concerns state created wrongful death actions. *The Hamilton*, 207 U.S. 398 (1907). *See infra, pp.* 754–755.

[12] *Supra, p.* 740. As noted there, these courts did not have jurisdiction of *in rem* cases, only those *in personam*.

[13] E.g., *Hazard's Administrator* v. *New England Marine Ins. Co.*, 8 Pet. (33 U.S.) 557 (1834); *The Belfast*, 7 Wall. (74 U.S.) 624 (1869); *American Steamboat Co.* v. *Chase*, 16 Wall. (83 U.S.) 522 (1872); *Quebec Steamship Co.* v. *Merchant*, 135 U.S. 375 (1890); *Belden* v. *Chase*, 150 U.S. 674 (1893); *Homer Ramsdell Transp. Co.* v. *La Compagnie Gen. Transatlantique*, 182 U.S. 406 (1901).

[14] 244 U.S. 205 (1917). The worker here had been killed, but the same result was reached in a case of nonfatal injury. *Clyde S.S. Co.*, v. *Walker*, 244 U.S. 255 (1917). In *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372 (1918), the *Jensen* holding was applied to preclude recovery in a negligence action against the injured party's employer under state law. Under *The Osceola*, 189 U.S. 158 (1903), the employee had a maritime right to wages, maintenance, and cure.

[15] *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215 (1917).

[16] Id., 216.

The "savings to suitors" clause was unavailing because the workmen's compensation statute created a remedy "of a character wholly unknown to the common law, incapable of enforcement by the ordinary process of any court, and is not saved to suitors from the grant of exclusive jurisdiction." [17]

Congress needed three opportunities to legislate to meet the problem created by the decision, the lack of remedy for maritime workers to recover for injuries resulting from the negligence of their employers. First, Congress enacted a statute saving to claimants their rights and remedies under state workmen's compensation laws.[18] The Court invalidated it as an unconstitutional delegation of legislative power to the States. "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." [19] Second, Congress reenacted the law but excluded masters and crew members of vessels from those who might claim compensation for maritime injuries.[20]

The Court found this effort unconstitutional as well, since "the manifest purpose [of the statute] was to permit any state to alter the maritime law, and thereby introduce conflicting requirements." [21] Finally, Congress passed the Longshoremen's and Harbor Workers' Compensation Act, which provided accident compensation for injuries, including those resulting in death, sustained on navigable waters by employees, other than members of the crew, whenever "recovery . . . may not validly be provided by State law." [22]

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[17] Id., 218. There were four dissenters, Justices Holmes, Brandeis, Clarke, and Pitney. His *Jensen* dissent featured such Holmesian epigrams as: "Judges do and must legislate, but they can do so only interstitially: they are confined from molar to molecular motions," id., 221, and the famous statement supporting the assertion that supplementation of maritime law had to come from state law inasmuch as "the common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. It always is the law of some state." Id., 222.

[18] 40 Stat. 395 (1917).

[19] *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 160 (1920). The decision was again five-to-four with the same dissenters.

[20] 42 Stat. 634 (1922).

[21] *Washington* v. *Dawson & Co.*, 264 U.S. 219, 228 (1924). Holmes and Brandeis remained of the four dissenters and again dissented.

[22] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-950.

With certain exceptions,[23] the federal-state conflict since *Jensen* has taken place with regard to three areas: (1) the interpretation of federal and state bases of relief for injuries and death as affected by the Longshoremen's and Harbor Workers' Compensation Act; (2) the interpretation of federal and state bases of relief for personal injuries by maritime workers as affected by the Jones Act; and (3) the application of state law to permit recovery in maritime wrongful death cases in which until recently there was no federal maritime right to recover.[24]

(1) The principal difficulty here was that after *Jensen* the Supreme Court did not maintain the line between permissible and impermissible state-authorized recovery at the water's edge but created a "maritime but local" exception, by which some injuries incurred in or on navigable waters could be compensated under state workmen's compensation laws or state negligence laws.[25] "The application of the State Workmen's Compensation Acts has been sustained where the work of the employee has been deemed to have no direct relation to navigation or commerce and the operation of the local law 'would work no material prejudice to the essential features of the general maritime law.' " [1] Because Congress provid-

[23] E.g. *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409 (1954) (state direct action statute applies against insurers implicated in a marine accident); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (state statute determines effect of breach of warranty in marine insurance contract); *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 (1959); *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1955) (federal rather than state law determines effect of exculpatory provisions in towage contracts); *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961) (state statute of frauds inapplicable to oral contract for medical care between seaman and employer).

[24] *Jensen*, though much criticized, is still the touchstone of the decisional process in this area with its emphasis on the general maritime law. E.g., *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In *Askew* v. *American Waterways Operators*, 411 U.S. 325, 337–344 (1973), the Court, in holding that the States may constitutionally exercise their police powers respecting maritime activities concurrently with the Federal Government, such as by providing for liability for oil spill damages, noted that *Jensen* and its progeny, while still possessing vitality, have been confined to their facts; thus, it is only with regard "to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews" that state law is proscribed. Id., 344. *See also Sun Ship* v. *Pennsylvania*, 447 U.S. 715 (1980).

[25] *Western Fuel Co.* v. *Garcia*, 257 U.S. 233 (1921); *Grant-Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922); *State Industrial Comm.* v. *Nordenholt Corp.*, 259 U.S. 263 (1922); *Miller's Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926). The exception continued to be applied following enactment of the Longshoremen's and Harbor Workers' Compensation Act. *See* cases cited in *Davis* v. *Dept. of Labor and Industries*, 317 U.S. 249, 253–254 (1942).

[1] *Crowell* v. *Benson*, 285 U.S. 22, 39 n. 3 (1932). The internal quotation is from *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242 (1921).

ed in the Longshoremen's and Harbor Workers' Compensation Act for recovery under the Act "if recovery . . . may not validly be provided by State law",[2] it was held that the "maritime but local" exception had been statutorily perpetuated,[3] thus creating the danger for injured workers or their survivors that they might choose to seek relief by the wrong avenue to their prejudice. This danger was susequently removed by the Court when it recognized that there was a "twilight zone", a "shadowy area", in which recovery under either the federal law or a state law could be justified and forthwith held that in such a "twilight zone" the injured party should be enabled to recover under either.[4] Then, in *Calbeck* v. *Travelers Ins. Co.*,[5] the Court virtually read out of the Act its inapplicability when compensation would be afforded by state law and held that Congress' intent in enacting the statute was to extend coverage to all workers who sustain injuries while on navigable waters of the United States whether or not a particular injury was also within the constitutional reach of a state workmen's compensation law or other law. By the 1972 amendments to the LHWCA, Congress extended the law shoreward by refining the tests of "employee" and "navigable waters," so as to reach piers, wharfs, and the like in certain circumstances.[6]

(2) The passage of the Jones Act [7] gave seamen a statutory right of recovery for negligently inflicted injuries on which they could sue in state or federal courts. Because injured parties could obtain a jury trial in Jones Act suits, there was little attempted recourse under the savings clause [8] to state law claims and thus no need to explore the line between applicable and inapplicable state law. But in the 1940s personal injury actions based on unseaworthi-

[2] § 3(a), 44 Stat. 1424 (1927), 33 U.S.C. § 903(a).

[3] *Crowell* v. *Benson*, 284 U.S. 22, 39, (1932); *Davis* v. *Dept. of Labor and Industries*, 317 U.S. 249, 252-253 (1942).

[4] *Davis* v. *Dept of Labor and Industries*, 317 U.S. 249 (1942). The quoted phrases appear at id, 253, 256. *See also Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959).

[5] 370 U.S. 114 (1962). In the 1972 amendments, § 2, 86 Stat. 1251, amending 33 U.S.C. § 903(a), Congress ratified *Calbeck* by striking out "if recovery . . . may not validly be provided by State law."

[6] 86 Stat. 1251, § 2, amending 33 U.S.C. § 902. The Court had narrowly turned back an effort to achieve this result through construction in *Nacierema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969). *See also Victory Carriers* v. *Law*, 404 U.S. 202 (1971). On the interpretation of the amendments, *see Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977).

[7] 41 Stat. 1007 (1920), 46 U.S.C. § 688. For the prior-Jones Act law, *see The Osceola*, 189 U.S. 158 (1903)

[8] *Supra*, *p.* 740.

ness [9] were given new life by Court decisions for seamen [10] and the right was soon extended to longshoremen who were injured while on board ship or while working on the dock if the injury could be attributed either to the ship's gear or its cargo.[11] While these actions could have been brought in state court, federal law supplanted state law even with regard to injuries sustained in state territorial waters.[12] The 1972 LHWCA amendments, however, eliminated unseaworthiness recoveries by persons covered by the Act and substituted a recovery for injuries caused by negligence under the LHWCA itself.[13]

(3) In *The Harrisburg,*[14] the Court held that maritime law did not afford an action for wrongful death, a position to which the Court adhered until quite recently.[15] The Jones Act,[16] the Death on the High Seas Act,[17] and the Longshoremen's and Harbor

[9] Unseaworthiness "is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . [T]he owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." *Mitchell* v. *Trawler Racer,* 362 U.S. 539, 549 (1960).

[10] *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96 (1944). *See also Mitchell* v. *Trawler Racer,* 362 U.S. 539 (1960); *Michalic* v. *Cleveland Tankers,* 364 U.S. 325 (1960); *Waldron* v. *Moore-McCormack Lines,* 386 U.S. 724 (1967).

[11] *Seas Shipping Co.,* v. *Sieracki,* 328 U.S. 85 (1946); *Pope & Talbot* v. *Hawn,* 346 U.S. 406 (1953); *Alaska S.S. Co.* v. *Patterson,* 347 U.S. 396 (1954); *Gutierrez* v. *Waterman S.S. Corp.,* 373 U.S. 206 (1963); *But see Usner* v. *Luckenback Overseas Corp.,* 400 U.S. 494 (1971); *Victory Carriers* v. *Law,* 404 U.S. 202 (1971).

[12] *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239 (1942); *McAllister* v. *Magnolia Petroleum Co.,* 357 U.S. 221 (1958); *Kermarec* v. *Compagnie Generale Transatlantique,* 338 U.S. 625 (1959).

[13] 86 Stat. 1263, § 18, amending 33 U.S.C. § 905. On the negligence standards under the amendment, *see Scindia Steam Navigation Co.,* v. *De Los Santos,* 451 U.S. 156 (1981).

[14] 119 U.S. 199 (1886). Subsequent cases are collected in *Moragne* v. *States Marine Lines,* 398 U.S. 375 (1970).

[15] *Moragne* v. *States Marine Lines,* 398 U.S. 375 (1970).

[16] 41 Stat. 1007 (1920). 46 U.S.C. § 688. Recovery could be had if death resulted from injuries because of negligence but not from unseaworthiness. *See infra, p.* 755.

[17] 41 Stat. 537 (1920), 46 U.S.C. § 761 *et seq.* The Act applies to deaths caused by negligence occurring on the high seas beyond a marine league from the shore of any State. In *Rodrique* v. *Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), a unanimous Court held that this Act did not apply in cases of deaths on the artificial islands created on the continental shelf for oil drilling purposes but that the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. § 1331 *et seq.,* incorporated the laws of the adjacent State, so that Louisiana law governed. *See also Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971); *Gulf Offshore Co.* v. *Mobil Oil Corp.,* 453 U.S. 473 (1981).

Workers' Compensation Act [18] created causes of action for wrongful death, but for cases not falling within one of these laws the federal courts looked to state wrongful death and survival statutes.[19] Thus, in *The Tungus* v. *Skovgaard,*[20] the Court held that a state wrongful death statute encompassed claims both for negligence and unseaworthiness in the instance of a land-based worker killed when on board ship in navigable water; the Court divided five-to-four, however, in holding that the standards of the duties to furnish a seaworthy vessel and to use due care were created by the state law as well and not furnished by general maritime concepts.[21] And in *Hess* v. *United States,*[22] embracing a suit under the Federal Tort Claims Act for recovery for a death by drowning in a navigable Oregon river of an employee of a contractor engaged in repairing the federally-owned Bonneville Dam, a divided Court held that liability was to be measured by the standard of care expressed in state law, notwithstanding that the standard was higher than that required by maritime law. One area existed, however, in which beneficiaries of a deceased seaman were denied recovery.

The Jones Act provided a remedy for wrongful death resulting from negligence but not for one caused by unseaworthiness alone; in *Gillespie* v. *United States Steel Corp.,*[23] the Court held that the survivors of a seaman drowned while working on a ship docked in an Ohio port could not recover under the state wrongful death statute even though the act recognized unseaworthiness as a basis for recovery, the Jones Act having superseded state laws.

Thus did matters stand until 1970 when the Court, in a unanimous opinion in *Moragne* v. *States Marine Lines*[24] overruled its

[18] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–950.

[19] *Western Fuel Co.* v. *Garcia,* 257 U.S. 233 (1921); *Just* v. *Chambers,* 312 U.S. 383 (1941); *Levinson* v. *Deupree,* 345 U.S. 648 (1953).

[20] 358 U.S. 588 (1959).

[21] Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, argued that the extent of the duties owed the decedent while on board ship should be governed by federal maritime law, though the cause of action originated in a state statute, just as would have been the result had decedent survived his injuries. *See also United N.Y. & N.J. Sandy Hooks Pilot Assn.* v. *Halecki,* 358 U.S. 613 (1959).

[22] 361 U.S. 314 (1960). The four *Tungus* dissenters joined two of the *Tungus* majority solely "under compulsion" of the *Tungus* ruling; the other three Justices of the *Tungus* majority dissented on the ground that application of the state statute unacceptably disrupted the uniformity of maritime law.

[23] 379 U.S. 148 (1964). The decision was based on dictum in *Lindgren* v. *United States,* 281 U.S. 38 (1930), to the effect that the Jones Act remedy was exclusive.

[24] 398 U.S. 375 (1970).

earlier cases and held that a right of recovery for wrongful death is sanctioned by general maritime law and that no statute is needed to bring the right into being. The Court was careful to note that the cause of action created in *Moragne* would not, like the state wrongful death statutes in *Gillespie*, be held precluded by the Jones Act, so that the survivor of a seaman killed in navigable waters within a State would have a cause of action for negligence under the Jones Act or for unseaworthiness under the general maritime law.[25]

**Cases to Which the United States Is a Party**

***Right of the United States to Sue.***—In the first edition of his Treatise, Justice Story noted that while "an express power is no where given in the constitution", the right of the United States to sue in its own courts "is clearly implied in that part respecting the judicial power. . . . Indeed, all the usual incidents appertaining to a *personal* sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns." [1] As early as 1818 the Supreme Court ruled that the United States could sue in its own name in all cases of contract without congressional authorization of such suits.[2] Later, this rule was extended to other types of actions. In the absence of statutory provisions to the contrary, such suits are initiated by the Attorney General in the name of the United States.[3]

By the Judiciary Act of 1789, and subsequent amendments thereof, Congress has vested in the federal district courts jurisdiction to hear all suits of a civil nature at law or in equity brought by the United States as party plaintiff.[4] As in other judicial pro-

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[25] Id., 396 n. 12. For development of the law under *Moragne*, *see Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974).

[1] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1274 (emphasis in original).

[2] *Dugan* v. *United States*, 3 Wheat. (16 U.S.) 172 (1818).

[3] *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888); *United States* v. *Beebe*, 127 U.S. 338 (1888); *United States* v. *Bell Telephone Co.*, 128 U.S. 315 (1888). Whether without statutory authorization the United States may sue to protect the constitutional rights of its citizens has occasioned conflict. *Compare United States* v. *Brand Jewelers*, 318 F. Supp. 1293 (S.D.N.Y. 1970), and *United States* v. *Brittain*, 319 F. Supp. 1658 (S.D.Ala. 1970), *with United States* v. *Mattson*, 600 F. 2d 1295 (C.A. 9, 1979), and *United States* v. *Solomon*, 563 F.2d 1121 (C.A. 4, 1977). The result in *Mattson* and *Solomon* was altered by specific authorization in the Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349 (1980), 42 U.S.C. § 1997 *et seq.*

[4] 28 U.S.C. § 1345. By virtue of the fact that the original jurisdiction of the Supreme Court extends only to those cases enumerated in the Constitution, jurisdiction over suits brought by the United States against persons or corporation is vested in the lower federal courts. But suits by the United States against a State may be

ceedings, the United States, like any party plaintiff, must have an interest in the subject matter and a legal right to the remedy sought.[5] Under the long settled principle that the courts have the power to abate public nuisances at the suit of the Government, the provison in § 208(2) of the Labor Management Relations Act of 1949, authorizing federal courts to enjoin strikes which imperil national health or safety was upheld for the reason that the statute entrusts the courts with the determination of a "case or controversy" on which the judicial power can operate and does not impose any legislative, executive, or non-judicial function. Moreover, the fact that the rights sought to be protected were those of the public in unimpeded production in industries vital to public health, as distinguished from the private rights of labor and management, was held not to alter the adversary ("case or controversy") nature of the litigation instituted by the United States as the guardian of the aforementioned rights.[6] Also, by reason of the highest public interest in the fulfillment of all constitutional guarantees, "including those that bear . . . directly on private rights, . . . it [is] perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief." [7]

***Suits Against States.***—Controversies to which the United States is a party include suits brought against States as party defendants. The first such suit occurred in *United States* v. *North Carolina* [8] which was an action by the United States to recover upon bonds issued by North Carolina. Although no question of jurisdiction was raised, in deciding the case on its merits in favor of the State, the Court tacitly assumed that it had jurisdiction of such cases. The issue of jurisdiction was directly raised by Texas a few years later in a bill in equity brought by the United States to determine the boundary between Texas and the Territory of Oklahoma, and the Court sustained its jurisdiction over strong arguments by Texas to the effect that it could not be sued by the United States without its consent and that the Supreme Court's original jurisdiction did not extend to cases to which the United States is a

brought in the Supreme Court's original jurisdiction, 28 U.S.C. § 1251(b)(2), but may as well be brought in the district court. *Case* v. *Bowles*, 327 U.S. 92, 97 (1946).

[5] *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888).

[6] *United Steelworkers* v. *United States*, 361 U.S. 39, 43-44 (1960), citing *In re Debs*, 158 U.S. 564 (1895).

[7] *United States* v. *Raines*, 362 U.S. 17, 27 (1960), upholding jurisdiction of the federal court as to an action to enjoin state officials from discriminating against Negro citizens seeking to vote in state elections, *See also Oregon* v. *Mitchell*, 400 U.S. 112 (1970), in which two of the four cases considered were actions by the United States to enjoin state compliance with the Voting Rights Act Amendments of 1970.

[8] 136 U.S. 211 (1890).

party.[9] Stressing the inclusion within the judicial power of cases to which the United States and a State are parties, the elder Justice Harlan pointed out that the Constitution made no exception of suits brought by the United States. In effect, therefore, consent to be sued by the United States "was given by Texas when admitted to the Union upon an equal footing in all respects with the other States." [10]

Suits brought by the United States have, however, been infrequent. All of them have arisen since 1889, and they have become somewhat more common since 1926. That year the Supreme Court decided a dispute between the United States and Minnesota over land patents issued to the State by the United States in breach of its trust obligations to the Indian.[11] In *United States* v. *West Virginia*,[12] the Court refused to take jurisdiction of a suit in equity brought by the United States to determine the navigability of the New and Kanawha Rivers on the ground that the jurisdiction in such suits is limited to cases and controversies and does not extend to the adjudication of mere differences of opinion between the officials of the two governments. A few years earlier, however, it had taken jurisdiction of a suit by the United States against Utah to quite title to land forming the beds of certain sections of the Colorado River and its tributaries with the States.[13] Similarly, it took jurisdiction of a suit brought by the United States against California to determine the ownership of and paramount rights over the submerged land and the oil and gas thereunder off the coast of California between the low-water mark and the three-mile limit.[14] Like suits were decided against Louisiana and Texas in 1950.[15]

***Immunity of the United States From Suit.***—In pursuance of the general rule that a sovereign cannot be sued in his own courts, it follows that the judicial power does not extend to suits against the United States unless Congress by general or special enactment consents to suits against the Government. This rule first emanated in embryo form in an *obiter dictum* by Chief Justice Jay in *Chisholm*

[9] *United States* v. *Texas*, 143 U.S. 621 (1892).

[10] Id., 642–646. This suit, it may be noted, was specifically authorized by the Act of Congress of May 2, 1890, providing for a temporary government for the Oklahoma territory to determine the ownership of Greer County. 26 Stat. 81, 92, § 25. *See also United States* v. *Louisiana*, 339 U.S. 699, 701–702 (1950).

[11] *United States* v. *Minnesota*, 270 U.S. 181 (1926). For an earlier suit against a State by the United States, *see United States* v. *Michigan*, 190 U.S. 379 (1903).

[12] 295 U.S. 463 (1935).

[13] *United States* v. *Utah*, 283 U.S. 64 (1931).

[14] *United States* v. *California*, 332 U.S. 19 (1947).

[15] *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). *See also United States* v. *Maine*, 420 U.S. 515 (1975).

v. *Georgia*, where he indicated that a suit would not lie against the United States because "there is no power which the courts can call to their aid."[16] In *Cohens* v. *Virginia*,[17] also by way of dictum, Chief Justice Marshal asserted, "the universally received opinion is that no suit can be commenced or prosecuted against the United States." The issue was more directly in question in *United States* v. *Clarke*[18] where Chief Justice Marshall stated that as the United States is "not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." He thereupon ruled that the act of May 26, 1830, for the final settlement of land claims in Florida condoned the suit. The doctrine of the exemption of the United States from suit was repeated in various subsequent cases, without discussion or examination.[19] Indeed, it was not until *United States* v. *Lee*[20] that the Court examined the rule and the reasons for it, and limited its application accordingly.

Since suits against the United States can be maintained only by permission, it follows that they can be brought only in the manner prescribed by Congress and subject to the restrictions imposed.[21] Only Congress can take the necessary steps to waive the

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[16] 2 Dall. (2 U.S.) 419, 478 (1793).

[17] 6 Wheat. (19 U.S.) 264, 412 (1821).

[18] 8 Pet. (33 U.S.) 436, 444 (1834).

[19] *United States* v. *McLemore*, 4 How. (45 U.S.) 286 (1846); *Hill* v. *United States*, 9 How. (50 U.S.) 386, 389 (1850); *De Groot* v. *United States*, 5 Wall. (72 U.S.) 419, 431 (1867); *United States* v. *Eckford*, 6 Wall. (73 U.S.) 484, 488 (1868); *The Siren*, 7 Wall. (74 U.S.) 152, 154 (1869); *Nichols* v. *United States*, 7 Wall. (74 U.S.) 122, 126 (1869); *The Davis*, 10 Wall. (77 U.S.) 15, 20 (1870); *Carr* v. *United States*, 98 U.S. 433, 437–439 (1879). "It is also clear that the Federal Government, in the absence of its consent, is not liable in tort for the negligence of its agents or employee. *Gibbons* v. *United States* , 8 Wall. (75 U.S.) 269, 275 (1869); *Peabody* v. *United States*, 231 U.S. 530, 539 (1913); *Koekuk & Hamilton Bridge Co.* v. *United States*, 260 U.S. 125, 127 (1922). The reason for such immunity as stated by Mr. Justice Holmes in *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (1907), is because 'there can be no legal right as against the authority that makes the law on which the right depends.' *See also the Western Maid*, 257 U.S. 419, 433 (1922). As the Housing Act does not purport to authorize suits against the United States as such, the question is whether the Authority—which is clearly an agency of the United States—partakes of this sovereign immunity. The answer must be sought in the intention of the Congress. *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U.S. 549, 570 (1922). *Federal Land Bank* v. *Priddy*, 295 U.S. 229, 231 (1935). This involves a consideration of the extent to which other Government-owned corporations have been held liable for their wrongful acts." 39 *Ops. Atty. Gen.* 559, 562 (1938).

[20] 106 U.S. 196 (1882).

[21] *Lonergan* v. *United States*, 303 U.S. 33 (1938). For recent waivers of sovereign immunity, see P.L. 94-574, §1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702; P.L. 87-748, § 1(a), 76 Stat. 744 (1962), 28 U.S.C. § 1361.

immunity of the United States from liability for claims, and hence officers of the United States are powerless by their actions either to waive such immunity or to confer jurisdiction on a federal court.[22] Even when authorized, suits can be brought only in designated courts.[23] These rules apply equally to suits by States against the United States.[24] Although an officer acting as a public instrumentality is liable for his own torts, Congress may grant or withhold immunity from suit on behalf of government corporations.[25]

***Suits Against United States Officials.***—*United States* v. *Lee*, a five-to-four decision, qualified earlier holdings to the effect that where a judgment affected the property of the United States the suit was in effect against the United States, by ruling that title to the Arlington estate of the Lee family, then being used as a national cemetery, was not legally vested in the United States but was being held illegally by army officers under an unlawful order of the President. In its examination of the sources and application of the rule of sovereign immunity, the Court concluded that the rule "if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the rights of plaintiff when the United States is not a defendant or a necessary party to the suit." [1] Except, nevertheless, for an occasional case like *Kansas* v. *United States*,[2] which held that a State cannot sue the United States, most of the cases involving sovereign immunity from suit since 1883 have been cases against officers, agencies, or corporations of the United States where the United States has not been named as a party defendant. Thus, it has been held that a suit against the Secretary of the Treasury to review his decision on the rate of duty to be exacted on imported sugar would disturb the whole revenue system of the Government and would in effect be a suit against the United

[22] *United States* v. *New York Rayon Co.*, 329 U.S. 654 (1947).

[23] *United States* v. *Shaw*, 309 U.S. 495 (1940). Any consent to be sued will not be held to embrace action in the federal courts unless the language giving consent is clear. *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944).

The earlier narrow interpretation of the exceptions to the waiver of immunity set forth in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), gradually has given way to a liberal construction. Compare *Dalehite* v. *United States*, 346 U.S. 15 (1953), with *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955).

[24] *Minnesota* v. *United States*, 305 U.S. 382 (1939). The United States was held here to be an indispensable party defendant in a condemnation proceeding brought by a State to acquire a right of way over lands owned by the United States and held in trust for Indian allottees.

[25] *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575 (1943).

[1] *United States* v. *Lee*, 106, 207-208 (1882).

[2] 204 U.S. 331 (1907).

States.[3] Even more significant is *Stanley* v. *Schwalby*,[4] which resembled without paralleling *United States* v. *Lee*, where it was held that an action of trespass against an army officer to try title in a parcel of land occupied by the United States as a military reservation was a suit against the United States because a judgment in favor of the plaintiffs would have been a judgment against the United States.

Subsequent cases repeat and reaffirm the rule of *United States* v. *Lee* that where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[5] Contrariwise, the rule that a suit in which the judgment would affect the United States or its property is a suit against the United States has also been repeatedly approved and reaffirmed.[6] But, as the Court has pointed out, it is not "an easy matter to reconcile all of the decisions of the court in this class of cases," [7] and, as Justice Frankfurter quite justifiably stated in a dissent, "the subject is not free from casuistry." [8] Justice Douglas' characterization of *Land* v. *Dollar*, "this is the type of case where the question of *jurisdiction* is dependent on decision of the *merits*," [9] is frequently applicable.

The case of *Larson* v. *Domestic & Foreign Corp.*,[10] illuminates these obscurities somewhat. Here a private company sought to enjoin the Administrator of the War Assets in his official capacity from selling surplus coal to others than the plaintiff who had originally bought the coal, only to have the sale cancelled by the Administrator because of the company's failure to make an advance payment. Chief Justice Vinson and a majority of the Court looked upon the suit as one brought against the Administrator in his offi-

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[3] *Louisiana* v. *McAdoo*, 234 U.S. 627, 628 (1914).

[4] 162 U.S. 255 (1896). Justice Gray endeavored to distinguish between this and *Lee*. Id., 271. It was Justice Gray who spoke for the dissenters in *Lee*.

[5] *Land* v. *Dollar*, 330 U.S. 731, 737 (1947).

[6] *Oregon* v. *Hitchcock*, 202 U.S. 60 (1906); *Louisiana* v. *Garfield*, 211 U.S. 70 (1908); *New Mexico* v. *Lane*, 243 U.S. 52 (1971); *Wells* v. *Roper*, 246 U.S. 335 (1918); *Morrison* v. *Work*, 266 U.S. 481 (1925); *Minnesota* v. *United States*, 305 U.S. 382 (1939); *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371 (1945). *See also Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902).

[7] *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883), quoted by Chief Justice Vinson in the opinion of the Court in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 698 (1949).

[8] Id., 708. Justice Frankfurter's dissent also contains a useful classification of immunity cases and an appendix listing them.

[9] 330 U.S. 731, 735 (1947) (emphasis added).

[10] 337 U.S. 682 (1949).

cial capacity, acting under a valid statute and therefore a suit against the United States. It held that although an officer in such a situation is not immune from suits for his own torts, yet his official action, though tortious, cannot be enjoined or diverted, since it is also the action of the sovereign.[11] The Court then proceeded to repeat the rule that "the action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff's property) can be regarded as so individual only if it is not within the officer's statutory powers, or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void." [12] The Court rejected the contention that the doctrine of sovereign immunity should be relaxed as inapplicable to suits for specific relief as distinguished from damage suits, saying: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." [13]

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[11] Id., 689–697.

[12] Id., 701–702. This rule was applied in *Goldberg* v. *Daniels*, 231 U.S. 218 (1913), which also involved a sale of government surplus property. After the Secretary of the Navy rejected the highest bid, plaintiff sought mandamus to compel delivery. This suit was held to be against the United States. *See also Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), which held that prospective bidders for contracts derive no enforceable rights against a federal official for an alleged misinterpretation of his government's authority on the ground that an agent is answerable only to his principal for misconstruction of instructions, given for the sole benefit of the principal. In the *Larson* case the Court not only refused to follow *Goltra* v. *Weeks*, 271 U.S. 536 (1926), but in effect overruled it. The *Goltra* case involved an attempt of the Government to repossess barges which it had leased under a contract reserving the right to repossess in certain circumstances. A suit to enjoin repossession was held not to be a suit against the United States on the ground that the actions were personal and in the nature of a trespass.

Also decided in harmony with the *Larson* decision are the following, wherein the suit was barred by reason of being against the United States: (1) *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), a suit to eject a Forest Service Officer from land occupied by him in his official capacity under a claim of title from the United States; and (2) *Hawaii* v. *Gordon*, 373 U.S. 57 (1963), an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that State. In *Dugan* v. *Rank*, 372 U.S. 609 (1963), the Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an action against the United States, for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. Damages were recoverable in a suit under the Tucker Act, 28 U.S.C. § 1346.

[13] 337 U.S. 682, 703–704. Justice Frankfurter, dissenting, would have applied the rule of the *Lee* case. See P.L. 94–574, § 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (action seeking relief, except for money damages, against officer, employee, or agency not to be dismissed as action against United States).

Suits against officers involving the doctrine of sovereign immunity have been classified by Justice Frankfurter in a dissenting opinion into four general groups. First, there are those cases in which the plaintiff seeks an interest in property which belongs to the Government or calls "for an assertion of what is unquestionably official authority."[14] Such suits, of course, cannot be maintained.[15] Second, cases in which action adverse to the interests of a plaintiff is taken under an unconstitutional statute or one alleged to be so. In general these suits are maintainable.[16] Third, cases involving injury to a plaintiff because the official has exceeded his statutory authority. In general these suits are maintainable.[17] Fourth, cases in which an officer seeks immunity behind statutory authority or some other sovereign command for the commission of a common law tort.[18] This category of cases presents the greatest difficulties since these suits can as readily be classified as falling into the first group if the action directly or indirectly is one for specific performance or if the judgment would affect the United States.

***Suits Against Government Corporations.***—The multiplication of government corporations during periods of war and depression has provided one motivation for limiting the doctrine of sovereign immunity. In *Keifer & Keifer* v. *RFC*,[19] the Court held that the Government does not become a conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. Nor does the creation of a government corporation confer upon it legal immunity. Whether Congress endows a public corporation with governmental immunity in a specific instance is a matter of ascertaining the congressional will. Moreover, it has been held that

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[14] *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 709-710 (1949).

[15] *Oregon* v. *Hitchcock*, 202 U.S. 60 (1906); *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914); *Wells* v. *Roper*, 246 U.S. 335 (1918). *See also Belknap* v. *Schild*, 161 U.S. 10 (1896); *International Postal Supply Co.* v. *Bruce*, 194 U.S. 601 (1904).

[16] *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110 (1936); *Tennessee Power Co.* v. *TVA*, 306 U.S. 118 (1939), which held that one threatened with direct and special injury by the act of an agent of the Government under a statute may challenge the constitutionality of the statute in a suit against the agent.

[17] *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912); *Waite* v. *Macy*, 246 U.S. 606 (1918).

[18] *United States* v. *Lee*, 106 U.S. 196 (1882); *Goltra* v. *Weeks*, 271 U.S. 536 (1926); *Ickes* v. *Fox*, 300 U.S. 82 (1937); *Land* v. *Dollar*, 330 U.S. 731 (1947). *See also Barr* v. *Matteo*, 360 U.S. 564 (1959); *Howard* v. *Lyons*, 360 U.S. 593 (1959). An emerging variant is the constitutional tort case, which springs from *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and which involves different standards of immunity for officers. *Butz* v. *Economou*, 438 U.S. 478 (1978); *Carlson* v. *Green*, 446 U.S. 14 (1980); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

[19] 306 U.S. 381 (1939).

waivers of governmental immunity in the case of federal instrumentalities and corporations should be construed liberally.[20] On the other hand, Indian nations are exempt from suit without further congressional authorization; it is as though their former immunity as sovereigns passed to the United States for their benefit, as did their tribal properties.[21]

**Suits Between Two or More States**

The extension of federal judicial power to controversies between States and the vesting of original jurisdiction in the Supreme Court of suits to which a State is a party had its origin in experience. Prior to independence, disputes between colonies claiming charter rights to territory were settled by the Privy Council. Under the Articles of Confederation, Congress was made "the last resort on appeal" to resolve "all disputes and differences . . . between two or more States concerning boundary, jurisdiction, or any other cause whatever," and to constitute what in effect were *ad hoc* arbitral courts for determining such disputes and rendering a final judgment therein. When the Philadelphia Convention met in 1787, serious disputes over boundaries, lands, and river rights involved ten States.[1] It is hardly surprising, therefore, that during its first sixty years the only state disputes coming to the Supreme Court were boundary disputes [2] or that such disputes constitute the largest single number of suits between States. Since 1900, however, as the result of the increasing mobility of population and wealth and the effects of technology and industrialization, other types of cases have occurred with increasing frequency.

***Boundary Disputes: The Law Applied.***—Of the earlier examples of suits between States, that between New Jersey and New York [3] is significant for the application of the rule laid down earlier in *Chisholm* v. *Georgia* that the Supreme Court may proceed *ex parte* if a State refuses to appear when duly summoned. The long drawn out litigation between Rhode Island and Massachusetts is of even

[20] *FHA* v. *Burr*, 309 U.S. 242 (1940). Nonetheless, the Court held that a congressional waiver of immunity in the case of a governmental corporation did not mean that funds or property of the United States can be levied on to pay a judgment obtained against such a corporation as the result of waiver of immunity.

[21] *United States* v. *United States Fidelity Co.*, 309 U.S. 506 (1940).

[1] Warren, "The Supreme Court and Disputes Between States," 34 Bull. of William and Mary, No. 4 (1940), 7-11. For a more comprehensive treatment of background as well as the general subject, *see* C. Warren, *The Supreme Court and the Sovereign States* (Boston: 1924).

[2] Id., 13. However, only three such suits were brought in this period, 1789-1849. During the next 90 years, 1849-1939, at least twenty-nine such suits were brought. Id., 13, 14.

[3] *New Jersey* v. *New York*, 5 Pet. (30 U.S.) 284 (1831).

greater significance for its rulings, after the case had been pending for seven years, that though the Constitution does not extend the judicial power to all controversies between States, yet it does not exclude any,[4] that a boundary dispute is a justiciable and not a political question,[5] and that a prescribed rule of decision is unnecessary in such cases. On the last point, Justice Baldwin stated: "The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo,* of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." [6]

***Modern Types of Suits Between States.***—Beginning with *Missouri* v. *Illinois & Chicago District,*[7] which sustained jurisdiction to entertain an injunction suit to restrain the discharge of sewage into the Mississippi River, water rights, the use of water resources, and the like, have become an increasing source of suits between States. Such suits have been especially frequent in the western States, where water is even more of a treasure than elsewhere, but they have not been confined to any one region. In *Kansas* v. *Colorado,*[8] the Court established the principle of the equitable division of river or water resources between conflicting state interests. In *New Jersey* v. *New York,*[9] where New Jersey sought to enjoin the diversion of waters into the Hudson River watershed for New York in such a way as to diminish the flow of the Delaware River in New Jersey, injure its shad fisheries, and increase harmfully the

[4] *Rhode Island* v. *Massachusetts,* 12 Pet. (37 U.S.) 657, 721 (1838).

[5] Id., 736-737.

[6] Id., 737. Chief Justice Taney dissented because of his belief that the issue was not one of property in the soil, but of sovereignty and jurisdiction, and hence political. Id., 752-753. For different reasons, it should be noted, a suit between private parties respecting soil or jurisdiction of two States, to which neither State is a party does not come within the original jurisdiction of the Supreme Court. *Fowler* v. *Lindsey,* 3 Dall. (3 U.S.) 411 (1799).

[7] 180 U.S. 208 (1901).

[8] 206 U.S. 46 (1907). *See also Idaho ex rel. Evans* v. *Oregon and Washington,* 444 U.S. 380 (1980).

[9] 283 U.S. 336 (1931).

saline contents of the Delaware, Justice Holmes stated for the Court: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And, on the other hand, equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the river that must be reconciled as best they may be." [10]

Other types of interstate disputes of which the Court has taken jurisdiction include suits by a State as the donee of the bonds of another to collect thereon,[11] by Virginia against West Virginia to determine the proportion of the public debt of the original State of Virginia which the latter owed the former,[12] by Arkansas to enjoin Texas from interfering with the performance of a contract by a Texas foundation to contribute to the construction of a new hospital in the medical center of the University of Arkansas,[13] of one State against another to enforce a contract between the two,[14] of a suit in equity between States for the determination of a decedent's domicile for inheritance tax purposes,[15] and of a suit by two States to restrain a third from enforcing a natural gas measure which purported to restrict the interstate flow of natural gas from the State in the event of a shortage.[16]

In *Texas* v. *New Jersey*,[17] the Court adjudicated a multistate dispute about which State should be allowed to escheat intangible

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[10] Id., 342. *See also Nebraska* v. *Wyoming*, 325 U.S. 589 (1945).

[11] *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904).

[12] *Virginia* v. *West Virginia*, 220 U.S. 1 (1911).

[13] *Arkansas* v. *Texas*, 346 U.S. 368 (1953).

[14] *Kentucky* v. *Indiana*, 281 U.S. 163 (1930).

[15] *Texas* v. *Florida*, 306 U.S. 398 (1939). In *California* v. *Texas*, 437 U.S. 601 (1978), the Court denied a State leave to file an original action against another State to determine the contested domicile of a decedent for death tax purposes, with several Justices of the view that *Texas* v. *Florida* had either been wrongly decided or was questionable. But after determining that an interpleader action by the administrator of the estate for a determination of domicile was barred by the Eleventh Amendment, *Cory* v. *White*, 457 U.S. 85 (1982), the Court over dissent permitted filing of the original action. *California* v. *Texas*, 457 U.S. 164 (1982).

[16] *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). The Court, in *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), over strong dissent, relied on this case in permitting suit contesting a tax imposed on natural gas, the incidence of which fell on the suing State's consuming citizens.

[17] 379 U.S. 674 (1965). *See also Pennsylvania* v. *New York*, 406 U.S. 206 (1972).

property consisting of uncollected small debts held by a corporation. Emphasizing that the States could not constitutionally provide a rule of settlement and that no federal statute governed the matter, the Court evaluated the possible rules and choose the one easiest to apply and least likely to lead to continuing disputes.

In general in taking jurisdiction of these suits, along with those involving boundaries and the diversion or pollution of water resources, the Supreme Court proceeded upon the liberal construction of the term "controversies between two or more States" enunciated in *Rhode Island* v. *Massachusetts,*[18] and fortified by Chief Justice Marshall's dictum in *Cohens* v. *Virginia* [19] concerning jurisdiction because of the parties to a case, that "it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union." [20]

***Cases of Which the Court Has Declined Jurisdiction.***—In other cases, however, the Court, centering its attention upon the elements of a case or controversy, has declined jurisdiction. Thus, in *Alabama* v. *Arizona,*[21] where Alabama sought to enjoin nineteen States from regulating or prohibiting the sale of convict-made goods, the Court went far beyond holding that it had no jurisdiction, and indicated that jurisdiction of suits between States will be exercised only when absolutely necessary, that the equity requirements in a suit between States are more exacting than in a suit between private persons, that the threatened injury to a plaintiff State must be of great magnitude and imminent, and that the burden on the plaintiff State to establish all the elements of a case is greater than that generally required by a petitioner seeking an injunction suit in cases between private parties.

Pursuing a similar line of reasoning, the Court declined to take jurisdiction of a suit brought by Massachusetts against Missouri and certain of its citizens to prevent Missouri from levying inheritance taxes upon intangibles held in trust in Missouri by resident trustees. In holding that the complaint presented no justiciable

[18] 12 Pet. (37 U.S.) 657 (1838).

[19] 6 Wheat. (19 U.S.) 264 (1821).

[20] Id., 378. *See Western Union Co.* v. *Pennsylvania,* 368 U.S. 71, 79–80 (1961); *Texas* v. *New Jersey,* 379 U.S. 674, 677 (1965); *Pennsylvania* v. *New York,* 407 U.S. 206 (1972).

[21] 291 U.S. 286 (1934). The Court in recent years, with a significant caseload problem, has been loath to permit filings of original actions where the parties might be able to resolve their disputes in other courts, even in cases in which the jurisdiction over the particular dispute is exclusively original. *Arizona* v. *New Mexico,* 425 U.S. 794 (1976) (dispute subject of state court case brought by private parties); *California* v. *West Virginia,* 454 U.S. 1027 (1981).

controversy, the Court declared that to constitute such a controversy, the complainant State must show that it "has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to . . . the common law or equity systems of jurisprudence." [22] The fact that the trust property was sufficient to satisfy the claims of both States and that recovery by either would not impair any rights of the other distinguished the case from *Texas* v. *Florida*,[23] where the contrary situation obtained. Furthermore, the Missouri statute providing for reciprocal privileges in levying inheritance taxes did not confer upon Massachusetts any contractual right. The Court then proceeded to reiterate its earlier rule that a State may not invoke the original jurisdiction of the Supreme Court for the benefit of its residents or to enforce the individual rights of its citizens.[24] Moreover, Massachusetts could not invoke the original jurisdiction of the Court by the expedient of making citizens of Missouri parties to a suit not otherwise maintainable.[25] Accordingly, Massachusetts was held not to be without an adequate remedy in Missouri's courts or in a federal district court in Missouri.

***The Problem of Enforcement: Virginia v. West Virginia.***—A very important issue that presents itself in interstate litigation is the enforcement of the Court's decree, once it has been entered. In some types of suits this issue may not arise, and if it does, it may be easily met. Thus a judgment putting a State in possession of disputed territory is ordinarily self-executing. But if the losing State should oppose execution, refractory state officials, as individuals, would be liable to civil suits or criminal prosecutions in the federal courts. Likewise an injunction may be enforced against state officials as individuals by civil or criminal proceedings. Those judgments, on the other hand, which require a State in its governmental capacity to perform some positive act present the issue of enforcement in more serious form. The issue arose directly in the long and much litigated case between Virginia and West Virginia over the proportion of the state debt of original Virginia owed by

[22] *Massachusetts* v. *Missouri*, 308 U.S. 1, 15–16, (1939), citing *Florida* v. *Mellon*, 273 U.S. 12 (1927).

[23] 306 U.S. 398 (1939).

[24] 308 U.S., 17, citing *Oklahoma* v. *Atchison, T. & S.F. Ry.*, 220 U.S. 277 286, (1911), and *Oklahoma ex rel Johnson* v. *Cook*, 304 U.S. 387, 394 (1938). *See also New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U.S. 76 (1883), which held that a State cannot bring a suit on behalf of its citizens to collect on bonds issued by another State, and *Louisiana* v. *Texas*, 176 U.S. 1 (1900), which held that a State cannot sue another to prevent maladministration of quarantine laws.

[25] 308 U.S., 17, 19.

West Virginia after its separate admission to the Union under a compact which provided that West Virginia assume a share of the debt.

The suit was begun in 1906, and a judgment was rendered against West Virginia in 1915. Finally, in 1917, Virginia filed a suit against West Virginia to show cause why, in default of payment of the judgment, an order should not be entered directing the West Virginia legislature to levy a tax for payment of the judgment.[1] Starting with the rule that the judicial power essentially involves the right to enforce the results of its exertion,[2] the Court proceeded to hold that it applied with the same force to States as to other litigants [3] and to consider appropriate remedies for the enforcement of its authority. In this connection, Chief Justice White declared: "As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the federal government, judicial, legislative, or executive, which may be appropriately exercised." [4] The Court, however, left open the question of its power to enforce the judgment under existing legislation and scheduled the case for reargument at the next term, but in the meantime West Virginia accepted the Court's judgment and entered into an agreement with Virginia to pay it.[5]

**Controversies Between a State and Citizens of Another State**

The decision in *Chisholm* v. *Georgia* [1] that this category of cases included equally those where a State was a party defendant provoked the proposal and ratification of the Eleventh Amendment, and since then controversies between a State and citizens of another State have included only those cases where the State has been a party plaintiff or has consented to be sued.[2] As a party plaintiff, a State may bring actions against citizens of other States to protect its legal rights or in some instances as *parens patriae* to protect the health and welfare of its citizens. In general, the Court has tended to construe strictly this grant of judicial power, which

[1] The various litigations of *Virginia* v. *West Virginia* are to be found in 206 U.S. 290 (1907); 209 U.S. 514 (1908); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S.C. 531 (1916); 246 U.S. 565 (1918).

[2] 246 U.S., 591.

[3] Id., 600.

[4] Id., 601.

[5] C. Warren, *The Supreme Court and Sovereign States* (Boston: 1924), 78–79.

[1] 2 Dall. (2 U.S.) 419 (1793).

[2] *Infra, pp.* 1427–1448.

simultaneously comes within its original jurisdiction, by perhaps an even more rigorous application of the concepts of cases and controversies than that in cases between private parties.[3] This it does by holding rigorously to the rule that all the party defendants be citizens of other States [4] and by adhering to congressional distribution of its original jurisdiction concurrently with that of other federal courts.[5]

***Jurisdiction Confined to Civil Cases.***—In *Cohens* v. *Virginia,*[6] there is a dictum to the effect that the original jurisdiction of the Supreme Court does not include suits between a State and its own citizens. Long afterwards, the Supreme Court dismissed an action for want of jurisdiction because the record did not show the corporation against which the suit was brought was chartered in another State.[7] Subsequently the Court has ruled that it will not entertain an action by a State to which its citizens are either parties of record or would have to be joined because of the effect of a judgment upon them.[8] In his dictum in *Cohens* v. *Virginia,* Chief Justice Marshall also indicated that perhaps no jurisdiction existed over suits by States to enforce their penal laws.[9] Sixty-seven years later the Court wrote this dictum into law in *Wisconsin* v. *Pelican Ins. Co.*[10] Here Wisconsin sued a Louisiana corporation to recover a judgment rendered in its favor by one of its own courts. Relying partly on the rule of international law that the courts of no country execute the penal laws of another, partly upon the 13th section of the Judiciary Act of 1789 which vested the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a State is a party, and partly on Justice Iredell's dissent in *Chisholm* v. *Georgia,*[11] where he confined the term "controversies" to civil suits, Justice Gray ruled for the Court that for purposes of original jurisdiction, "controversies between a State and citizens of another State" are confined to civil suits.[12]

[3] *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923); *Florida* v. *Mellon,* 273 U.S. 12 (1927); *New Jersey* v. *Sargent,* 269 U.S. 328 (1926).

[4] *Pennsylvania* v. *Quicksilver Company,* 10 Wall. (77 U.S.) 553 (1871); *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902).

[5] *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. 265 (1888).

[6] 6 Wheat. (19 U.S.) 264, 398–399 (1821).

[7] *Pennsylvania* v. *Quicksilver Mining Co.,* 10 Wall. (77 U.S.) 553 (1871).

[8] *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902).

[9] 6 Wheat. (19 U.S.) 264, 398–399 (1821).

[10] 127 U.S. 265 (1888).

[11] 2 Dall. (2 U.S.) 419, 431–432 (1793).

[12] 127 U.S., 289–300.

***The State's Real Interest.***—Ordinarily, a State may not sue in its name unless it is the real party in interest with real interests. It can sue to protect its own property interests,[13] and if it sues for its own interest as owner of another State's bonds, rather than as an assignee for collection, jurisdiction exists.[14] Where a State in order to avoid the limitation of the Eleventh Amendment by statute provided for suit in the name of the State to collect on the bonds of another State held by one of its citizens, it was refused the right to sue.[15] Nor can a State sue on behalf of its own citizens the citizens of other States to collect claims.[16]

***The State as Parens Patriae.***—The distinction between suits brought by States to protect the welfare of its citizens as a whole and suits to protect the private interests of individual citizens is not easily drawn. Thus, in *Oklahoma* v. *Atchison, T. & S.F. Ry.*,[17] the State was refused permission to sue to enjoin unreasonable rate charges by a railroad on the shipment of specified commodities, inasmuch as the State was not engaged in shipping these commodities and had no proprietary interest in them. But in *Georgia* v. *Pennsylvania R. Co.*,[18] a closely divided Court accepted a suit by the State, suing as *parens patriae* and in its proprietary capacity, the latter being treated by the Court as something of a makeweight, seeking injunctive relief against twenty railroads on allegations that the rates were discriminatory against the State and its citizens and their economic interests and that the rates had been fixed through coercive action by the northern roads against the southern lines in violation of the Clayton Antitrust Act. For the Court, Justice Douglas observed that the interests of a State for purposes of invoking the original jurisdiction of the Court were not to be confined to those which are proprietary but to "embrace the so called 'quasi-sovereign' interests which . . . are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'" [19]

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[13] *Pennsylvania* v. *Wheeling & B. Bridge Co.*, 13 How. (54 U.S.) 518, 559 (1852); *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938); *Georgia* v. *Evans*, 316 U.S. 159 (1942).

[14] *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904).

[15] *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883).

[16] *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938).

[17] 220 U.S. 277 (1911).

[18] 324 U.S. 439 (1945).

[19] Id., 447–448, quoting from *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), in which the State was permitted to sue *parens patriae* to enjoin defendant from emitting noxious gases from its works in Tennessee which caused substantial damage in nearby areas of Georgia. In *Alfred L. Snapp & Son* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607–608 (1982), the Court attempted to enunciate the standards by which to recognize permissible *parens patriae* assertions. *See also Maryland* v. *Louisiana*, 451 U.S. 725, 737–739 (1981).

Discriminatory freight rates, the Justice continued, may cause a blight no less serious than noxious gases in that they may arrest the development of a State and put it at a competitive disadvantage. "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction." [20]

The continuing vitality of this case is in some doubt, inasmuch as the Court has limited it in a similar case.[21] But the ability of States to act as *parens patriae* for their citizens in environmental pollution cases seems established, although as a matter of the Supreme Court's original jurisdiction such suits are not in favor.[22]

One clear limitation had seemed to be solidly established until recent litigation cast doubt on its foundation. It is no part of a State's "duty or power," said the Court in *Massachusetts* v. *Mellon*,[23] "to enforce [her citizens'] rights in respect to their rela-

[20] *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 468 (1945). Chief Justice Stone and Justices Roberts, Frankfurter, and Jackson dissented.

[21] In *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), the Court, five-to-two, held that the State could not maintain an action for damages *parens patriae* under the Clayton Act and limited the previous case to instances in which injunctive relief is sought. Hawaii had brought its action in federal district court. The result in *Hawaii* was altered by P.L. 94-435, 90 Stat. 1383 (1976), 15 U.S.C. § 15c *et seq.*, but the decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), reduced in importance the significance of the law.

[22] Most of the cases, *but see Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907), concern suits by one State against another. *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *New York* v. *New Jersey*, 256 U.S. 296 (1921); *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923). While recognizing that original jurisdiction exists when a State sues a political subdivision of another State or a private party as *parens patriae* for its citizens and on its own proprietary interests to abate environmental pollution, the Court has held that because of the technical complexities of the issues and the inconvenience of adjudicating them on its original docket the cases should be brought in the federal district court under federal question jurisdiction founded on the federal common law. *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972). The Court had earlier thought the cases must be brought in state court. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

[23] 262 U.S. 447, 486 (1923).

tions with the Federal Government. In that field, it is the United States and not the State which represents them as *parens patriae* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." But in *South Carolina* v. *Katzenbach*,[24] while holding that the State lacked standing under *Massachusetts* v. *Mellon* to attack the constitutionality of the Voting Rights Act of 1965[25] under the Fifth Amendment's due process clause and under the bill of attainder clause of Article I,[26] the Court proceeded to decide on the merits the State's claim that Congress had exceeded its powers under the Fifteenth Amendment.[27] Was the Court here *sub silentio* permitting it to assert its interest in the execution of its own laws, rather than those enacted by Congress, or its interest in having Congress enact only constitutional laws for application to its citizens, an assertion which is contrary to a number of supposedly venerated cases.[28] Either alternative possibility would be significant in a number of respects.[29]

[24] 383 U.S. 301 (1966). The State sued the Attorney General of the United States as a citizen of New Jersey, thus creating the requisite jurisdiction, and avoiding the problem that the States may not sue the United States without its consent. *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902); *Oregon* v. *Hitchcock*, 202 U.S. 60 (1906); *Kansas* v. *United States*, 204 U.S. 331 (1907). The expedient is, of course, the same device as is used to avoid the Eleventh Amendment prohibition against suing a State by suing its officers. *Ex parte Young*, 209 U.S. 123 (1908).

[25] 79 Stat. 437 (1965), 42 U.S.C. § 1973 *et seq.*

[26] The Court first held that neither of these provisions were restraints on what the Federal Government might do with regard to a State. It then added: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parents patriae* of every American citizen." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966).

[27] The Court did not indicate on what basis South Carolina could raise the issue. At the beginning of its opinion, the Court did note the "[o]riginal jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the constitution. *See Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439." Id., 307 But surely this did not have reference to that case's *parens patriae* holding.

[28] *See Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *Florida* v. *Mellon*, 273 U.S. 12 (1927); *Jones ex rel. Louisiana* v. *Bowles*, 322 U.S. 707 (1944). *See* especially *Georgia* v. *Stanton*, 6 Wall. (73 U.S.) 50 (1868); *Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475 (1867). In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), four original actions were consolidated and decided. Two were actions by the United States against States, but the other two were suits by States against the Attorney General, as a citizen of New York, seeking to have the Voting Rights Act Amendments of 1970 voided as unconstitutional. *South Carolina* v. *Katzenbach* was uniformly relied on by all parties as decisive of the jurisdictional question and in announcing the judgment of the Court Justice Black simply noted that no one raised jurisdictional or justiciability questions. Id., 117 n. 1. *And see* id., 152 n. 1 (Justice Harlan concurring in part and dissenting in part).

[29] Bickel, "The Voting Rights Cases," 1966 Sup. Ct. Rev. 79, 80–93.

**Controversies Between Citizens of Different States**

The records of the Federal Convention are silent with regard to the reasons the Framers included in the judiciary article jurisdiction in the federal courts of controversies between citizens of different States,[1] but since the Judiciary Act of 1789 "diversity jurisdiction" has been bestowed statutorily on the federal courts.[2] The traditional explanation remains that offered by Chief Justice Marshall. "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." [3] Other explanations have been offered and controverted,[4] but diversity cases constitute a large bulk of cases on the dockets of the federal courts today, though serious proposals for restricting access to federal courts in such cases have been before Congress for some time.[5] The essential difficulty with this type of jurisdiction is that it requires federal judges to decide issues of local import on the basis of their reading of how state judges would decide them, an oftentimes laborious process which detracts from the time and labor needed to resolve issues of federal import.

***The Meaning of "State" and the District of Columbia Problem.***—In *Hepburn* v. *Ellzey,*[6] Chief Justice Marshall for the Court

[1] Friendly, "The Historic Basis of Diversity Jurisdiction," 41 Harv. L. Rev. 483 (1928).

[2] 1 Stat. 78, § 11. Subject to a jurisdictional amount, the statute conferred diversity jurisdiction when the suit was between a citizen of the State in which the suit was brought and a citizen of another State. The Act of March 3, 1875, § 1. 18 Stat. 470, first established the language in the present statute, 28 U.S.C. § 1332(a)(1), merely requiring diverse citizenship, so that a citizen of Maryland could sue a citizen of Delaware in federal court in New Jersey. *Snyder* v. *Harris,* 394 U.S. 332 (1969), held that in a class action in diversity the individual claims could not be aggregated to meet the jurisdictional amount. *Zahn* v. *International Paper Co.,* 414 U.S. 291 (1974), extended *Snyder* in holding that even though the named plaintiffs had claims of more than $10,000 they could not represent a class in which many of the members had claims for less than $10,000.

[3] *Bank of the United States* v. *Deveaux,* 5 Cr. (9 U.S.) 61, 87 (1809).

[4] Summarized and discussed in C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), § 23; American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (Philadelphia: 1969), 99–110, 458–464.

[5] The principal proposals are those of the American Law Institute. Id., 123–134.

[6] 2 Cr. (6 U.S.) 445 (1805).

confined the meaning of the word "State" as used in the Constitution to "the members of the American confederacy" and ruled that a citizen of the District of Columbia could not sue a citizen of Virginia on the basis of diversity of citizenship. Marshall noted that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration." [7] The same rule was subsequently applied to citizens of the territories of the United States.[8]

Whether the Chief Justice had in mind a constitutional amendment or a statute when he spoke of legislative consideration remains unclear. Not until 1940, however, did Congress attempt to meet the problem by statutorily conferring on federal district courts jurisdiction of civil actions, not involving federal questions, "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any State or Territory." [9] In *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*,[10] this act was upheld in a five-to-four decision but for widely divergent reasons by a coalition of Justices. Two Justices thought that Chief Justice Marshall's 1804 decision should be overruled, but the other seven Justices disagreed; however, three of the seven thought the statute could be sustained under Congress' power to enact legislation for the inhabitants of the District of Columbia, but the remaining four plus the other two rejected this theory. The statute was upheld because a total of five Justices voted to sustain it, although of the two theories relied on, seven Justices rejected one and six the other. The result, attributable to "conflicting minorities in combination",[11] means that *Hepburn* v. *Ellzey* is still good law insofar as it holds that the District of Columbia is not a State, but is overruled insofar as it holds that District citizens may not utilize federal diversity jurisdiction.[12]

***Citizenship of Natural Persons.***—For purposes of diversity jurisdiction, state citizenship is determined by the concept of domicile [13] rather than of mere residence.[14] That is, while the Court's

[7] Id., 453.

[8] *City of New Orleans* v. *Winter*, 1 Wheat. (14 U.S.) 91 (1816).

[9] 54 Stat. 143 (1940), as revised, 28 U.S.C. § 1332(d).

[10] 337 U.S. 582 (1948).

[11] Id., 655 (Justice Frankfurter dissenting).

[12] The statute's provision allowing citizens of Puerto Rico to sue in diversity was sustained in *Americana of Puerto Rico* v. *Kaplus*, 368 F. 2d 431 (C.A. 3, 1966), *cert. den.*, 386 U.S. 943 (1967), under Congress' power to make rules and regulations for United States territories. *Cf. Examining Board* v. *Flores de Otero*, 426 U.S. 572, 580–597 (1976) (discussing congressional acts with respect to Puerto Rico).

[13] *Chicago & N.W.R. Co.* v. *Ohle*, 117 U.S. 123 (1886).

[14] *Sun Printing & Pub. Assn.* v. *Edwards*, 194 U.S. 377 (1904).

definition has varied throughout the cases,[15] a person is a citizen of the State in which he has his true, fixed, and permanent home and principal establishment and to which he intends to return whenever he is absent from it.[16] Acts may disclose intention more clearly and decisively than declarations.[17] One may change his domicile in an instant by taking up residence in the new place and by intending to remain there indefinitely and one may obtain the benefit of diversity jurisdiction by so changing for that reason alone,[18] provided the change is more than a temporary expedient.[19]

If the plaintiff and the defendant are citizens of different States, diversity jurisdiction exists regardless of the State in which suit is brought.[20] Chief Justice Marshall early established that in multiparty litigation, there must be complete diversity, that is, that no party on one side could be a citizen of any State of which any party on the other side was a citizen.[21] It has now apparently been decided that this requirement flows from the statute on diversity rather than from the constitutional grant and that therefore minimal diversity is sufficient.[22] The Court has also placed some issues beyond litigation in federal courts in diversity cases, apparently solely on policy grounds.[23]

***Citizenship of Corporations.***—In *Bank of the United States* v. *Deveaux*.[24] Chief Justice Marshall declared: "That invisible, intan-

[15] *Knox* v. *Greenleaf*, 4 Dall. (4 U.S.) 360 (1802); *Shelton* v. *Tiffin*, 6 How. (47 U.S.) 163 (1848); *Williamson* v. *Osenton*, 232 U.S. 619 (1914).

[16] *Stine* v. *Moore*, 213 F. 2d 446, 448 (C.A. 5, 1954).

[17] *Shelton* v. *Tiffin*, 6 How. (47 U.S.) 163 (1848).

[18] *Williamson* v. *Osenton*, 232 U.S. 619 (1914).

[19] *Jones* v. *League*, 18 How. (59 U.S.) 76 (1855).

[20] 28 U.S.C. § 1332(a)(1).

[21] *Strawbridge* v. *Curtiss*, 3 Cr. (7 U.S.) 267 (1806).

[22] In *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 530–531 (1967), holding that congressional provision in the interpleader statute of minimal diversity, 28 U.S.C. § 1335(a)(1), was valid, the Court said of *Strawbridge*. "Chief Justice Marshall there purported to construe only "The words of the act of Congress,' not the Constitution itself. And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." In class actions, only the citizenship of the named representatives is considered and other members of the class can be citizens of the same State as one or more of the parties on the other side. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969).

[23] In domestic relations cases and probate matters, the federal courts will not act, though diversity exists. *Barber* v. *Barber*, 21 How. (62 U.S.) 582 (1858); *Ex parte Burrus*, 136 U.S. 586 (1890); *In re Broderick's Will*, 21 Wall. (88 U.S.) 503 (1875). *But see Markham* v. *Allen*, 326 U.S. 490 (1946).

[24] 5 Cr. (9 U.S.) 61, 86 (1809).

gible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." The Court upheld diversity jurisdiction because the members of the bank as a corporation were citizens of one State and Deveaux was a citizen of another. The holding was reaffirmed a generation later,[25] but the pressures were building for change, because of the increased economic role of the corporation and because the *Strawbridge* rule [1] would have soon closed the doors of the federal courts to the larger corporations with stockholders in many States.

*Deveaux* was overruled in 1844, when after elaborate argument a divided Court held that "a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person." [2] Ten years later the Court abandoned this rationale but achieved the same result by creating a conclusive presumption that all of the stockholders of a corporation are citizens of the State of incorporation.[3] Through this fiction, substantially unchanged today,[4] the Court was able to hold that a corporation cannot be a citizen for diversity purposes and that the citizenship of its stockholders controls but to provide corporations access to federal courts in diversity in every State except the one in which it is incorporated.[5] The right of foreign corporations to resort to federal courts in diversity is not one which the States may condition as a qualification for doing business in the State.[6]

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[25] *Commercial & Railroad Bank* v. *Slocomb*, 14 Pet. (39 U.S.) 60 (1840).

[1] *Strawbridge* v. *Curtiss*, 3 Cr. (7 U.S.) 267 (1806).

[2] *Louisville, C. & C.R. Co.* v. *Letson*, 2 How. (43 U.S.) 497, 558 (1844).

[3] *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. (57 U.S.) 314 (1854). *See Muller* v. *Dows*, 94 U.S. 444 (1877); *St. Louis & S.F. Ry. Co.* v. *James*, 161 U.S. 545 (1896).

[4] § 2, 72 Stat. 415 (1958), amending 28 U.S.C. § 1332(c), provided that a corporation is to be deemed a citizen of any State in which it has been incorporated and of the State in which it has its principal place of business. 78 Stat. 445 (1964), amending 28 U.S.C. § 1332(c), was enacted to correct the problem revealed by *Lumbermen's Mutual Casualty Co.* v. *Elbert*, 348 U.S. 48 (1954).

[5] *See United Steelworkers* v. *R.H. Bouligny*, 382 U.S. 145, 148 (1965).

[6] In *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922), the Court resolved two conflicting lines of cases and voided a state statute which required the cancellation of the license of a foreign corporation to do business in the State upon notice that the corporation had removed a case to a federal court.

Unincorporated associations, such as partnerships, joint stock companies, labor unions, governing boards of institutions, and the like, do not enjoy the same privilege as a corporation; the actual citizenship of each of its members must be considered in determining whether diversity exists.[7]

***Manufactured Diversity.***—One who because of diversity of citizenship can choose whether to sue in state or federal court will properly consider where the advantages and disadvantages balance; one who perceives the balance clearly favoring the federal forum where no diversity exists will no doubt often attempt to create diversity. In the Judiciary Act of 1789, Congress exempted from diversity jurisdiction suits on choses of action in favor of an assignee unless the suit could have been brought in federal court if no assignment had been made.[8] One could create diversity by a bona fide change of domicile even with the sole motive of creating domicile.[9] Similarly, one could create diversity, or defeat it, by choosing a personal representative of the requisite citizenship.[10] By far, the greatest number of attempts to manufacture or create diversity has concerned corporations. A corporation cannot get into federal court by transferring its claim to a subsidiary incorporated in another State,[11] and for a time the Supreme Court tended to look askance at collusory incorporations and the creation of dummy corporations for purposes of creating diversity.[12] But in *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*,[13] it became highly important to the plaintiff company to bring its suit in federal court rather than in a state court.[14] Thus, Black & White, a Kentucky corporation, dissolved itself and obtained a charter as a Tennessee corporation; the only change made was the State of incorporation, the name, officers, shareholders, and location of the business remaining the same. A majority of the Court,

[7] *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U.S. 449 (1900); *Chapman* v. *Barney*, 129 U.S. 677 (1889); *Thomas* v. *Board of Trustees*, 195 U.S. 207 (1904); *United Steelworkers* v. *R.H. Bouligny*, 382 U.S. 145 (1965).

[8] § 11, 1 Stat. 78, sustained in *Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 8 (1799), and *Sheldon* v. *Sill*, 8 How. (49 U.S.) 441 (1850). The present statute, 28 U.S.C. § 1359, provides that no jurisdiction exists in a civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *See Kramer* v. *Carribean Mills*, 394 U.S. 823 (1969).

[9] *Williamson* v. *Osenton*, 232 U.S. 619 (1914); *Morris* v. *Gilmer*, 129 U.S. 315 (1889).

[10] *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931).

[11] *Miller & Lux* v. *East Side Canal & Irrigation Co.*, 211 U.S. 293 (1908).

[12] E.g., *Southern Realty Co.* v. *Walker*, 211 U.S. 603 (1909).

[13] 276 U.S. 518 (1928).

[14] *Infra*, p 768 n. 21.

over a strong dissent by Justice Holmes,[15] saw no collusion and upheld diversity, meaning that the company won whereas it would have lost had it sued in the state court. *Black & White Taxicab* probably more than anything led to a reexamination of the decision on the choice of law to be applied in diversity litigation.

***The Law Applied in Diversity Cases.***—By virtue of § 34 of the Judiciary Act of 1789,[16] state law expressed in constitutional and statutory form was regularly applied in federal courts in diversity actions to govern the disposition of such cases. But in *Swift* v. *Tyson*,[17] Justice Story for the Court ruled that state court decisions were not laws within the meaning of § 34 and though entitled to respect were not binding on federal judges, except with regard to matters of a "local nature", such as statutes and interpretations thereof pertaining to real estate and other immovables, in contrast to questions of general commercial law as to which the answers were dependent not on "the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[18] The course of decision over the period of almost one hundred years was toward an expansion of the areas in which federal judges were free to construct a federal common law and a concomitant contraction of the definition of "local" laws.[19] Although dis-

[15] 276 U.S., 532 (joined by Justices Brandeis and Stone). Justice Holmes here presented his view that *Swift* v. *Tyson*, 16 Pet. (41 U.S.) 1 (1842), had been wrongly decided, but he preferred not to overrule it, merely "not allow it to spread . . . into new fields." Id. 535.

[16] The section provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92. With only insubstantial changes, the section now appears as 28 U.S.C. § 1652. For a concise review of the entire issue, *see* C. Wright, *Handbook of the Law of Federal Courts* (St. Paul; 4th ed. 1983), ch. 9.

[17] 16 Pet. (41 U.S.) 1 (1842). The issue in the case was whether a pre-existing debt was good consideration for an indorsement of a bill of exchange so that the endorsee would be a holder in due course.

[18] Id., 19. The Justice concluded this portion of the opinion: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke* v. *Lyde*, 2 Burr. R. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world. *Nun erit alia lex Romae, alia Athenis; alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtenebit.*" Ibid. The thought that the same law should prevail in Rome as in Athens was used by Justice Story in *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815). For a modern utilization, *see United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 861 (C.A. 5, 1966); id., 380 F. 2d 385, 398 (C.A. 5, 1967) (dissenting opinion).

[19] The expansions included: *Lane* v. *Vick*, 3 How. (44 U.S.) 464 (1845) (wills); *City of Chicago* v. *Robbins*, 2 Bl. (67 U.S.) 418 (1862), and *Baltimore & Ohio R. Co.* v. *Baugh* 149 U.S. 368 (1893) (torts); *Yates* v. *City of Milwaukee*, 10 Wall. (77 U.S.) 497 (1870) (real estate titles and rights of riparian owners); *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349 (1910) (mineral conveyances); *Rowan* v. *Runnels*, 5 How. (46 U.S.) 134

satisfaction with *Swift* v. *Tyson* was almost always present, within and without the Court,[20] it was the Court's decision in *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*[21] which brought disagreement to the strongest point and perhaps precipitated the overruling of *Swift* v. *Tyson* in *Erie Railroad Co.* v. *Tompkins.*[22]

"It is impossible to overstate the importance of the *Erie* decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the federal government and the states, and returns to the states a power that had

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(1847) (contracts); *Lake Shore & M.S. Ry. Co.* v. *Prentice*, 147 U.S. 101 (1893). It was strongly contended that uniformity, the goal of Justice Story's formulation, was not being achieved, in great part because state courts followed their own rules of decision even when prior federal decisions were contrary. Frankfurter, "Distribution of Judicial Power Between Federal and State Courts," 13 Corn. L.Q. 499, 529 n. 150 (1928). Moreover, the Court held that while state court interpretations of state statutes or constitutions were to be followed, federal courts could ignore them if they conflicted with earlier federal constructions of the same statute or constitutional provision. *Rowan* v. *Runnels*, 5 How. (46 U.S.) 134 (1847), or if they had been rendered after the case had been tried in federal court, *Burgess* v. *Seligman*, 107 U.S. 20 (1883), thus promoting lack of uniformity. *See also Gelpcke* v. *City of Debuque*, 1 Wall. (68 U.S.) 175 (1865); *Williamson* v. *Berry*, 8 How. (49 U.S.) 495 (1850); *Pease* v. *Peck*, 18 How. (59 U.S.) 595 (1856); *Watson* v. *Tarpley*, 18 How. (59 U.S.) 517 (1856).

[20] Extensions of the scope of *Tyson* frequently were rendered by a divided Court over the strong protests of dissenters E.g., *Gelpcke* v. *City of Debuque*, 1 Wall. (68 U.S.) 175 (1865); *Lane* v. *Vick*, 3 How. (44 U.S.) 463 (1845); *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349 (1910). In *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U.S. 368, 401–404 (1893), Justice Field dissented in an opinion in which he expressed the view that Supreme Court disregarding of state court decisions was unconstitutional, a view endorsed by Justice Holmes in *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (dissenting opinion), and adopted by the Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). Numerous proposals were introduced in Congress to change the rule.

[21] 276 U.S. 518 (1928). B. & W. had contracted with a railroad to provide exclusive taxi service at its station. B. & Y. began operating taxis at the same station and B. & W. wanted to enjoin the operation, but it was a settled rule by judicial decision in Kentucky courts that such exclusive contracts were contrary to public policy and were unenforceable in court. Therefore, B. & W. dissolved itself in Kentucky and reincorporated in Tennessee, solely in order to create diversity of citizenship and enable itself to sue in federal court. *Supra, p.* 778. It was successful and the Supreme Court ruled that diversity was present and that the injunction should issue. In *Mutual Life Ins. Co.* v. *Johnson*, 293 U.S. 335 (1934), the Court, in an opinion by Justice Cardozo, appeared to retreat somewhat from its extensions of *Tyson*, holding that state law should be applied, through a "benign and prudent comity," in a case "balanced with doubt," a concept first used by Justice Bradley in *Burgess* v. *Seligman*, 107 U.S. 20 (1883).

[22] 304 U.S. 64 (1938). Judge Friendly has written: "Havng served as the Justice's [Brandeis's] law clerk the year *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.* came before the Court, I have little doubt he was waiting for an opportunity to give *Swift* v. *Tyson* the happy dispatch he thought it deserved." H. Friendly, *Benchmarks*, (Chicago: 1967), 20.

for nearly a century been exercised by the federal government." [23] *Erie* was remarkable in a number of ways aside from the doctrine it announced. It reversed a 96-year-old precedent which counsel had specifically not questioned, it reached a constitutional decision when a statutory interpretation was available though perhaps less desirable, and it marked the only time in United States constitutional history when the Court has held that it had undertaken an unconstitutional action.[24]

Tompkins was injured by defendant's train while he was walking along the tracks. He was a citizen of Pennsylvania and the railroad was incorporated in New York. Had he sued in a Pennsylvania court, state decisional law was to the effect that inasmuch as he was a trespasser, the defendant owned him only a duty not to injure him through wanton or willful misconduct; [25] the general federal law treated him as a licensee who could recover for negligence. Tompkins sued and recovered in federal court in New York and the railroad presented the issue to the Supreme Court as one covered by "local" law within the meaning of *Swift* v. *Tyson*. Justice Brandeis for himself and four other Justices, however, choose to overrule the early case. First, it was argued that *Tyson* had failed to bring uniformity of decision about and that its application discriminated against citizens of a State by noncitizens. Justice Brandeis cited recent researches [1] which indicated that § 34 of the 1789 Act included court decisions in the phrase "laws of the several States". "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." [2]

For a number of reasons, it would not have been wise to have overruled *Tyson* on the basis of arguable new discoveries.[3] Second,

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[23] C Wright, *Handbook of the Law of Federal Courts* (St Paul: 2d ed. 1983), 355 *See* Judge Friendly's exposition, "In Praise of Erie—And of the New Federal Common Law," in H. Friendly, *Benchmarks* (Chicago: 1967), 155

[24] Id., 157–164, 171 n. 71.

[25] This result was obtained in retrial in federal court on the basis of Pennsylvania law. *Tompkins* v. *Erie Railroad Co.*, 98 F. 49 (C.A. 3), *cert. den.* 305 U.S. 637 (1938).

[1] *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 72–73 (1938), citing Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49 84–88 (1923). *See* C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), 353.

[2] 304 U.S., 77–78 (footnote citations omitted).

[3] Congress had re-enacted § 34 as §721 of the Revised Statutes, citing *Swift* v. Tyson in its annotation, thus presumably accepting the gloss placed on the words by that ruling. But note that Justice Brandeis did not think even the re-enacted statute

then, the decision turned on the lack of power vested in Congress to have prescribed rules for federal courts in state cases. "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. No clause in the Constitution purports to confer such a power upon the federal courts."[4] But having said this, Justice Brandeis made it clear that the unconstitutional assumption of power had been made not by Congress but by the Court itself. "[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."[5] Third, the rule of *Erie* replacing *Tyson* is that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. Whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."[6]

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was unconstitutional. *Infra*, text at n. 5. *See* H. Friendly, *Benchmarks* (Chicago: 1967), 161-163. Perhaps a more compelling reason of policy was that stated by Justice Frankfurter rejecting for the Court a claim that the general grant of federal question jurisdiction to the federal courts in 1875 made maritime suits cognizable on the law side of the federal courts. "Petitioner now asks us to hold that no student of the jurisdiction of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875. In light of such impressive testimony from the past the claim of a sudden discovery of a hidden latent meaning in an old technical phrase is surely suspect.

"The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. [Here, the Justice footnotes: 'For reasons that would take us too far afield to discuss, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, is no exception.'] The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." *Romero* v. *International Terminal Operating Co.* 358 U.S. 354, 370-371 (1959).

[4] 304 U.S. 78. Justice Brandeis does not argue the constitutional issue and does not cite either provisions of the Constitution or precedent beyond the views of Justices Holmes and Field. Id., 78-79. Justice Reed thought that Article III and the necessary and proper clause might contain authority. Id., 91-92 (Justice Reed concurring in the result). For a formulation of the constitutional argument in favor of the Brandeis position, *see* H. Friendly, *Brenchmarks* (Chicago: 1967), 167-171. *See also Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198, 202, 208 (1956); *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965).

[5] 304 U.S. 79-80.

[6] Id., 78. *Erie* applies in equity as well as in law. *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202 (1938).

Since 1938, the effect of *Erie* has first increased and then diminished, as the nature of the problems presented changed. Thus, the Court at first indicated that not only the decision of the highest court of a State were binding on a federal court in diversity but intermediate appellate courts [7] and courts of first instance as well [8] even where the decisions bound no other state judge except as they were persuasive on their merits. It has now retreated from this position to the extent that federal judges are to give careful consideration to lower state court decisions and to old, perhaps outmoded decisions, but they must find for themselves the state law where the State's highest court has not spoken definitively and within a period which would raise no questions about the continued viability of the decision.[9] In the event of a state supreme court reversal of an earlier decision, the federal courts are, of course, bound by the later decision and a judgment of a federal district court, correct when rendered, must be reversed on appeal if the State's highest court in the meantime has changed the applicable law.[10] In diversity cases which present conflicts of law problems, the Court has reiterated that the district court is to apply the law of the State in which it sits, so that in a case in State A in which the law of State B is applicable, perhaps because a contract was made there or a tort was committed there, the federal court is to apply State A's conception of State B's law.[11]

The greatest difficulty in applying the *Erie* doctrine has been in cases in which issues of procedure were important.[12] The proc-

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[7] *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Six Companies of California* v. *Joint Highway District*, 311 U.S. 180 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940).

[8] *Fidelity Union Trust Co.*, v. *Field*, 311 U.S. 169 (1940).

[9] *King* v. *Order of Commercial Travelers of America*, 333 U.S. 153 (1948); *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198, 205 (1956) (1910 decision must be followed in absence of confusion in state decisions since, "no developing line of authorities that cast a shadow over established ones, no dicta, doubts or ambiguities . . ., no legislative development that promises to undermine the judicial rule.") *See also Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967).

[10] *Vanderbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944); *Nolan* v. *Transocean Air Lines*, 365 U.S. 293 (1961).

[11] *Klaxon Co.* v. *Stentor Manufacturing Co.*, 313 U.S. 487 (1941); *Griffin* v. *McCoach*, 313 U.S. 498 (1941); *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Nolan* v. *Transocean Air Lines*, 365 U.S. 293 (1961).

[12] Interestingly enough, 1938 marked what seemed to be a switching of positions *vis-a-vis* federal and state courts of substantive law and procedural law. Under *Tyson*, federal courts in diversity actions were free to formulate a federal common law, while they were required by the Conformity Act. § 5, 17 Stat. 196 (1872), to conform their procedure to that of the State in which the court sat. *Erie* then ruled that state substantive law was to control in federal court diversity actions, while by implication matters of procedure in federal court were subject to congressional governance. Congress authorized the Court to promulgate rules of civil procedure, 48 Stat. 1064 (1934), which it did in 1938, a few months after *Erie* was decided, 302 U.S. 783.

ess was initiated in 1945 when the Court held that a state statute of limitations, which would have barred suit in state court, would bar it in federal court, although as a matter of federal law the case still could have been brought in federal court.[13] The Court regarded the substance-procedure distinction as immaterial. "[S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."[14] The standard to be applied was compelled by the "intent" of the *Erie* decision, which "was to insure that, in all cases where a federal court is exercising jurisdication solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[15] The Court's application of this standard created substantial doubt that the Federal Rules of Civil Procedure had any validity in diversity cases.[16]

But in two more recent cases, the Court has contracted the application of *Erie* in matters governed by the Federal Rules. Thus, in the earlier case, the Court said that "outcome" was no longer the sole determinant and countervailing considerations expressed in federal policy on the conduct of federal trials should be considered; a state rule making it a question for the judge rather than a jury of a particular defense in a tort action had to yield to a federal policy enunciated through the Seventh Amendment of favoring juries.[17] The latter ruling simplified the matter greatly. *Erie* is not to be the proper test when the question is the application of one of the Rules of Civil Procedure; if the rule is valid when measured against the Enabling Act and the Constitution, it is to be applied regardless of state law to the contrary.[18]

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[13] *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945).

[14] Id., 108–109.

[15] Id., 109.

[16] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (state rule making unsuccessful plaintiffs liable for all expenses and requiring security for such expenses as a condition of proceeding applicable in federal court); *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949) (state statute barring foreign corporation not qualified to do business in State applicable in federal court); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (state rule determinative when an action is begun for purposes of statute of limitations applicable in federal court although a Federal Rule of Civil Procedure states a different rule).

[17] *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958).

[18] *Hanna* v. *Plumer*, 380 U.S. 460 (1965).

Although it seems clear that *Erie* applies in nondiversity cases in which the source of the right sued upon is state law,[19] it is equally clear that *Erie* is not applicable always in diversity cases whether the nature of the issue be substantive or procedural. Thus, it may be that there is an overriding federal interest which compels national uniformity of rules, such as a case in which the issue is the appropriate rule for determining the liability of a bank which had guaranteed a forged federal check,[20] in which the issue is the appropriate rule for determining whether a tortfeasor is liable to the United States for hospitalization of a soldier and loss of his services,[21] and in which the issue is the appropriate rule for determining the validity of a defense raised by a federal officer sued for having libeled one in the course of his official duties.[22] In such cases, when the issue is found to be controlled by federal law, common or otherwise, the result is binding on state courts as well as on federal.[23] Despite, then, Justice Brandeis' assurance that there is no "federal general common law," there is a common law existing and developing in the federal courts, even in diversity cases, which will sometimes control decision.[24]

### Controversies Between Citizens of the Same State Claiming Land Under Grants of Different States

The genesis of this clause was in the report of the Committee on Detail which vested the power to resolve such land disputes in

[19] *Maternally Yours* v. *Your Maternity Shop*, 234 F. 2d 538, 540 n. 1 (C.A. 2, 1956). The contrary view was implied by Justice Jackson in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 466–467, 471–472 (1942) (concurring opinion). *See Wichita Royalty Co.* v. *City National Bank*, 306 U.S. 103 (1939).

[20] *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). *See also National Metropolitan Bank* v. *United States*, 323 U.S. 454 (1945); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942); *United States* v. *Standard Rice Co.*, 323 U.S. 106 (1944); United States v. *Acri*, 348 U.S. 211 (1955); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *Bank of America National Trust & Savings Assn.* v. *Parnell*, 352 U.S. 29 (1956). *But see United States* v. *Yazell*, 382 U.S. 341 (1966).

[21] *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947). Federal law applies in maritime tort cases brought on the "law side" of the federal courts in diversity cases. *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953).

[22] *Howard* v. *Lyons*, 360 U.S. 593 (1959). Matters concerned with our foreign relations also are governed by federal law in diversity. *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

[23] *Free* v. *Bland*, 369 U.S. 663 (1962); *Yiatchos* v. *Yiatchos*, 376 U.S. 306 (1964).

[24] The quoted Brandeis phrase is in *Erie Railroad Co.* v. *Tompkins* 304 U.S. 64, 78 (1938). On the same day *Erie* was decided, the Court, in an opinion by Justice Brandeis, held that the issue of apportionment of the waters of an interstate stream between two States "is a question of 'federal common law.'" *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). On the matter, *see Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972).

the Senate,[1] but this proposal was defeated in the Convention,[2] which then added this clause to the jurisdiction of the federal judiciary without reported debate.[3] The motivation for this clause was the existence of boundary disputes affecting ten States at the time the Convention met. With the adoption of the Northwest Ordinance of 1787, the ultimate settlement of the boundary disputes, and the passing of land grants by the States, this clause, never productive of many cases, became obsolete.[4]

### Controversies Between a State, or the Citizens Thereof, and Foreign States, Citizens, or Subjects

The scope of this jurisdiction has been limited both by judicial decisions and the Eleventh Amendment. By judicial application of the law of nations, a foreign state is immune from suit in the federal courts without its consent,[1] an immunity which extends to suits brought by States of the American Union.[2] Conversely, the Eleventh Amendment has been construed to bar suits by foreign states against a State of the United States.[3] Consequently, the jurisdiction conferred by this clause comprehends only suits brought by a State against citizens or subjects of foreign states, by foreign states against American citizens, citizens of a State against the citizens or subjects of a foreign state, and by aliens against citizens of a State.[4]

***Suits by Foreign States.***—The privilege of a recognized foreign state to sue in the courts of another state upon the principle of comity is recognized by both international law and American constitutional law.[5] To deny a sovereign this privilege "would manifest

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[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven; rev. ed. 1937), 162, 171, 184.

[2] Id., 400–401.

[3] Id., 431.

[4] *See Pawlet* v. *Clark*, 9 Cr. (13 U.S.) 292 (1815). *Cf. City of Trenton* v. *New Jersey*, 262 U.S. 182 (1923).

[1] *The Schooner Exchange* v. *McFaddon*, 7 Cr. (11 U.S.) 116 (1812); *Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U.S. 562 (1926); *Compania Espanola* v. *The Navemar*, 303 U.S. 68 (1938); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938).

[2] *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 330 (1934).

[3] Ibid.

[4] But in the absence of a federal question, there is no basis for jurisdiction between the subjects of a foreign State. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959). The Foreign Sovereign Immunities Act of 1976, P.L. 94–538, 90 Stat. 2891, amending various sections of title 28 U.S.C., comprehensively provides jurisdictional bases for suits by and against foreign states and appears as well to comprehend suits by an alien against a foreign state which would be beyond the constitutional grant. *Verlinden B.V.* v. *Central Bank of Nigeria*, 647 F. 2d 320 (C.A. 2, 1981).

[5] *The Sapphire* 11 Wall. (78 U.S.) 164, 167 (1871).

a want of comity and friendly feeling." [6] Although national sovereignty is continuous, a suit in behalf of a national sovereign can be maintained in the courts of the United States only by a government which has been recognized by the political branches of our own government as the authorized government of the foreign state.[7] As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit.[8] Once a foreign government avails itself of the privilege of suing in the courts of the United States, it subjects itself to the procedure and rules of decision governing those courts and accepts whatever liabilities the court may decide to be a reasonable incident of bringing the suit.[9] The rule that a foreign nation instituting a suit in a federal district court cannot invoke sovereign immunity as a defense to a counterclaim growing out of the same transaction has been extended to deny a claim of immunity as a defense to a counterclaim extrinsic to the subject matter of the suit but limited to the amount of the sovereign's claim.[10] Moreover, certain of the benefits extending to a domestic sovereign do not extend to a foreign sovereign suing in the courts of the United States. A foreign state does not receive the benefit of the rule which exempts the United States and its member States from the operation of the statute of limitations, because those considerations of public policy back of the rule are regarded as absent in the case of the foreign sovereign.[11]

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[6] Ibid. This case also held that a change in the person of the sovereign does not affect the continuity or rights of national sovereignty, including the right to bring suit or to continue one that has been brought.

[7] *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137 (1938), citing *Jones* v. *United States*, 137 U.S. 202, 212 (1890); *Matter of Lehigh Valley Railroad Company*, 265 U.S. 573 (1924). Whether a government is to be regarded as the legal representative of a foreign state is, of course, a political question.

[8] *Ex parte Peru*, 318 U.S. 578, 589 (1943), distinguishing *Compania Espanola* v. *The Navemar*, 303 U.S. 68 (1938), which held that where the Executive Department neither recognizes nor disallows the claim of immunity, the court is free to examine that question for itself. Under the latter circumstances, however, a claim that a foreign vessel is a public ship and immune from suit must be substantiated to the satisfaction of the federal court.

[9] *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938). Among other benefits which the Court cited as not extending to foreign states as litigant included exemption from costs and from giving discovery. Decisions were also cited to the effect that a sovereign plaintiff "should so far as the thing can be done, be put in the same position as a body corporate."

[10] *National Bank* v. *Republic of China*, 348 U.S. 356, 361 (1955), citing 26 Dept. State Bull. 984 (1952), wherein the Department "has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government."

[11] *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 135, 137 (1938), citing precedents to the effect that a sovereign plaintiff "should be put in the same position as a body corporate."

***Indian Tribes***.—Within the terms of Article III, an Indian tribe is not a foreign state and hence cannot sue in the courts of the United States. This rule was applied in the case of *Cherokee Nation* v. *Georgia*,[12] where Chief Justice Marshall conceded that the Cherokee Nation was a state, but not a foreign state, being a part of the United States and dependent upon it. Other passages of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

***Narrow Construction of the Jurisdiction***.—As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as "late of the district of Maryland," but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.[13] The meticulous care manifested in this case appeared twenty years later when the Court narrowly construed § 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction when an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.[14] This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.[15] These rules, however, do not preclude a suit between citizens of the same State if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[16]

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such

[12] 5 Pet. (30 U.S.) 1, 16–20 (1831).

[13] *Hodgson & Thompson* v. *Bowerbank*, 5 Cr. (9 U.S.) 303 (1809).

[14] *Jackson* v. *Twentyman*, 2 Pet. (27 U.S.) 136 (1829); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959).

[15] *Coal Co.* v. *Blatchford*, 11 Wall. (78 U.S.) 172 (1871). *See*, however, *Lacassagne* v. *Chapuis*, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

[16] *Browne* v. *Strode*, 5 Cr. (9 U.S.) 303 (1809).

Exceptions, and under such Regulations as the Congress shall make.

## THE ORIGINAL JURISDICTION OF THE SUPREME COURT

From the beginning the Supreme Court has assumed that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.[1] In *Chisholm* v. *Georgia*,[2] the Court entertained an action of assumpsit against Georgia by a citizen of another State. Congress in § 3 of the Judiciary Act of 1789 [3] purported to invest the Court with original jurisdiction in suits between a State and citizens of another State, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of original jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which States were parties were now limited to States as party plaintiffs, to two or more States disputing, or to United States suits against States.[4]

By 1861, Chief Justice Taney could confidently enunciate, after review of the precedents, that in all cases where original jusrisdiction is given by the Constitution, the Supreme Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice." [5]

Although Chief Justice Marshall apparently assumed the Court had exclusive jurisdiction of cases within its original jurisdiction,[6] Congress from 1789 on gave the inferior federal courts con-

[1] But in § 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress did so purport to convey the jurisdiction and the statutory conveyance exists today. 28 U.S.C. § 1251. It does not, however, exhaust the listing of the Constitution.

[2] Dall. (2 U.S.) 419 (1793). In an earlier case, the point of jurisdiction was not raised. *Georgia* v. *Brailsford*, 2 Dall. (2 U.S.) 402 (1792).

[3] 1 Stat. 80.

[4] On the Eleventh Amendment, *see infra, pp.* 1427–1448. On suits involving States as parties, *see supra, pp.* 763–769.

[5] *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 98 (1861).

[6] *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137, 174 (1803).

current jurisdiction in some classes of such cases.[7] Sustained in the early years on circuit,[8] this concurrent jurisdiction was finally approved by the Court itself.[9] The Court has also relied on the first Congress' interpretation of the meaning of Article III in declining original jurisdiction of an action by a State to enforce a judgment for a precuniary penalty awarded by one of its own courts.[10] Noting that § 13 of the Judiciary Act had referred to "controversies of a civil nature," Justice Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning." [11]

However, another clause of § 13 of the Judiciary Act of 1789 was not accorded the same presumption by Chief Justice Marshall, who, interpreting it as giving the Court power to issue a writ of mandamus on an original proceeding, declared that as Congress could not restrict the original jurisdiction neither could it enlarge it and pronounced the clause void.[12] While the Chief Justice's interpretation of the meaning of the clause may be questioned, no one has questioned the constitutional principle thereby proclaimed. While the rule deprives Congress of power to expand or contract the jurisdiction, it allows a considerable latitude of interpretation to the Court itself. In some cases, as in *Missouri* v. *Holland*,[13] the Court has manifested a tendency toward a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be invoked sparingly." [14] Original jurisdic-

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[7] In § 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.

[8] *United States* v. *Ravara*, 2 Dall. (2 U.S.) 297 (C.C.Pa. 1793).

[9] *Bors* v. *Preston*, 111 U.S. 252 (1884); *Ames* v. *Kansas ex rel. Johnson*, 111 U.S. 449 (1884). Such suits could be brought and maintained in state courts as well, the parties willing. *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U.S. 511 (1898); *Ohio ex rel. Poporici* v. *Alger*, 280 U.S. 379 (1930).

[10] *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265 (1888).

[11] Id., 297. *See also* the dictum in *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 398-399 (1821).

[12] *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803). The Chief Justice delclared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. Id., 174. This exclusive interpretation has been since followed. *Ex parte Bollman*, 4 Cr. (8 U.S.) 75 (1807); *New Jersey* v. *New York*, 5 Pet. (30 U.S.) 284 (1831); *Ex parte Barry*, 2 How. (43 U.S.) 65 (1844); *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243, 252 (1864); *Ex parte Yerger*, 8 Wall. (75 U.S.) 85, 98 (1869). In the curious case of *Ex parte Levitt*, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I. § 6, cl.2. Although it rejected petitioner's application, the Court did not point our that it was being asked to assume original jurisdiction in violation of *Marbury* v. *Madison*.

[13] 252 U.S. 416 (1920). *See also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[14] *Utah* v. *United States*, 394 U.S. 89, 95 (1968).

tion "is limited and manifestly to be sparingly exercised, and should not be expanded by construction." [15] Exercise of its original jurisdiction is not obligatory on the Court but discretionary, to be honored "only in appropriate cases. And the question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer." [16]

## POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

### The Theory of Plenary Congressional Control

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to "exceptions and regulations" prescribed by Congress and the jurisdiction of the inferior federal courts is subject to congressional prescription. Additionally, Congress has power to regulate modes and practices of proceeding on the part of the inferior federal courts. Whether there are limitations to the exercise of these congressional powers, and what the limitations may be, are matters which have vexed scholarly and judicial interpretation over the years, inasmuch as congressional displeasure with judicial decisions has sometimes led to successful efforts to "curb" the courts and more frequently to proposed but unsuccessful curbs.[1] Supreme Court holdings establish clearly the

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[15] *California* v. *Southern Pacific Co.*, 157 U.S. 229, 261 (1895).

[16] *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93–94 (1972). In this case, and in *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972), and *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), the Court declined to permit adjudication of environmental pollution cases manifestly within its original jurisdiction because the nature of the cases required the resolution of complex, novel, and technical factual questions not suitable for resolution at the Court's level as a matter of initial decision but which could be brought in the lower federal courts. Not all such cases, however, were barred. *Vermont* v. *New York* 406 U.S. 186 (1972) (granting leave to file complaint). In other instances, notably involving "political questions," *cf. Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), the Court has simply refused permission for parties to file bills of complaint without hearing them on the issue or producing an opinion. E.g., *Massachusetts* v. *Laird*, 400 U.S. 886 (1970) (constitutionality of United States action in Indochina); *Delaware* v. *New York*, 385 U.S. 895 (1966) (constitutionality of electoral college under one-man, one-vote rule).

[1] A classic but now dated study is Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act," 47 Am. L. Rev. 1, 161 (1913). The most comprehensive consideration of the constitutional issue is Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L. Rev. 1362 (1953).

breadth of congressional power and numerous dicta assert an even broader power, but that Congress may through the exercise of its powers vitiate and overturn constitutional decisions and restrain the exercise of constitutional rights is an assertion often made but not sustained by any decision of the Court.

***Appellate Jurisdiction.***—In *Wiscart* v. *D'Auchy*,[2] the issue was whether the statutory authorization for the Supreme Court to review on writ of error circuit court decisions in "civil actions" gave it power to review admiralty cases.[3] A majority of the Court decided that admiralty cases were "civil actions" and thus reviewable; in the course of decision, it was said that "[i]f Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." [4] Much the same thought was soon to be expressed by Chief Justice Marshall, although he seems to have felt that in the absence of congressional authorization, the Court's appellate jurisdiction would have been measured by the constitutional grant. "Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished.

"The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject." [5] Later Justices viewed the matter differently than had Marshall. "By the constitution of the United States," it was said in one opinion, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress." [6] In order for a case to come within its appellate juris-

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reprinted in H. Hart & H. Wechsler, *The Federal Courts and the Federal System* (Brooklyn: 2d ed. 1973), 330.

[2] 3 Dall. (3 U.S) 321 (1796).

[3] Judiciary Act of 1789, § 22, 1 Stat. 84.

[4] *Wiscart* v. *D'Auchy*, 3 Dall. (3 U.S.) 321, 327 (1796). The dissent thought that admiralty cases were not "civil actions" and thus that there was no appellate review. Id., 326–327. *See also Clarke* v. *Bazadone*, 1 Cr. (5 U.S.) 212 (1803); *Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 8 (1799).

[5] *Durousseau* v. *United States*, 6 Cr. (10 U.S.) 307, 313–314 (1810). "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman*, 4 Cr. (4 U.S.) 75, 93 (1807) (Chief Justice Marshall). Marshall had earlier expressed his *Durousseau* thoughts in *United States* v. *More*, 3 Cr. (7 U.S.) 159 (1805).

[6] *Barry* v. *Mercein*, 5 How. (46 U.S.) 103, 119 (1847) (case held nonreviewable because minimum jurisdictional amount not alleged).

diction, the Court has said, "two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Moreover, "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation." [7]

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*,[8] the Court accepted review on *certiorari* of a denial of a petition for a writ of *habeas corpus* by the circuit court; the petition was by a civilian convicted by a military commission of acts obstructing Reconstruction. Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress enacted over the President's veto a provision repealing the act which authorized the appeal *McCardle* had taken.[9] Although the Court had already heard argument on the merits, it then dismissed for want to jurisdiction.[10] "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function re-

[7] *Daniels* v. *Railroad Co.*, 3 Wall. (70 U.S.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute.)

[8] 6 Wall. (73 U.S.) 318 (1868). That Congress' apprehensions might have had a basis in fact, *see* C. Fairman, *History of the Supreme Court of the United States: Vol VI, Pt. I—Reconstruction and Reunion 1964–88* (New York: 1971), 493–495. *McCardle* is fully reviewed in id., 433–514.

[9] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying *habeas corpus*. Previous to this statute, the Court's jurisdiction to review *habeas corpus* decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. Compare *United States* v. *Hamilton*, 3 Dall. (3 U.S.) 17 (1795), and *Ex parte Burford*, 3 Cr. (7 U.S.) 448 (1806), with *Ex parte Bollman*, 4 Cr. (8 U.S.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.

[10] *Ex parte McCardle*, 7 Wall. (74 U.S.) 506 (1869). In the course of the opinion, Chief Justice Chase speculated about the Court's power in the absence of any legislation in tones reminiscent of Marshall's comments. Id., 513.

maining to the court is that of announcing the fact and dismissing the cause." [11] Although *McCardle* grew out of the stresses of Reconstruction, the principle there applied has been similarly affirmed and applied in later cases.[12]

***Jurisdiction of the Inferior Federal Courts.***—The Framers, as we have seen[13] divided with regard to the necessity of inferior courts to the Supreme Court, simply authorized Congress to create such courts, in which, then, judicial power "shall be vested" and to which nine classes of cases and controversies "shall extend." [14] While Justice Story deemed it imperative of Congress to create inferior federal courts and, when they had been created, to vest them with all the jurisdiction they were capable of receiving,[15] the First Congress acted upon a wholly different theory. Inferior courts were created, but jurisdiction generally over cases involving the Constitution, laws, and treaties of the United States was not given them,

[11] Id., 514.

[12] Thus, *see* Justice Frankfurter's remarks in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 655 (1948) (dissenting): "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice.*" In *The Francis Wright*, 105 U.S. 381, 385–386 (1882), upholding Congress' power to confine Supreme Court review in admiralty cases to questions of law, the Court said: "[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not." *See also Luckenbuch S. S. Co.* v. *United States*, 272 U.S. 533, 537 (1926); *American Construction Co.* v. *Jacksonville, T. & K.W. RY.*, 148 U.S. 372, 378 (1893); *United States* v. *Bitty*, 208 U.S. 393 (1908); *United States* v. *Young*, 94 U.S. 258 (1876). Numerous restrictions on the exercise of appellate jurisdiction have been upheld. E.g., Congress for a hundred years did not provide for a right of appeal to the Supreme Court in criminal cases, except upon a certification of division by the circuit court: at first appeal was provided in capital cases and then in others. F. Frankfurter & J. Landis, *The Business of the Supreme Court* (New York: 1928), 79, 109–120. Other limitations noted heretofore include minimum jurisdictional amounts, restrictions of review to questions of law and to questions certified from the circuits, and the scope of review of state court decisions of federal constitutional questions. *See Walker* v. *Taylor*, 5 How. (46 U.S.) 64 (1847). Though *McCardle* is the only case in which Congress successfully forestalled an expected decision by shutting off jurisdiction, other cases have been cut off while pending on appeal, either inadvertently, *Insurance Co.* v. *Ritchie*, 5 Wall. (72 U.S.) 541 (1866), or intentionally, *Railroad Co.* v. *Grant*, 98 U.S. 398 (1878), by raising the requirements for jurisdiction without a reservation for pending cases. *See also Bruner* v. *United States*, 343 U.S. 112 (1952); *District of Columbia* v. *Eslin*, 183 U.S. 62 (1901).

[13] *Supra*, *pp.* 615–616.

[14] Article III, §§ 1, 2.

[15] *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 374 (1816).

diversity jurisdiction was limited by a minimal jurisdictional amount requirement and by a prohibition on creation of diversity through assignments, equity jurisdiction was limited to those cases where a "plain, adequate, and complete remedy" could not be had at law.[16] This care for detail in conferring jurisdiction upon the inferior federal courts bespoke a conviction by Members of Congress that it was within their power to confer or to withhold jurisdiction at their discretion. The cases have generally sustained this view.

Thus, in *Turner* v. *Bank of North America,*[17] the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same State but in which the note had been assigned to a citizen of a second State so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789.[18] Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt[19] and from Justice Chase a firm rejection. "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."[20] Applying § 11, the Court held that the circuit court had lacked jurisdiction.

Chief Justice Marshall himself soon made similar assertions[21] and the early decisions of the Court continued to be sprinkled with

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[16] Judiciary Act of 1789, 1 Stat. 73. *See* Warren, "New Light on the History of the Judiciary Act of 1789," 37 Harv. L. Rev. 49 (1923).

[17] 4 Dall. (4 U.S.) 8 (1799).

[18] "[N]or shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

[19] *Turner* v. *Bank of North America,* 4 Dall. (4 U.S.) 8, 10 (1799).

[20] Ibid.

[21] In *Ex parte Bollman,* 4 Cr. (8 U.S.) 75, 93 (1807), Marshall observed that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

assumptions that the power of Congress to create inferior federal courts necessarily implied "the power to limit jurisdiction of those Courts to particular objects." [22] In *Cary* v. *Curtis,* [23] a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitutional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." [24] Five years later, the validity of the assignee clause of the Judiciary Act of 1789 [25] was placed in issue in *Sheldon* v. *Sill,* [1] in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that inasmuch as the right of a citizen of any State to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected these contentions and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies in Article III. The case and the principle has been cited and reaffirmed numerous times, [2] and has been quite recently applied. [3]

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[22] *United States* v. *Hudson & Goodwin,* 7 Cr. (11 U.S.) 32, 33 (1812). Justice Johnson continued: "All other Courts [beside the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." *See also Rhode Island* v. *Massachusetts.* 12 Pet. (37 U.S.) 657, 721-722 (1838).

[23] 3 How. (44 U.S.) 236 (1845).

[24] Id., 244-245. Justices McLean and Story dissented, arguing that the right to construe the law in all matters of controversy is of the essence of judicial power, Id., 264.

[25] *Supra, p.* 777 n. 8.

[1] 8 How. (49 U.S.) 441 (1850).

[2] E.g., *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 233-234 (1922); *Ladew* v. *Tennessee Copper Co.,* 218 U.S. 357, 358 (1910); *Venner* v. *Great Northern R. Co.,* 209 U.S. 24, 35 (1908); *Kentucky* v. *Powers,* 201 U.S. 1, 24 (1906); *Stevenson* v. *Fain,* 195 U.S. 165, 167 (1904); *Plaquemines Fruit Co.* v. *Henderson,* 170 U.S. 511, 513-521 (1898); *The Mayor* v. *Cooper,* 6 Wall, (73 U.S.) 247, 251-252 (1868).

[3] By the Voting Rights Act of 1965. Congress required covered States that wished to be relieved of coverage to bring actions to this effect in the District Court of the District of Columbia. In *South Carolina* v. *Katzenbach,* 383 U.S. 301, 331

***Congressional Control Over Writs and Processes.***—The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding court, even of the Supreme Court, to times of adjournment, appointment of officers, issuance of writs, citations for contempt, and many other matters which it might be supposed courts had some authority of their own to regulate.[4] The power to enjoin governmental and private action has frequently been curbed by Congress, especially as the action has involved the power of taxation at either the federal or state level.[5] Though the courts have variously interpreted these restrictions,[6] they have not denied the power to impose them.

Reacting to judicial abuse of injunctions in labor disputes,[7] Congress in 1932 enacted the Norris-La Guardia Act which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and fact-finding process which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be prevented.[8] The Court seemingly experienced no difficulty upholding the Act,[9] and has liberally applied it through the years.[10]

Congress' power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942[11] and in the cases arising from it. Fearful that the price control program might be nullified by injunctions, Congress provided for a special court in which persons could challenge the validity of price regula-

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(1966), Chief Justice Warren for the Court said: "Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." *See also Palmore* v. *United States*, 411 U.S. 389, 400–402 (1973); *Swain* v. *Pressley*, 430 U.S. 372 (1977). And see *Taylor* v. *St. Vincent's Hosp.*, 369 F. Supp. 948 D. Mont. (1973), *aff'd.*, 523 F.2d 75 (C.A. 9), *cert. den.*, 424 U.S. 948 (1976).

[4] 1 Stat. 73. For a comprehensive discussion with itemization, *see* Frankfurter & Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 Harv. L. Rev. 1010 (1924).

[5] The Act of March 2, 1867, § 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes); Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). *See also* Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state rate-making).

[6] *Compare Snyder* v. *Marks*, 109 U.S. 189 (1883), with *Dodge* v. *Brady*, 240 S. 122 (1916); with *Allen* v. *Regents*, 304 U.S. 439 (1938).

[7] F. Frankfurter & I. Greene, *The Labor Injuunction* (New York: 1930).

[8] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115.

[9] In *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), the Court simply declared: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

[10] E.g., *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co.*, 353 U.S. 30 (1957); *Boys Market* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

[11] 56 Stat. 23 (1942).

tions issued by the Government with appeal from the Emergency Court of Appeals to the Supreme Court. The basic consitutionality of the Act was sustained in *Lockerty* v. *Phillips.*[12] In *Yakus* v. *United States,*[13] The Court upheld the provision of the Act which conferred exclusive jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such regulation or order as a defense to a criminal proceeding under the Act in the regular district courts. Although Justice Rutledge protested in dissent that this provision conferred jurisdiction on district courts from which essential elements of the judicial power had been abstracted,[14] Chief Justice Stone for the Court declared that the provision presented no novel constitutional issue.

**The Theory Reconsidered**

Despite the breadth of the language of many of the previously cited cases, the actual holdings constitute something less than an affirmance of plenary congressional power to do anything desired by manipulation of jurisdiction and indeed the cases reflect certain limitations. Setting to one side various formulations, such as mandatory vesting of jurisdiction [1] and inherent judicial power,[2] which lack textual and subsequent judicial support, one can see nonetheless the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function.

*Ex parte McCardle* [3] marks the furtherest advance of congressional imposition of its will on the federal courts and it is signifi-

[12] 319 U.S. 182 (1943).

[13] 321 U.S. 414 (1944).

[14] Id., 468. A statutory scheme similar to that in *Yakus* was before the Court in *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. *See* esp. id., 289 (Justice Powell concurring). *See also Harrison* v. *PPG Industries,* 446 U.S. 578 (1980), and id., 594 (Justice Powell concurring).

[1] This was Justice Story's theory propounded in *Martin* v. *Hunter's Lessee,* 1 Wheat. (14 U.S.) 304, 329–336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self-executing and accepted the necessity of statutory conferral. *White* v. *Fenner,* 29 Fed. Cas. 1015 (No. 17,547) (C.C.D.R.I. 1818) (Justice Story).

[2] Justice Brewer in his opinion for the Court in *United States* v. *Detroit Timber & Lumber Co.,* 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. *See also Paine Lumber Co.* v. *Neal,* 244 U.S. 459, 473, 475–476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, *supra, p.* 797, contradicts these assertions.

[3] 7 Wall (74 U.S.) 506 (1869). *Supra. p.* 793.

cant because the curb related to the availability of the writ of *habeas corpus,* which is marked out with special recognition by the Constitution.[4]

But how far did *McCardle* actually reach? In concluding its opinion, the Court carefully observed: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus,* is denied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised." [5] A year later, in *Ex parte Yerger,*[6] the Court held that it did have authority under the Judiciary Act of 1789 to review on *certiorari* a denial by a circuit court of a petition for writ of *habeas corpus* on bel alf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of *habeas corpus.*[7]

Another Reconstruction Congress attempt to curb the judiciary failed in *United States* v. *Klein,*[8] in which a statute couched in jurisdictional terms which attempted to set aside both the effect of a presidential pardon and the judicial effectuation of such a pardon was voided.[9] The statute declared that no pardon was to be admis-

[4] Article I, § 9, cl. 2. *Supra, pp.* 376–377.

[5] *Ex parte McCardle,* 7 Wall, (74 U.S.) 506, 515 (1869).

[6] 8 Wall. (75 U.S.) 85 (1869). *Yerger* is fully reviewed in C. Fairman, *History of the Supreme Court of the United States: Vol. VI, Pt. I—Reconstruction and Reunion,* 1864–88 (New York: 1971), 558–618.

[7] *Cf. Eisentrager* v. *Forrestal,* 174 F. 2d 961, 966 (C.A.D.C. 1949), *rev'd. on other grounds sub nom. Johnson* v. *Eisentranger,* 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 605 n. 11 (1962) (dissenting opinion): "There is a serious question whether the *McCardle case* could command a majority view today." Justice Harlan, however, cites *McCardle* with apparent approval of its *holding,* id., 567–568, while noting that Congress' "authority is not, of course, unlimited." Id., 568. *McCardle* was cited approvingly in *Bruner* v. *United States,* 343 U.S. 112, 117 n. 8 (1952), as illustrating the rule "that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."

[8] 13 Wall. (80 U.S.) 128 (1872). *See* C. Fairman. *History of the Supreme Court of the United States: Vol. VI, Pt. I—Reconstruction and Reunion* 1864–88 (New York: 1971), 558–618.

[9] Congress by the Act of July 17, 1862, §§ 5, 13, authorized the confiscation of property of those persons in rebellion and authorized the President to issue pardons on such conditions as he deemed expedient, the latter provision being unnecessary in light of Article II, § 2, cl. 1. The President's pardons all provided for restoration of property, except slaves, and in *United States* v. *Padelford,* 9 Wall, (76 U.S.) 531 (1870), the Court held the claimant entitled to the return of his property on the basis of his pardon. Congress thereupon enacted the legislation in question. 16 Stat. 235 (1870).

sible in evidence in support of any claim against the United States in the Court of Claims for the return of confiscated property of Confederates nor, if already put in evidence in a pending case, should it be considered on behalf of the claimant by the Court of Claims or by the Supreme Court on appeal. Proof of loyalty was required to be made according to provisions of certain congressional enactments and when judgment had already been rendered on other proof of loyalty the Supreme Court on appeal should have no further jurisdiction and should dismiss for want of jurisdiction. Moreover, it was provided that the recitation in any pardon which had been received that the claimant had taken part in the rebellion was to be taken as conclusive evidence that the claimant had been disloyal and was not entitled to regain his property.

The Court began by reaffirming that Congress controlled the existence of the inferior federal courts and the jurisdiction vested in them and the appellate jurisdiction of the Supreme Court. "But the language of this provision shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end . . . . It is evident . . . that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." [10] The statute was void for two reasons; it "infring[ed] the constitutional power of the Executive," [11] and it "prescrib[ed] a rule for the decision of a cause in a particular way." [12] *Klein* thus stands for the proposition that Congress may not violate the principle of separation of powers [13] and that it may not accomplish certain forbidden substantive acts by casting them in jurisdictional terms.[14]

[10] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 145–146 (1872).

[11] Id., 147.

[12] Id., 146.

[13] Id., 147. For an extensive discussion of *Klein*, *see United States* v. *Sioux Nation*, 448 U.S. 371, 391–405 (1980), and *id.*, 424, 427–434 (Justice Rehnquist dissenting). *See also Pope* v. *United States*, 323 U.S. 1, 8–9 (1944); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962) (Justice Harlan).

[14] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 147 (1872).

Other restraints on congressional power over the federal courts may be gleaned from the opinion in the much-disputed *Crowell* v. *Benson.*[15] In an 1856 case, the Court distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and which cannot be withdrawn from judicial cognizance and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cognizance.[16] What this might mean was elaborated in *Crowell* v. *Benson,*[17] involving the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial *de novo* of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes fused the due process clause of the Fifth Amendment and Article III but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." The answer was stated broadly. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function. . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."[18]

It is not at all clear that *Crowell* v. *Benson* remains good law. It has never been overruled, and it has been cited by several Jus-

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[15] 285 U.S. 22 (1932). *See also Ng Fung Ho* v. *White*, 259 U.S. 276 (1922); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920); *St. Joseph Stock Yard Co.* v. *United States*, 298 U.S. 38 (1936).

[16] *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272 (1856).

[17] 285 U.S. 22 (1932). Justices Brandeis, Stone, and Roberts dissented.

[18] Id., 56, 60, 64.

tices approvingly,[19] but the Court has never applied the principle to control another case.[20]

***Express Constitutional Restrictions on Congress.***—"[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas;" Justice Black said in a different context, "these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."[21] The Supreme Court has had no occasion to deal with this principle in the context of Congress' power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act[22] presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. While some district courts sustained the Act on the basis of the withdrawal of jurisdiction, this action was disapproved by the Courts of Appeals which indicated that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter was invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[23]

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[19] *See Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 76–87 (1982) (plurality opinion), and *id.*, 100–103, 109–111 (Justice White dissenting) (discussing the due process/Article III basis of *Crowell*). Both the plurality and the dissent agreed that later cases had "undermined" the constitutional/jurisdictional fact analysis. Id., 82, n. 34; 110 n. 12. For other discussions, *see Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (Justice Brennan announcing judgment of the Court, joined by Justice [illegible]berg); *Pickering* v. *Board of Education*, 391 U.S. 563, 578–579 (1968); *Agosto* v. [illegible] 436 U.S. 748, 753 (1978); *United States* v. *Raddatz*, 447 U.S. 667, 682–684 (1980), and id., 707–712 (Justice Marshall dissenting).

[20] *Compare Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 792 (1968); *Cordillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 (1940). Justice Frankfurter was extremely critical of *Crowell*. *Estep* v. *United States*, 327 U.S. 114, 142 (1946); *City of Yonkers* v. *United States*, 320 U.S. 685 (1944).

[21] *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968) (opinion of the Court.) The elder Justice Harlan perhaps had the same thought in mind when he said that, with regard to Congress' power over jurisdiction, "what such exceptions and regulations should be it is for Congress, in its wisdom to establish, having of course due regard to all the Constitution." *United States* v. *Bitty*, 208 U.S. 393, 399–400 (1908).

[22] 52 Stat. 1060, 29 U.S.C. § 201.

[23] *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254, 257 (C.A. 2), *cert. den.* 335 U.S. 887 (1948) (Judge Chase). *See also Seese* v. *Bethlehem Steel Co.*, 168 F. 2d 58, 65

***Conclusion.***—There thus remains a measure of doubt that Congress' power over the federal courts is as plenary as some of the Court's language suggests it is. Congress has a vast amount of discretion in conferring and withdrawing and structuring the original and appellate jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court; so much is clear from the practice since 1789 and the holdings of many Court decisions. That its power extends to accomplishing by means of its control over jurisdiction actions which it could not do directly by substantive enactment is by no means clear from the text of the Constitution nor from the cases.

## FEDERAL-STATE COURT RELATIONS

### Problems Raised by Concurrency

The Constitution established a system of government in which total power, sovereignty, was not unequivocally lodged in one level of government. In Chief Justice Marshall's words, "our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union . . . ." Naturally, in such a system, "contests respecting power must arise." [1] Contests respecting power may frequently arise in a federal system with dual structures of courts exercising concurrent jurisdiction in a number of classes of cases. Too, the possibilities of frictions grow out of the facts that one set of courts may interfere directly or indirectly with the other through injunctive and declaratory processes, through the use of *habeas corpus* and removal to release persons from the custody of the other set, and through the refusal by state courts to be bound by decisions of the United States Supreme Court. The relations between federal and state courts are governed in part by constitutional law, with respect, say, to state court interference with federal courts and state court refusal to comply with the judgments of federal tribunals, in part by statutes, with respect to the federal law generally enjoining federal-court interference with pending state court proceedings, and in part by self-imposed rules of comity and restraint,

(C.A. 4, 1948) (Chief Judge Parker). For recent dicta, *see Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974); *Weinberger* v. *Salfi*, 422 U.S. 749, 761-762 (1975); *Territory of Guam* v. *Olsen*, 431 U.S. 195, 201-202, 204 (1977); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978).

[1] *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1.204-205 (1824).

such as the abstention doctrine, all applied to avoid unseemly conflicts, which, however, have at times occurred.

Subject to congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except suits between States, those to which the United States is a party, those to which a foreign state is a party, and those within the traditional admiralty jurisdiction.[2] Even within this last category, however, state courts, though unable to prejudice the harmonious operation and uniformity of general maritime law,[3] have concurrent jurisdiction over cases that occur within the maritime jurisdiction when such litigation assumes the form of a suit at common law.[4] Review of state court decisions by the United States Supreme Court is intended to protect the federal interest and promote uniformity of law and decision relating to the federal interest.[5] The first category of conflict surfaces here. The second broader category arises from the fact that state interests, actions, and wishes, all of which may at times be effectuated through state courts, are variously subject to restraint by federal courts. Although the possibility always existed,[6] it became much more significant and likely when, in the wake of the Civil War, Congress bestowed general federal question jurisdiction on the federal courts,[7] enacted a series of civil rights statutes and conferred jurisdiction on the federal courts to enforce them,[8] and most important of all proposed and saw to the ratification of the three constitutional amendments, especially the Fourteenth, which made subject to federal scrutiny an ever-increasing number of state actions.[9]

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[2] *See* 28 U.S.C. §§ 1251, 1331 *et seq.* Indeed, the presumption is that states courts enjoy concurrent jurisdiction and Congress must explicity or implicitly confine jurisdiction to the federal courts to oust the state courts. *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477–484 (1981).

[3] *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

[4] Through the "saving to suitors" clause, 28 U.S.C. § 1333(1). *Supra, pp.* 750–752. *See Madruga* v. *Superior Court*, 346 U.S. 556, 560–561 (1954).

[5] *Supra, pp.* 615–616, 716–720. *See* 28 U.S.C. § 1257.

[6] E.g., by a suit against a State by a citizen of another State directly in the Supreme Court, *Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 419 (1793), which was overturned by the Eleventh Amendment; by suits in diversity or removal from state courts where diversity existed, 1 Stat. 78, 79; by suits by aliens on treaties, 1 Stat. 77, and, subsequently, by removal from state courts of certain actions. 3 Stat. 198. And for some unknown reason. Congress passed in 1793 a statute prohibiting federal court injunctions against state court proceedings. *See Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 120–132 (1941).

[7] Act of March 3, 1875, 18 Stat. 470.

[8] Civil Rights Act of 1871, § 1, 17 Stat. 13. The authorization for equitable relief is now 42 U.S.C. § 1983, while jurisdiction is granted by 28 U.S.C. § 1343.

[9] *Infra*, p. 1303ff. And see H. Wechsler. *The Nationalization of Civil Liberties and Civil Rights* (Austin: 1969).

## The Autonomy of State Courts

***Noncompliance With and Disobedience of Supreme Court Orders by State Courts.***—The United States Supreme Court when deciding cases on review from the state courts usually remands the case to the state court when it reverses for "proceedings not inconsistent" with the Court's opinion. This disposition leaves open the possibility that unresolved issues of state law will be decided adversely to the party prevailing in the Supreme Court or that the state court will so interpret the facts or the Court's opinion to the detriment of the party prevailing in the Supreme Court.[1] When it is alleged that the state court has deviated from the Supreme Court's mandate, the party losing below may appeal again [2] or he may presumably apply for mandamus to compel compliance.[3] Statutorily, the Court may attempt to overcome state recalcitrance by a variety of specific forms of judgment.[4] If, however, the state courts simply defy the mandate of the Court, difficult problems face the Court, extending to the possibility of contempt citations.[5]

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[1] H. Hart & H. Wechsler, *The Federal Courts and the Federal System* (Brooklyn: 2d ed. 1973), 458–460. Notable examples include *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816); *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264 (1821); *Ableman* v. *Booth*, 21 How. (62 U.S.) 506 (1859). For studies, *see* Note, "Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term 1931 to October Term 1940," 55 Harv. L. Rev. 1357 (1942); Note, "Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941," 67 Harv. L. Rev. 1251 (1954).

[2] *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816). *See* 2 W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: 1953), 785–817; 1 C. Warren, *The Supreme Court in United States History* (Boston: 1926), 442–453. For recent examples, *see NAACP* v. *Alabama*, 360 U.S. 240, 245 (1959); *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964), *after remand*, 277 Ala. 89, 167 So. 2d 171 (1964); *Stanton* v. *Stanton*, 429 U.S. 501 (1977); *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978).

[3] It does not appear that mandamus has ever actually issued. *See In re Blake*, 175 U.S. 114 (1899); *Ex parte Texas*, 315 U.S. 8 (1942); *Fisher* v. *Hurst*, 333 U.S. 147 (1948); *Lavender* v. *Clark*, 329 U.S. 674 (1946); *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978).

[4] *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816); *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 437 (1819); *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 239 (1824); *Williams* v. *Bruffy*, 102 U.S. 248 (1880) (entry of judgment); *Tyler* v. *Maguire*, 17 Wall. (84 U.S.) 253 (1873) (award of execution); *Stanley* v. *Schwalby*, 162 U.S. 255 (1896); *Poindexter* v. *Greenhow*, 114 U.S. 270 (1885) (remand with direction to enter a specific judgment). *See* 28 U.S.C. §§ 1651(a), 2106.

[5] *See* 18 U.S.C. § 401. In *United States* v. *Shipp*, 203 U.S. 563 (1906), 214 U.S. 386 (1909); 215 U.S. 580 (1909), on action by the Attorney General, the Court appointed a commissioner to take testimony, rendered judgment of conviction, and imposed sentence on a state sheriff who had conspired with others to cause the lynching of a prisoner in his custody after the Court had allowed an appeal from a circuit court's denial of a petition for a writ of *habeas corpus*. A question whether a probate judge was guilty of contempt of an order of the Court in failing to place certain candidates on the ballot was certified to the district court, over the objections of Justices Douglas and Harlan, who wished to follow the *Shipp* practice. *In re Herndon*, 394 U.S. 399 (1969). *See In re Herndon*, 325 F. Supp. 779 (D.C. M.D. Ala. 1971).

The most spectacular disobedience of federal authority arose out of the conflict between the Cherokees and the State of Georgia, which was seeking to remove them and seize their lands, with the active support of President Jackson.[6] In the first instance, after the Court had issued a writ of error to the Georgia Supreme Court to review the murder conviction of a Cherokee, Corn Tassel, and after the writ was served, Corn Tassel was executed on the day set for the event, contrary to the federal law that a writ of error superseded sentence until the appeal was decided.[7] Two years later, Georgia again defied the Court when in *Worcester* v. *Georgia,*[8] it set aside the conviction of two missionaries for residing among the Indians without a license. Despite the issuance of a special mandate to a local court to discharge the missionaries, they were not released and the State's governor loudly proclaimed resistance. Consequently, the two remained in jail until they agreed to abandon further efforts for their discharge by federal authority and to leave the State, whereupon the governor pardoned them.

***Use of State Courts in Enforcement of Federal Law.***—Although the states-rights proponents in the Convention and in the First Congress wished to leave to the state courts the enforcement of federal law and rights rather than to create inferior federal courts,[9] it was not long before these persons or their successors began to argue that state courts could not be required to adjudicate cases based on federal law. The practice in the early years was to make the jurisdiction of federal courts generally concurrent with that of state courts [10] and early Congresses imposed positive duties on state courts to enforce federal laws.[11] Reaction set in out of hostility to the Embargo Acts, the Fugitive Slave Law, and other measures [12] and in *Prigg* v. *Pennsylvania,*[13] involving the Fugitive Slave

[6] 1 C. Warren, *The Supreme Court in United States History* (Boston: 1926), 729–779.

[7] Id., 732–736.

[8] 6 Pet. (31 U.S.) 515 (1832).

[9] *Supra, pp.* 615–618.

[10] Judiciary Act of 1789, §§ 9, 11, 1 Stat. 76, 78, and *see* id., § 25, 1 Stat, 85.

[11] E.g., Carriage Tax Act, 1 Stat. 373 (1794); License Tax on Wine & Spirits Act, 1 Stat. 376 (1794); Fugitive Slave Act, 1 Stat. 302 (1794); Naturalization Act of 1795, 1 Stat. 414; Alien Enemies Act of 1798, 1 Stat. 577. State courts in 1799 were vested with jurisdiction to try criminal offenses against the postal laws. 1 Stat. 733, § 28. The Act of March 3, 1815, 3 Stat. 244, vested state courts with jurisdiction of complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures, *See* Warren, "Federal Criminal Laws and State Courts," 38 Harv. L. Rev. 545, 577–581 (1925).

[12] Embargo Acts, 2 Stat. 453, 473, 499, 506, 528, 550, 605, 707 (1808–1812); 3 Stat. 88 (1813); Fugitive Slave Act, 1 Stat. 302 (1793).

[13] 16 Pet. (41 U.S.) 539, 615 (1842), *See also Houston* v. *Moore,* 5 Wheat. (18 U.S.) 1, 69 (1820) (Justice Story dissenting); *United Sates* v. *Bailey,* 9 Pet. (34 U.S.) 238, 259

Law, the Court indicated that the States could not be compelled to enforce federal law. After a long period, however, Congress resumed its former practice,[14] which the Court sustained,[15] and it went even further in the Federal Employers' Liability Act by not only giving state courts concurrent jurisdiction but also by prohibiting the removal of cases begun in state courts to the federal courts.[16]

When Connecticut courts refused to enforce an FELA claim on the ground that to do so was contrary to the public policy of the State, the Court held on the basis of the supremacy clause that when Congress enacts a law and declares a national policy that policy is as much Connecticut's and every other State's as it is of the collective United States.[17] The Court's suggestion that the Act could be enforced "as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion",[18] leaving the impression that state practice might in some instances preclude enforcement in state courts, was given body when the Court upheld New York's refusal to adjudicate an FELA claim which fell in a class of cases in which claims under state law would not be entertained.[19] "[T]here is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." [20]

In *Testa* v. *Katt*,[21] the Court unanimously held that state courts, at least in regard to claims and cases analogous to claims and cases enforceable in those courts under state law, were as required to enforce penal laws of the United States as they were to enforce remedial laws. Respecting Rhode Island's claim that one sovereign cannot enforce the penal laws of another, Justice Black observed that the assumption underlying this claim flew "in the

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(1835) (Justice McLean dissenting). However, it was held that States could exercise concurrent jurisdiction if they wished. *Claflin* v. *Houseman*, 93 U.S. 130 (1876), and cases cited.

[14] E.g., Act of June 8, 1872, 17 Stat. 323.

[15] *Claflin* v. *Houseman*, 93 U.S. 130 (1876).

[16] 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51–60.

[17] *Second Employers' Liability Cases (Mondou* v. *New York, N.H. & H. R. Co.)*, 223 U.S. 1 (1912).

[18] Id., 59.

[19] *Douglas* v. *New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929).

[20] Id., 388. For what constitutes a valid excuse, compare *Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950), with *McKnett* v. *St. Louis & S.F. Ry. Co.*, 292 U.S. 230 (1934). It appears that generally state procedure must yield to federal when it would make a difference in outcome. Compare *Brown* v. *Western Ry. of Alabama*, 338 U.S. 294 (1949), and *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952), with *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211 (1916).

[21] 330 U.S. 386 (1947).

face of the fact that the States of the Union constitute a nation" and the fact of the existence of the supremacy clause.[22]

***State Interference with Federal Jurisdiction.***—It seems settled, though not without dissent, that state courts have no power to enjoin proceedings [23] or effectuation of judgments [24] of the federal courts, with the exception of cases in which a state court has custody of property in proceedings *in rem* or *quasi in rem*, where the state court has exclusive jurisdiction to proceed and may enjoin parties from further action in federal court.[25]

**Conflicts of Jurisdiction: Rules of Accommodation**

Federal Courts primarily interfere with state courts in three ways: by enjoining proceedings in them, by issuing writs of *habeas corpus* to set aside convictions obtained in them, and by adjudicating cases removed from them. With regard to all three but particularly with regard to the first, there have been developed certain rules plus a statutory limitation designed to minimize needless conflict.

***Comity.***—"[T]he notion of 'comity,' " Justice Black asserted, is composed of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are

[22] Id., 389. *See*, for a discussion as well as an extension of *Testa*, *FERC* v. *Mississippi*, 456 U.S. 742 (1982). Cases since *Testa* requiring state court enforcement of federal rights have generally concerned federal remedial laws. E.g., *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969). The Court has approved state court adjudication under 42 U.S.C. § 1983, *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n. 1 (1980), but curiously in *Martinez* v. *California*, 444 U.S. 277, 283 n. 7 (1980), it noted that it has "never considered . . . the question whether a State *must* entertain a claim under 1983." Enforcement is not limited to federal statutory law; federal common law must similarly be enforced. *Free* v. *Brand*, 369 U.S. 663 (1962).

[23] *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), and cases cited. Justices Harlan, Clark, and Stewart dissented, arguing that a State should have power to enjoin vexatious, duplicative litigation which would have the effect of thwarting a state-court judgment already entered. *See also Baltimore & Ohio R. Co.* v. *Kepner*, 314 U.S. 44, 56 (1941) (Justice Frankfurter dissenting). In *Riggs* v. *Johnson County*, 6 Wall. (73 U.S.) 166 (1868), the general rule was attributed to the complete independence of state and federal courts in their spheres of action, but federal courts, of course may under certain circumstances enjoin actions in state courts. *Infra*. pp. 815–820.

[24] *McKim* v. *Voorhies*, 7 Cr. (11 U.S.) 279 (1812); *Riggs* v. *Johnson County*, 6 Wall. (73 U.S.) 166 (1868).

[25] *Princess Lida* v. *Thompson*, 305 U.S. 456 (1939). Nor do state courts have any power to release by *habeas corpus* persons in custody pursuant to federal authority. *Ableman* v. *Booth*, 21 How. (62 U.S.) 506 (1859); *Tarble's Case*, 13 Wall. (80 U.S.) 397 (1872).

left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism' . . . ." [1] Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. It is not a rule of law but "one of practice, convenience, and expediency" [2] which persuades but does not command.

***Abstention.***—Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine. The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive of the controversy, is unclear and a state court interpretation of the state law question might obviate the necessity of deciding a federal constitutional issue.[3] Abstention is not proper, however, where the relevant state law is settled [4] nor where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law.[5] Federal jurisdiction is not ousted

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[1] *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). Compare *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U.S. 100 (1981), with *id.*, 119–125 (Justice Brennan concurring, joined by three other Justices).

[2] *Mast, Foos & Co.* v. *Stover Manufacturing Co.*, 177 U.S. 458, 488 (1900). Recent decisions emphasize comity as the primary reason for restraint in federal court actions tending to interfere with state courts. E.g., *O'Shea* v. *Littleton*, 414 U.S. 488, 499–504 (1974); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 599–603 (1975); *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977); *Moore* v. *Sims*, 442 U.S. 415, 430 (1979). The Court has also cited comity as a reason to restrict access to federal *habeas corpus*. *Francis* v. *Henderson*, 425 U.S. 536, 541 and n. 31 (1976); *Wainwright* v. *Sykes*, 433 U.S. 72, 83, 88, 90 (1977); *Engle* v. *Isaac*, 456 U.S. 107, 128–129 (1982). *See also Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981); *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U.S. 100 (1981) (comity limits federal court interference with state tax systems).

[3] C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), §13. The basic doctrine was formulated by Justice Frankfurter for the Court in *Railroad Comm.* v. *Pullman Co.*, 312 U.S. 496 (1941). Other strands of the doctrine are that a federal court should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a State of its own affairs, *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Pubic Service Comm.* v. *Southern Ry.*, 341 U.S. 341 (1951); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943); *Martin* v. *Creasy*, 360 U.S. 219 (1959), especially where state law is unsettled. *Meredith* v. *City of Winter Haven*, 320 U.S. 228 (1943); *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959); *Louisiana Power & Light Co.* v. *City of Thiobodaux*, 360 U.S. 25 (1959). *See also Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1960). Also, while pendency of an action in state court will not ordinarily cause a federal court to abstain, there are "exceptional" circumstances in which it should. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976); *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978).

[4] *City of Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77 (1958); *Zwickler* v. *Koota*, 389 U.S. 241, 249–251 (1967).

[5] *Harman* v. *Forssenius*, 380 U.S. 528, 534–535 (1965); *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 305–312 (1979). Abstention is not proper simply to afford a

by abstention; rather it is postponed.[6] Federal-state tensions would be ameliorated through federal-court deference to the concept that state courts are as adequate a protector of constitutional liberties as the federal courts and through the minimization of the likelihood that state programs would be thwarted by federal intercession. Federal courts would benefit because time and effort would not be expended in decision of difficult constitutional issues which might not require decision.[7]

During the 1960's the abstention doctrine was in disfavor with the Supreme Court, suffering rejection in numerous cases, most of them civil rights and civil liberties cases.[8] Time-consuming delays [9] and piecemeal resolution of important questions [10] were cited as a too-costly consequence of the doctrine. Actions brought under the civil rights statutes seem not to be wholly subject to the doctrine [11] and for awhile cases involving First Amendment expression guarantees seemed to be as well, but this appears no longer to be necessarily the rule.[12] While the Court has ordered abstention in several

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state court the opportunity to hold that a state law violates the federal Constitution. *Wisconsin* v. *Constanineau*, 400 U.S. 433 (1971); *Zablocki* v. *Redhail*, 434 U.S. 374, 379 n. 5 (1978); *Douglas* v. *Seacoast Products*, 431 U.S. 265, 271 n. 4 (1977). But if the statute is clear and there is a reasonable possibility that the state court would find it in violation of a distinct or specialized state constitutional provision, abstention may be proper, *Harris County Comrs. Court* v. *Moore*, 420 U.S. 77 (1975); *Reetz* v. *Bozanich*, 397 U.S. 82 (1970), although not if the state and federal constitutional provisions are alike. *Examining Bd.* v. *Flores de Otero*, 426 U.S. 572, 598 (1976).

[6] *American Trial Lawyers Assn.* v. *New Jersey Supreme Court*, 409 U.S. 467, 469 (1973); *Harrison* v. *NAACP*, 360 U.S. 167 (1959). Dismissal may be necessary if the state court will not accept jurisdiction while the case is pending in federal court. *Harris County Comrs.* v. *Moore*, 420 U.S. 77, 88 n. 14 (1975).

[7] E.g., *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944); *Louisiana Power & Light Co.* v. *City of Thiobodaux*, 360 U.S. 25 (1959); *Harrison* v. *NAACP*, 360 U.S. 167 (1959).

[8] *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Griffin* v. *School Board*, 377 U.S. 218 (1964); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Harman* v. *Forssenius*, 380 U.S. 528 (1965); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Wisconsin* v. *Constanineau*, 400 U.S. 433 (1971).

[9] *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 426 (1964) (Justice Douglas concurring). *See* C. Wright, *Handbook of the Law of Federal Courts* (St. Paul: 4th ed. 1983), 305.

[10] *Baggett* v. *Bullitt*, 377 U.S. 360, 378–379 (1964). Both consequences may be alleviated substantially by state adoption of procedures by which federal courts may certify to the State's highest court questions of unsettled state law which would be dispositive of the federal court action. The Supreme Court has actively encouraged resort to certification where it exists. *Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1960); *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974); *Bellotti* v. *Baird*, 428 U.S. 132, 151 (1976).

[11] *Compare Harrison* v. *NAACP*, 360 U.S. 167 (1959), with *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

[12] *Compare Baggett* v. *Bullitt*, 377 U.S. 360 (1964), and *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), with *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Samuels* v.

recent cases,[13] it has made clear that abstention is proper "only in narrowly limited 'special circumstances,' " which are primarily limited to matters where state law is unclear, and it has directed that ordinarily a suitor's choice of a federal forum rather than a state court should be respected.[14]

***Exhaustion of State Remedies.***—A complainant will ordinarily be required, as a matter of comity, to exhaust all his state legislative and administrative remedies before seeking relief in federal court where such remedies are, of course, available.[15] To do so may make unnecessary federal-court adjudication. The complainant will ordinarily not be required, however, to exhaust his state judicial remedies, inasmuch as it is a litigant's choice to proceed in either state or federal courts when the alternatives exist and a question for judicial adjudication is present.[16] But when a litigant is suing for protection of federally-guaranteed civil rights, he need not exhaust any kind of state remedy.[17]

***Anti-Injunction Statute.***—For reasons unknown,[18] Congress in 1793 enacted a statute to prohibit the issuance of injunctions by federal courts to stay state court proceedings.[19] Over time a long list of exceptions to the statutory bar was created by judicial decision,[20] but in *Toucey* v. *New York Life Ins. Co.*,[21] the Court in a

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*Mackell*, 401 U.S. 66 (1971). *See Babbitt* v. *United Farm Workers*, 442 U.S. 289, 305–312 (1979).

[13] *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970); *Askew* v. *Hargrave*, 401 U.S. 476 (1971); *Lake Carriers Assn.* v. *MacMullan*, 406 U.S. 498 (1972); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Elkins* v. *Moreno*, 435 U.S. 647 (1978); *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 305–312 (1979); *Moore* v. *Sims*, 442 U.S. 415, 426–430 (1979).

[14] *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967); *Kusper* v. *Pontikes*, 414 U.S. 51, 54 (1973); *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 306 (1979).

[15] The rule was formulated in *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), and *Bacon* v. *Rutland R. Co.*, 232 U.S. 134 (1914).

[16] *City Bank Farmers' Trust Co.* v. *Schnader*, 291 U.S. 24 (1934); *Lane* v. *Wilson*, 307 U.S. 268 (1939). *But see Alabama Public Service Comm.* v. *Southern Ry. Co.*, 341 U.S. 341 (1951). Exhaustion of state court remedies is required in *habeas corpus* cases and usually in suits to restrain state court proceedings. *Infra*, *pp.* 815–820.

[17] *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982). But under title VII of the Civil Rights Act of 1964, barring employment discrimination on racial and other specified grounds, the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter. 42 U.S.C. § 2000e–5(c). *See Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

[18] *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 130–132 (1941).

[19] "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state; . . ." § 5, 1 Stat. 334 (1793), 28 U.S.C. § 2283.

[20] Durfee & Sloss, "Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute," 30 Mich. L. Rev. 1145 (1932).

[21] 314 U.S. 118 (1941).

lengthy opinion by Justice Frankfurter announced a very liberal interpretation of the anti-junction statute so as to do away with practically all the exceptions that had been created. Congress' response was to redraft the statute and to indicate that it was restoring the pre-*Toucey* interpretation.[22] Considerable disagreement exists over the application of the statute, however, and especially with regard to the exceptions permissible under its language. The present tendency appears to be to read the law expansively and the exceptions restrictively in the interest of preventing conflict with state courts.[23] Nonetheless, some exceptions do exist, either expressly or implicitly in statutory language [24] or through Court interpretation.[25] The Court's general policy of application, however, seems to a considerable degree to effectuate what is now at least the major rationale of the statute, deference to state court adjudication of issues presented to them for decision.[1]

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[22] "A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Reviser's Note is appended to the statute, stating intent.

[23] *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511 (1955); *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). See M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Charlottesville: 1980), ch. 10.

[24] The greatest difficulty is with the "expressly authorized by Act of Congress" exception. No other Act of Congress expressly refers to § 2283 and the Court has indicated that no such reference is necessary to create a statutory exception. *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, 516 (1955). Rather, "in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Mitchum* v. *Foster*, 407 U.S. 225, 237 (1972). Applying this test, the Court in *Mitchum* held that a 42 U.S.C. § 1983 suit is an exception to § 2283 and that persons suing under this authority may, if they satisfy the requirements of comity, *supra*, pp 808–809, obtain an injunction against state court proceedings. The exception is, of course, highly constrained by the comity principle. *Infra, pp.* 815–820. On the difficulty of applying the test, see *Vendo Co.* v. *Lektco-Vend Corp.*, 433 U.S. 623 (1977) (fragmented Court on whether Clayton Act authorization of private suits for injunctive relief is an "expressly authorized" exception to § 2283).

[25] Thus, the Act bars federal court restraint of *pending* state court proceedings but not restraint of the institution of such proceedings. *Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2 (1965). Restraint is not barred if sought by the United States or an officer or agency of the United States. *Leiter Minerals* v. *United States*, 352 U.S. 220 (1957); *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971). Restraint is not barred if the state court proceeding is not judicial but rather administrative. *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908); *Roudebush* v. *Hartke*, 405 U.S. 15 (1972). *Compare Hill* v. *Martin*, 296 U.S. 393, 403 (1935), *with Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552–556 (1972).

[1] The statute is to be applied "to prevent needless friction between state and federal courts." *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940); *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285–286 (1970).

***Res Judicata.***—Both the Constitution and a contemporaneously-enacted statute require federal courts to give "full faith and credit" to state court judgments, to give, that is, preclusive effect to state court judgments when those judgments would be given preclusive effect by the courts of that state.[2] The present Court views the interpretation of "full faith and credit" in the overall context of deference to state courts running throughout this section. "Thus, *res judicata* and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." [3] The Court in this case, after reviewing enactment of the statute that is now 42 U.S.C. § 1983, held that § 1983 is not an exception to the mandate of the *res judicata* statute.[4] An exception to § 1738 "will not be recognized unless a later statute contains an express or implied partial repeal." [5] Thus, a claimant who has pursued his employment discrimination remedies through state administrative procedures, as the federal law requires him to do (within limits), and then appealed an adverse state agency decision to state court will be precluded from bringing his federal claim to federal court, since the federal court is obligated to give the state court decision "full faith and credit." [6]

***Three-Judge Court Act.***—When the Court in *Ex parte Young* [7] held that federal courts were not precluded by the Eleventh Amendment from restraining state officers from enforcing state laws determined to be in violation of the federal Constitution, serious efforts were made in Congress to take away the authority thus asserted, but the result instead was legislation providing that suits in which an interlocutory injunction was sought against the enforcement of state statutes by state officers were to be heard by a panel of three federal judges, rather than by a single district judge, with appeal direct to the Supreme Court.[8] The provision was de-

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[2] Article IV, § 1, of the Constitution; 28 U.S.C. § 1738. *Infra*, *pp.* 832ff.

[3] *Allen* v. *McCurry*, 449 U.S. 90, 95–96 (1980).

[4] Id., 96–105. There were three dissenters. Id., 105 (Justices Blackmun, Brennan, and Marshall). In *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Court held that when parties are compelled to go to state court under *Pullman* abstention, either party may reserve the federal issue and thus be enabled to return to federal court without being barred by *res judicata*.

[5] *Kramer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982).

[6] Id., 468–476. There were four dissents. Id., 486 (Justices Blackmun, Brennan, and Marshall), 508 (Stevens).

[7] 209 U.S. 123 (1908).

[8] 36 Stat. 557 (1910). The statute was amended in 1925 to apply to requests for permanent injunctions, 43 Stat. 936, and again in 1937 to apply to constitutional attacks on federal statutes. 50 Stat. 752.

signed to assuage state feeling by vesting such determinations in a court more prestigious than a single-judge district court, to assure a more authoritative determination, and to prevent the assertion of individual predilections in sensitive and emotional areas.[9] Because, however, of the heavy burden that convening a three-judge court placed on the judiciary and that the direct appeals placed on the Supreme Court, the provisions for such courts, save in cases "when otherwise required by an Act of Congress" [10] or in cases involving state legislative or congressional districting, were repealed in Congress in 1976.[11]

### Conflicts of Jurisdiction; Federal Court Interference with State Courts

One challenging the constitutionality, under the United States Constitution, of state actions, statutory or otherwise, could, of course, bring suit in state court and on some occasions this has been done.[1] But the usual course is to sue in federal court for either an injunction or a declaratory judgment or both. In an era in which landmark decisions of the Supreme Court and of inferior federal courts have been handed down voiding racial segregation requirements, legislative apportionment and congressional districting, and many other state laws and policies, it is difficult to imagine a situation in which it might be impossible to obtain such rulings because no one required as a defendant could be sued. Yet the adoption of the Eleventh Amendment in 1798 [2] resulted in the immunity of the State,[3] and the immunity of state officers if the

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[9] *Swift & Co.* v. *Wickham*, 382 U.S. 111, 119 (1965); *Ex parte Collins*, 277 U.S. 565, 567 (1928).

[10] These now are primarily limited to suits under the Voting Rights Act, 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c), and to certain suits by the Attorney General under public accommodations and equal employment provisions of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000a-5(b), 2000e-6(b).

[11] Pub. L. 94-381, 90 Stat. 1119, 28 U.S.C. § 2284. In actions still required to be heard by three-judge courts, direct appeals are still available to the Supreme Court. 28 U.S.C. § 1253.

[1] For example, one of the cases decided in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), came from the Supreme Court of Delaware. In *Scott* v. *Germano*, 381 U.S. 407 (1965), the Court set aside an order of the district court refusing to defer to the state court which was hearing an apportionment suit and said: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States has been specifically encouraged." *See also Scranton* v. *Drew*, 379 U.S. 40 (1964).

[2] *Infra*, *pp.* 1427-1448, a result of *Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 419 (1793).

[3] By its terms, the Eleventh Amendment bars only suits against a State by citizens of other States, but in *Hans* v. *Louisiana*, 134 U.S. 1 (1890), the Court deemed it to embody principles of sovereign immunity which applied to unconsented suits by its own citizens.

action upon which they were being sued was state action,[4] from suit without the State's consent.[5] *Ex parte Young*[6] is a seminal case in American constitutional law because it created a fiction by which the validity of state statutes and other actions could be challenged by suits against state officers as individuals.[7]

Conflict between federal and state courts is inevitable when the federal courts are open to persons complaining about unconstitutional or unlawful state action which could as well be brought in the state courts and perhaps is so brought by other persons, but the various rules of restraint flowing from the concept of comity reduce federal interference here some considerable degree. It is rather in three fairly well defined areas that institutional conflict is most pronounced.

***Federal Restraint of State Courts by Injunctions.***—Even where the federal anti-injunction law is inapplicable, or where the question of application is not reached,[8] those seeking to enjoin state court proceedings must overcome substantial prudential barriers, among them the abstention doctrine[9] and more important than that the equity doctrine that suits in equity are to be withheld "in any case where plain, adequate and complete remedy may be had at law."[10] The application of this latter principle has been most pronounced in the reluctance of federal courts to interfere with a State's good faith enforcement of its criminal law. Here, the Court has required of a litigant seeking to bar threatened state prosecution not only a showing of irreparable injury which is both great and immediate but an inability to defend his constitutional right in the state proceeding. Certain types of injury, such as the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, are insufficient to be considered irreparable in this sense. Even if a state criminal statute *is* unconstitutional, a person charged under it usually has an adequate remedy at law by raising

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[4] *In re Ayers*, 123 U.S. 443 (1887).

[5] Consent need not be express, it may be implied. E.g., *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964).

[6] 209 U.S. 123 (1908).

[7] The fiction is that while the official is a state actor for purposes of suit against him, the claim that his action is unconstitutional removes the imprimatur of the State that would shield him under the Eleventh Amendment. Id., 159–160.

[8] 28 U.S.C. § 2283 may be inapplicable because no state court proceeding is pending or because the action is brought under 42 U.S.C. § 1983. Its application may never be reached because a court may decide that equitable principles do not justify injunctive relief, *Younger* v. *Harris*, 401 U.S. 37, 54 (1971).

[9] *Supra*, *pp.* 809–811.

[10] The quoted phrase setting out the general principle is from the Judiciary Act of 1789, § 16, 1 Stat. 82.

his constitutional defense in the state trial.[11] The policy has never been stated as an absolute, recognizing that in exceptional and limited circumstances, such as the existence of factors making it impossible for a litigant to protect his federal constitutional rights through a defense of the state criminal charges or the bringing of multiple criminal charges, a federal court injunction could properly issue.[12]

In *Dombrowski* v. *Pfister*,[13] the Court appeared to change the policy somewhat. The case on its face contained allegations and offers of proof that may have been sufficient alone to establish the "irreparable injury" justifying federal injunctive relief.[14] But the formulation of standards by Justice Brennan for the majority placed great emphasis upon the fact that the state criminal statute in issue regulated expression. Any criminal prosecution under a statute regulating expression might of itself inhibit the exercise of First Amendment rights, it was said, and prosecution under an overbroad[15] statute like the one in this case might critically impair exercise of those rights. The mere threat of prosecution under such an overbroad statute "may deter . . . almost as potently as the actual application of sanctions."

In such cases, courts could no longer embrace the assumption that defense of the criminal prosecution "will generally assure

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[11] *Fenner* v. *Boykin* 271 U.S. 240 (1926); *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935); *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45 (1941); *Watson* v. *Buck*, 313 U.S. 387 (1941); *Williams* v. *Miller*, 317 U.S. 599 (1942); *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943). There is a stricter rule against federal restraint of the use of evidence in state criminal trials. *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Pugach* v. *Dollinger*, 365 U.S. 458 (1961). The Court has recently affirmed the rule. *Perez* v. *Ledesma*, 401 U.S. 82 (1971). State officers may not be enjoined from testifying or using evidence gathered in violation of federal constitutional restrictions, *Cleary* v. *Bolger*, 371 U.S. 392 (1963), but the rule is unclear with regard to federal officers and state trials. *Compare Rea* v. *United States*, 350 U.S. 214 (1956), *with Wilson* v. *Schnettler*, 365 U.S. 381 (1961).

[12] E.g., *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163–164 (1943); *Stefanelli* v. *Minard*, 342 U.S. 117, 122 (1951). *See also Terrace* v. *Thompson*, 263 U.S. 197, 214 (1923), Future criminal proceedings were sometimes enjoined, E.g., *Hague* v. *CIO*, 307 U.S. 496 (1939).

[13] 380 U.S. 479 (1965). Grand jury indictments had been returned after the district court had dissolved a preliminary injunction, erroneously in the Supreme Court's view, so that it took the view that no state proceedings were pending as of the appropriate time.

[14] "[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." Id., 485–486.

[15] That is, a statute which reaches both protected and unprotected expression and conduct, *Infra*, *p.* 1030.

ample vindication of constitutional rights," because either the mere threat of prosecution or the long wait between prosecution and final vindication could result in a "chilling effect" upon First Amendment rights.[16] The principle apparently established by the Court was two-phased: a federal court should not abstain when there is a facially unconstitutional statute infringing upon speech and application of that statute to discourage protected activities, and the court should further enjoin the state proceedings when there is prosecution or threat of prosecution under an overbroad statute regulating expression if the prosecution or threat of prosecution chills the exercise of freedom of expression.[17] These formulations were reaffirmed in *Zwickler* v. *Koota*,[18] in which a declaratory judgment was sought with regard to a statute prohibiting anonymous election literature. Abstention was deemed improper[19] and further it was held that adjudication for purposes of declaratory judgment is not hemmed in by considerations attendant upon injunctive relief.[20]

The aftermath of the *Dombrowski-Zwickler* decisions was a considerable expansion of federal-court adjudication of constitutional attack through requests for injunctive and declaratory relief, which gradually spread out from First Amendment areas to other constitutionally-protected activities.[21] After three arguments on the issue, the Court in a series of cases circumscribed the discretion of the lower federal courts to a considerable but inexact degree.[22] The important difference between this series of cases and *Dombrowski-Zwickler* is that in the latter for particular reasons there were no prosecutions pending whereas in the former there were. Nevertheless, the care with which Justice Black for the majority undertook to distinguish and limit *Dombrowski* signified a limitation of its doctrine. He reviewed and reaffirmed the traditional

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[16] Id., 486–487.

[17] *See Cameron* v. *Johnson*, 381 U.S. 741 (1965); *Cameron* v. *Johnson*, 390 U.S. 611 (1968.)

[18] 389 U.S. 241 (1967). The state criminal conviction had been reversed by a state court on state law grounds and no new charge had been instituted.

[19] It was clear that the statute could not be construed by a state court and thus a federal constitutional decision rendered unnecessary. Id., 248–252.

[20] "[T]he District Court's views on the question of injunctive relief are irrelevant to the question of abstention here. For a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute." Id., 254.

[21] Maraist, "Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski," 48 Tex. L. Rev. 535 (1970).

[22] *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

rule of reluctance to interfere with state court proceedings except in extraordinary circumstances. The holding in *Dombrowski*, as distinguished from some of the language, did not change the general rule, because extraordinary circumstances had existed. Thus, Justice Black, with considerable support from the other Justices,[23] went on to affirm that where a criminal proceeding is already pending in a state court, if it is a single prosecution about which there is no allegation that it was brought in bad faith or that it was one of a series of repeated prosecutions which would be brought, and the defendant may put in issue his federal-constitutional defense at the trial, federal injunctive relief is improper, even if it is alleged that the statute on which the prosecution was based regulated expression and was overbroad.

Many statutes regulating expression were valid and some overbroad statutes could be validly applied and attacks on facial unconstitutionality abstracted from concrete factual situations was not a sound judicial method. "It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief." [24]

Moreover, in a companion case, the Court held that when prosecutions are pending in state court, ordinarily the propriety of injunctive and declaratory relief should be judged by the same standards.[25] A declaratory judgment is as likely to interfere with state proceedings as an injunction, whether the federal decision be treated as *res judicata* or whether it is viewed as a strong precedent guiding the state court. Additionally, "the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting 'further necessary or proper relief' and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings." [1]

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[23] Only Justice Douglas dissented. Id., 58. Justices Brennan, White, and Marshall generally concurred in somewhat restrained fashion. Id., 56, 75, 93.

[24] Id., 54. On bad faith enforcement, *see* id., 56 (Justices Stewart and Harlan concurring); 97 (Justices Brennan, White, and Marshall concurring in part and dissenting in part). For an example, *see Universal Amusement Co.* v. *Vance*, 559 F. 2d 1286, 1293-1301 (C.A. 5, 1977), *aff'd. per curiam sub nom., Dexter* v. *Butler*, 587 F. 2d 176 (C.A. 5) (*en banc*), *cert. den.*, 442 U.S. 929 (1979).

[25] *Samuels* v. *Mackell*, 401 U.S. 66 (1971). The holding was in line with *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943).

[1] *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971).

When, however, there is no pending state prosecution, the Court is clear that, with respect to a declaratory judgment, a plaintiff in a federal court who can demonstrate a genuine threat of enforcement of a disputed criminal statute, whether the statute is attacked on its face or as applied, is entitled to a federal declaratory judgment.[2] And, in fact, when no state prosecution is pending, a federal plaintiff need not demonstrate the existence of the *Younger* factors to justify the issuance of a preliminary or permanent injunction against prosecution under a disputed state statute.[3] But the general trend has been to expansively apply the *Younger* principles, such as by permitting the State to institute proceedings against the federal plaintiff in state court before any "proceedings of substance on the merits" have taken place in the federal court and oust the federal court of authority to give declaratory or injunctive relief.[4] The Court also has imposed to some extent a rule of exhaustion of state judicial proceedings before one may seek relief in federal court, where relief may then be barred by *res judicata*.[5] Of much greater significance is the evident intention of the Court to extend *Younger* to civil proceedings in state courts [6] and to relief sought against executive or administrative officers of state and local governments.[7]

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[2] *Steffel* v. *Thompson*, 415 U.S. 452 (1974).

[3] *Doran* v. *Salem Inn*, 422 U.S. 922 (1975) (preliminary injunction may issue to preserve *status quo* while court considers whether to grant declaratory relief); *Wooley* v. *Maynard*, 430 U.S. 705 (1977) (when declaratory relief is given, permanent injunction may be issued if necessary to protect constitutional rights).

[4] *Hicks* v. *Miranda*, 422 U.S. 332 (1975).

[5] *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 610–611 (1975) (federal plaintiff lost trial court judgment in state court, did not appeal, and sought federal injunction against enforcement of judgment. *Younger* applied). *But compare Wooley* v. *Maynard*, 430 U.S. 705, 710–711 (1977) (federal plaintiff seeking to enjoin future prosecutions under state statute under which he had been convicted but had not appealed may obtain relief since he does not seek to disturb past convictions). On *res judicata*, see *Allen* v. *McCurry*, 449 U.S. 90 (1980).

[6] The rule appears to be that *Younger* policies extend to all noncriminal state judicial proceedings when important state interests are involved which the State, or its officer or agency, is seeking to enforce. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Judice* v. *Vail*, 430 U.S. 327 (1977); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Moore* v. *Sims*, 442 U.S. 415 (1979); *Middlesex County Ethics Committee* v. *Garden State Bar Assn*, 457 U.S. 423 (1982). Indeed, in *Rizzo* v. *Goode*, 423 U.S. 362, 380 (1976), Justice Rehnquist seemed to speak as if all civil proceedings were covered. Federal courts are not to stay their hands if plaintiffs do not have an opportunity to fairly pursue their constitutional claims in the ongoing state proceeding. *Quern* v. *Hernandez*, 440 U.S. 951 (1979).

[7] *Rizzo* v. *Goode*, 423 U.S. 362 (1976), used quite broad language in this respect. Whether state administrative proceedings are entitled to *Younger* application is unclear. In *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), the Court, without explicitly holding *Younger* applicable, held that because the federal plaintiff would not have a full and fair opportunity to litigate his constitutional claims before a state agency, the federal court could enjoin the proceedings. In *Middlesex County Ethics Committee* v.

It appears that the equitable/comity principles of *Younger* are supplying a larger and more forceful barrier to federal declaratory and injunctive relief than was envisioned until recently.

***Habeas Corpus.***—It was noted above that the Court over the years has considerably broadened the scope of the power of federal courts under *habeas corpus* to inquire into the criminal convictions of defendants in state courts.[8] Basic power in this area was conferred by Congress in 1867 as a Reconstruction measure,[9] but it lay dormant for many years until the Court began to construe the relevant provisions of the Bill of Rights and of the Fourteenth Amendment's due process clause so as to demand high standards of procedural fairness in both federal and state court.[10] At least by 1942, the Court had abandoned the rule that only absence of jurisdiction in the convicting court would void a conviction for *habeas corpus* purposes and held that in "exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights", a federal *habeas* court had power to intervene.[11] "Its province," the Court said recently of *habeas*, "shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." [12]

State hostility to federal *habeas corpus* should be unsurprising. The effect of the existence of the power is that a defendant who has been tried in a state court and who has failed to obtain relief through the state appellate process and who perhaps has been denied review of that appeal by the United States Supreme Court and who has perhaps unsuccessfully presented his claims to the state courts under a post-conviction relief system may present the federal claims to a federal district court, more than once sometimes, and perhaps at that point be found to have meritorious claims. The federal courts, sensitive to the hostility and in fulfillment of the policy of comity, abide by some measure of restraint but this restraint is less than it used to be.

The rule of restraint in this area relates to the exhaustion of state remedies. This rule was early formulated [13] and Congress en-

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*Garden State Bar Assn.*, 457 U.S. 423, 432-434 (1982), because the Court found the administrative proceeding "judicial in nature" it did not have to confront the question.

[8] *Supra*, *pp.* 651-658.

[9] Act of February 5, 1867, § 1, 14 Stat. 385, now 28 U.S.C. § 2241(c)(3).

[10] *See* Fourth, Fifth, and Sixth Amendments.

[11] *Waley* v. *Johnson*, 316 U.S. 101, 104-105 (1942).

[12] *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968).

[13] *Ex parte Royall*, 117 U.S. 241 (1886); *Urquhart* v. *Brown*, 205 U.S. 179 (1907).

acted it as part of the statute in 1948.[14] It basically requires that before coming to federal court a prisoner must present his claims to the state courts and petition for relief.[15] A prisoner who appeals his conviction up through the state system need not now petition for a writ of *certiorari* in the United States Supreme Court.[16] If he unsuccessfully presented his federal constitutional claim in the state appellate process, he need not under the exhaustion doctrine petition under a state post-conviction relief procedure before presenting his claim to a federal court.[17] If, however, he did not raise the claim in the appellate process he must prior to coming to the federal court give the state courts an opportunity to review his claim,[18] provided there is an avenue of relief open to him.[19]

Recurrence to the principles of comity and respect for state judiciaries expressed by the Court in recent years have not passed by *habeas* cases. Many of the precedents of the 1960s have been restricted and modified and many more state criminal convictions than previously have been shielded from *habeas* review.[20]

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[14] *See* 28 U.S.C. § 2254. The 1948 amendments were intended to restrict the availability of the writ to review state court convictions and was a product of the United States Judicial Conference under the leadership of Chief Judge John J. Parker. *See* Parker, "Limiting the Abuse of Habeas Corpus," 8 F. R. D. 171 (1948).

[15] *Ex parte Royall*, 117 U.S. 241 (1886); *Ex parte Hawk*, 321 U.S. 114 (1944); *Darr* v. *Burford*, 339 U.S. 200 (1950); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Brown* v. *Allen*, 344 U.S. 443 (1953); *Picard* v. *Connor*, 404 U.S. 270 (1971). "[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional error." *Darr* v. *Burford*, *supra*, 204. It should be noted that 28 U.S.C. § 2254 requires exhaustion of remedies only by persons in state custody "pursuant to the judgment of a State court", so that it is arguable that the exhaustion requirement does not apply if the detention is pursuant to an arrest or indictment. In fact, the exhaustion doctrine was first formulated in *Ex parte Royall*, *supra*, in a pre-conviction situation. *Habeas* release of persons prior to trial is, however, not unknown. *In re Neagle*, 135 U.S. 1 (1890); *In re Loney*, 134 U.S. 372 (1890); *Ex parte Kieffner*, 40 Fed. 399 (C.C.D. Kan. 1889).

[16] *Fay* v. *Noia*, 372 U.S. 391, 435–436 (1963), overruling *Darr* v. *Burford*, 339 U.S. 200 (1950). When should a federal judge independently review a petitioner's fact allegations, *see Townsend* v. *Sain*, 372 U.S. 293 (1963).

[17] *Brown* v. *Allen*, 344 U.S. 443, 447–450 (1953). *See also Roberts* v. *LaValle*, 389 U.S. 40 (1967).

[18] *See Picard* v. *Connor*, 404 U.S. 270 (1971), and cases cited. *Cf. Hill* v. *California*, 401 U.S. 797, 805–806 (1971); *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). In a recent modification, the Court held that when a *habeas* petition contains claims that have been exhausted at the state level and claims that have not been exhausted, the federal *habeas* court is to dismiss the entire petition, giving the prisoner the option of exhausting all his claims before returning to federal court or of presenting only his exhausted claims. *Rose* v. *Lundy*, 455 U.S. 509 (1982).

[19] *Fay* v. *Noia*, 372 U.S. 391 (1963).

[20] *Supra*, pp. 655–658.

***Removal.***—In the Judiciary Act of 1789, Congress provided that civil actions commenced in the state courts which could have been brought in the original jurisdiction of the inferior federal courts could be removed by the defendant from the state court to the federal court.[21] Generally, as Congress expanded the original jurisdiction of the inferior federal courts, it similarly expanded removal jurisdiction.[22] Although there is potentiality for intra-court conflict here, of course, in the implied mistrust of state courts' willingness or ability to protect federal interests, it is rather with regard to the limited areas of removal that do not correspond to federal court original jurisdiction that the greatest amount of conflict is likely to arise.

If a federal officer is sued or prosecuted in a state court for acts done under color of law [23] or if a federal employee is sued for injury caused by his operation of a motor vehicle within the scope of his employment,[24] the actions may be removed. But the statute most open to federal-state court dispute is the civil rights removal law, which authorizes removal of any action, civil or criminal, which is commenced in a state court "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." [25] In the

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[21] § 12, 1 Stat. 79. The removal provision contained the same jurisdictional amount requirement as the original jurisdictional statute. It applied in the main to aliens and defendants not residents of the State in which suit was brought.

[22] Thus the Act of March 3, 1875, § 2, 18 Stat. 470, conferring federal question jurisdiction on the inferior federal courts, provided for removal of such actions. The constitutionality of congressional authorization for removal is well-established. *Chicago & N.W. Ry. Co.* v. *Whitton's Administrator*, 13 Wall. (80 U.S.) 270 (1871); *Tennessee* v. *Davis*, 100 U.S. 257 (1879)); *Ames* v. *Kansas ex rel. Johnston*, 111 U.S. 449 (1884). *See City of Greenwood* v. *Peacock*, 384 U.S. 808, 833 (1966).

[23] *See* 28 U.S.C. § 1442. This statute had its origins in the Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts), and the Act of March 2, 1833, § 3, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), both of which grew out of disputes arising when certain States attempted to nullify federal laws, and the Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers for acts done during the existence of the Civil War under color of federal authority). *See Willingham* v. *Morgan*, 395 U.S. 402 (1969).

[24] 28 U.S.C. § 2679(d).

[25] 28 U.S.C. § 1443(1). Subsection (2) provides for the removal of state court actions "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." This subsection "is available only to federal officers and to persons assisting such officers in the performance of their official duties." *City of Greenwood* v. *Peacock*, 384 U.S. 808, 815 (1966).

years after enactment of this statute, however, the court narrowly construed the removal privilege granted [1] and recent decisions for the most part confirm this restrictive interpretation,[2] so that instances of successful resort to the statute are fairly rare.

Thus, the Court's position holds, one may not obtain removal simply by an assertion that he is being denied equal rights or that he cannot enforce the law granting equal rights. Because the removal statute requires the denial to be "in the courts of such State", the pretrial conduct of police and prosecutors was deemed irrelevant, because it afforded no basis for predicting that state courts would not vindicate the federal rights of defendants.[3] Moreover, in predicting a denial of rights, only an assertion founded on a facially unconstitutional state statute denying the right in question would suffice. From the existence of such a law, it could be predicted that defendant's rights would be denied.[4] Furthermore, the removal statute's reference to "any law providing for . . . equal rights" covered only laws "providing for specific civil rights stated in terms of racial equality." [5] Thus, apparently federal con-

[1] *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Virginia* v. *Rives*, 100 U.S. 313 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1880); *Bush* v. *Kentucky*, 107 U.S. 110 (1882); *Gibson* v. *Mississippi*, 162 U.S. 565 (1896); *Smith* v. *Mississippi*, 162 U.S. 592 (1896); *Murray* v. *Louisiana*, 163 U.S. 101 (1896); *Williams* v. *Mississippi*, 170 U.S. 213 (1898); *Kentucky* v. *Powers*, 201 U.S. 1 (1906).

[2] *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966). There was a hiatus of cases reviewing removal from 1906 to 1966 because from 1887 to 1964 there was no provision for an appeal of an order of a federal court remanding a removed case to the state courts. § 901 of the Civil Rights Act of 1964, 78 Stat. 266, 28 U.S.C. § 1447(d).

[3] *Georgia* v. *Rachel*, 384 U.S. 780, 803 (1966); *City of Greenwood* v. *Peacock*, 384 U.S. 808, 827 (1966). Justice Douglas in dissent, joined by Justices Black, Fortas, and Chief Justice Warren, argued that "in the courts of such State" modified only "cannot enforce", so that one could be denied rights prior to as well as during a trial and police and prosecutorial conduct would be relevant. Alternately, he argued that state courts could be implicated in the denial prior to trial by certain actions. Id., 844-855.

[4] *Georgia* v. *Rachel*, 384 U.S. 780, 797-802 (1966). Thus, in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), Negroes were excluded by statute from service on grand and petit juries and it was held that a Negro's criminal indictment should have been removed because federal law secured nondiscriminatory jury service and it could be predicted that he would be denied his rights before a discriminatorily-selected state jury. In *Virginia* v. *Rives*, 100 U.S. 313 (1880), there was no state statute but there was exclusion of Negroes from juries pursuant to custom and removal was denied. In *Neal* v. *Delaware*, 103 U.S. 370 (1880), the state provision authorizing discrimination in jury selection had been held invalid under federal law by a state court and a similar situation existed in *Bush* v. *Kentucky*, 107 U.S. 110 (1882). Removal was denied in both cases. The dissenters in *City of Greenwood* v. *Peacock*, 384 U.S. 808, 848-852 (1966), argued that federal courts should consider facially valid statutes which might be applied unconstitutionally and state court enforcement of custom as well in evaluating whether a removal petitioner could enforce his federal rights in state court.

[5] *Georgia* v. *Rachel*, 384 U.S. 780, 788-794 (1966); *City of Greenwood* v. *Peacock*, 384 U.S. 808, 824-827 (1966), *See also* id., 847-848 (Justice Douglas dissenting).

stitutional provisions and many general federal laws do not qualify as a basis for such removal.[6]

Clause 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.*

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open court.

## TREASON

The treason clause is a product of the awareness of the Framers of the "numerous and dangerous excrescences" which had disfigured the English law of treason and was therefore intended to put it beyond the power of Congress to "extend the crime and punishment of treason." [1] The debate in the Convention, remarks in the ratifying conventions, and contemporaneous public comment make clear that a restrictive concept of the crime was imposed and that ordinary partisan divisions within political society was not to be escalated by the stronger into capital charges of treason, as so often had happened in England.[2]

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[6] Id., 824–827. See also *Johnson* v. *Mississippi*, 421 U.S. 213 (1975).

**See* the Sixth Amendment, *pp.* 1329–1370.

[1] 2 J. Elliott, *Debates in the Several State Conventions on Adoption of the Constitution* (Philadelphia: 1836), 469 (James Wilson). Wilson was apparently the author of the clause in the Committee on Detail and had some first hand knowledge of the abuse of treason charges. J. Hurst, *The Law of Treason in the United States—Selected Essays* (Westport, Conn.: 1971), 90–91, 129–136.

[2] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 345–350; 2 J. Elliot, *Debates in the Several State Conventions on Adoption of the Constitution* (Philadelphia: 1836), 469, 487 (James Wilson); 3 id., 102–103, 447, 451, 466; 4 id., 209, 219, 220; *The Federalist* No. 43 (Modern Library ed. 1937), 280–281 (Madison); id., No. 84, 555–557 (Hamilton); *The Works of James Wilson*, R. McCloskey ed. (Cambridge: 1967 ed), 663–669. The matter is comprehensively studied in J. Hurst, *The Law of Treason in the United States—Selected Essays* (Westport, Conn.: 1971), chs. 3, 4.

Thus, the Framers adopted two of the three formulations and the phraseology of the English Statute of Treason enacted in 1350,[3] but they conspicuously omitted the phrase defining as treason the "compass[ing] or imagin[ing] the death of our lord the King" [4] under which most of the English law of "constructive treason" had been developed.[5] Beyond limiting the power of Congress to define treason,[6] the clause also prescribes limitations upon Congress' ability to make proof of the offense easy to establish [7] and its ability to define punishment.[8]

**Levying War**

Early judicial interpretation of the meaning of treason in terms of levying war was conditioned by the partisan struggles of the early nineteenth century, in which were involved the treason trials of Aaron Burr and his associates. In *Ex parte Bollman,*[1] which involved two of Burr's confederates, Chief Justice Marshall, speaking for himself and three other Justices, confined the meaning of levying war to the actual waging of war. "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have

[3] 25 Edward III, Stat. 5, ch. 2, *See* J. Hurst, *The Law of Treason in the United States—Selected Essays* (Westport, Conn.: 1971), ch 2.

[4] Id., 15, 31-37, 41-49, 51-55.

[5] Ibid. "[T]he record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the treason clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king's death had been the principal instrument by which 'treason' had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king's death to the mere speaking or writing of views restrictive of the royal authority." Id., 152-153.

[6] The clause does not, however, prevent Congress from specifying other crimes of a subversive nature and prescribing punishment, so long as Congress is not merely attempting to evade the restrictions of the treason clause. E.g., *Ex parte Bollman,* 4 Cr. (8 U.S.) 75, 126 (1807); *Wimmer* v. *United States,* 264 Fed. 11, 12-13 (C.A. 6, 1920), *cert den.,* 253 U.S. 494 (1920).

[7] By the requirement of two witnesses to the same overt act or a confession in open court.

[8] Cl. 2, *infra, pp.* 830-831.

[1] 4 Cr. (8 U.S.) 75 (1807).

been committed. So far has this principle been carried, that . . . it has been determined that the actual enlistment of men to serve against the government does not amount to levying of war." Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. "On the contrary, if it be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war."

On the basis of these considerations and due to the fact that no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District and ordered their discharge. He continued by saying that "the crime of treason should not be extended by construction to doubtful cases" and concluded that no conspiracy for overturning the Government and "no enlisting of men to effect it, would be an actual levying of war." [2]

***The Burr Trial.***—Not long afterward the Chief Justice went to Richmond to preside over the trial of Burr himself. His ruling [3] denying a motion to introduce certain collateral evidence bearing on Burr's activities is significant both for rendering the latter's acquittal inevitable and for the qualifications and exceptions made to the *Bollman* decision. In brief, this ruling held that Burr, who had not been present at the assemblage on Blennerhassett's Island, could be convicted of advising or procuring a levying of war only upon the testimony of two witnesses to his having procured the assemblage. This operation having been covert, such testimony was naturally unobtainable. The net effect of Marshall's pronouncements was to make it extremely difficult to convict one of levying war against the United States short of the conduct of or personal participation in actual hostilities.[4]

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[2] Id., 126-127.

[3] *United States* v. *Burr*, 4 Cr. (8 U.S.), 469, Appx. (1807).

[4] There have been a number of lower court cases in some of which convictions were obtained. As a result of the Whiskey Rebellion, convictions of treason were obtained on the basis of the ruling that forcible resistance to the enforcement of the revenue laws was a constructive levying of war. *United States* v. *Vigol*, 29 Fed. Cas. 376 (No. 16621) (C.C.D. Pa. 1795); *United States* v. *Mitchell*, 26 Fed. Cas. 1277 (No. 15788) (C.C.D. Pa. 1795). After conviction, the defendants were pardoned. *See also* for the same ruling in a different situation the *Case of Fries*, 9 Fed. Cas. 826, 924 (Nos. 5126, 5127) (C.C.D. Pa. 1799, 1800). The defendant was again pardoned after convic-

### Aid and Comfort to the Enemy

***The Cramer Case.***—Since the *Bollman* case, the few treason cases which have reached the Supreme Court were outgrowths of World War II and have charged adherence to enemies of the United States and the giving of aid and comfort. In the first of these, *Cramer* v. *United States,*[1] the issue was whether the "overt act" had to be "openly manifest treason" or if it was enough if, when supported by the proper evidence, it showed the required treasonable intention.[2] The Court in a five-to-four opinion by Justice Jackson in effect took the former view holding that "the two-witness principle" interdicted "imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness," [3] even though the single witness in question was the accused himself. "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses," [4] Justice Jackson asserted. Justice Douglas in a dissent, in which Chief Justice Stone and Justices Black and Reed concurred, contended that Cramer's treasonable intention was sufficiently shown by overt acts as attested to by two witnesses each, plus statements made by Cramer on the witness stand.

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tion. About a half century later participation in forcible resistance to the Fugitive Slave Law was held not to be a constructive levying of war. *United States* v. *Hanway,* 26 Fed. Cas. 105 (No. 15299) (C.C.E.D. Pa. 1851). Although the United States Government regarded the activities of the Confederate States as a levying of war, the President by Amnesty Proclamation of December 25, 1868, pardoned all those who had participated on the southern side in the Civil War. In applying the Captured and Abandoned Property Act of 1863 (12 Stat. 820) in a civil proceeding, the Court declared that the foundation of the Confederacy was treason against the United States. *Sprott* v. *United States,* 20 Wall. (87 U.S.) 459 (1875). *See also Hanauer* v. *Doane,* 12 Wall. (79 U.S.) 342 (1871); *Thorington* v. *Smith,* 8 Wall. (75 U.S.) 1 (1869); *Young* v. *United States,* 97 U.S. 39 (1878). These four cases bring in the concept of adhering to the enemy and giving him aid and comfort, but these are not criminal cases and deal with attempts to recover property under the Captured and Abandoned Property Act by persons who claimed that they had given no aid or comfort to the enemy. These cases are not, therefore, an interpretation of the Constitution.

[1] 325 U.S. 1 (1945).

[2] 89 Law. Ed. 1443-1444 (Argument of Counsel).

[3] 325 U.S., 35.

[4] Id., 34-35. Earlier Justice Jackson had declared that this phase of treason consists of two elements: "adherence to the enemy; and rendering him aid and comfort." A citizen, it was said, may take actions "which do aid and comfort the enemy . . . but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." Id., 29. Justice Jackson states erroneously that the requirement of two witnesses to the same overt act was an original invention of the Convention of 1787. Actually it comes from the British Treason Trials Act of 1695. 7 Wm. III, c.3.

*The Haupt Case.*—The Supreme Court sustained a conviction of treason, for the first time in its history, in 1947 in *Haupt* v. *United States.*[5] Here it was held that although the overt acts relied upon to support the charge of treason—defendant's harboring and sheltering in his home his son who was an enemy spy and saboteur, assisting him in purchasing an automobile, and in obtaining employment in a defense plant—were all acts which a father would naturally perform for a son, this fact did not necessarily relieve them of the treasonable purpose of giving aid and comfort to the enemy. Speaking for the Court, Justice Jackson said: "No matter whether young Haupt's mission was benign or traitorous, known or unknown to the defendant, these acts were aid and comfort to him. In the light of this mission and his instructions, they were more than casually useful; they were aids in steps essential to his design for treason. If proof be added that the defendant knew of his son's instruction, preparation and plans, the purpose to aid and comfort the enemy becomes clear." [6]

The Court held that conversation and occurrences long prior to the indictment were admissible evidence on the question of defendant's intent. And more important, it held that the constitutional requirement of two witnesses to the same overt act or confession in open court does not operate to exclude confessions or admissions made out of court, where a legal basis for the conviction has been laid by the testimony of two witnesses of which such confessions or admissions are merely corroborative. This relaxation of restrictions surrounding the definition of treason evoked obvious satisfaction from Justice Douglas who saw in the *Haupt* decision a vindication of his position in the *Cramer* case. His concurring opinion contains what may be called a restatement of the law of treason and merits quotation at length:

"As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act. But if two witnesses are not required to prove treasonable intent, two witnesses need not be required to show the treasonable character of the overt act. For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character.

[5] 330 U.S. 631 (1947).
[6] Id., 635-636

"The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action. That requirement is undeniably met in the present case, as it was in the case of *Cramer*.

"The *Cramer* case departed from those rules when it held that 'The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness.' 325 U.S. p. 35. The present decision is truer to the constitutional definition of treason when it forsakes that test and holds that an act, quite innocent on its face, does not need two witnesses to be transfomred into a incriminating one." [7]

***The Kawakita Case.***—*Kawakita* v. *United States* [8] was decided on June 2, 1952. The facts are sufficiently stated in the following headnote: "At petitioner's trial for treason, it appeared that originally he was a native-born citizen of the United States and also a national of Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the United States; went to Japan for a visit on an American passport; and was prevented by the outbreak of war from returning to this country. During the war, he reached his majority in Japan; changed his registration from American to Japanese, showed sympathy with Japan and hostility to the United States; served as a civilian employee of a private corporation producing war materials for Japan; and brutally abused American prisoners of war who were forced to work there. After Japan's surrender, he registered as an American citizen; swore that he was an American citizen and had not done various acts amounting to expatriation; and returned to this country on an American passport." The question whether, on this record Kawakita had intended to renounce American citizenship, said the Court, in sustaining conviction, was peculiarly one for the jury and their verdict that he had not so intended was based on sufficient evidence. An American citizen, it continued, owes allegiance to the United States wherever he may reside, and dual nationality does not alter the situation.[9]

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[7] Id., 645–646, Justice Douglas cites no cases for these propositions. Justice Murphy in a solitary dissent stated: "But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non-treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how unlawful it might otherwise be." Id., 649.

[8] 343 U.S. 717 (1952).

[9] Id., 732. For citations in the subject of dual nationality, *see* id., 723 n. 2. Three dissenters asserted that Kawakita's conduct in Japan clearly showed he was consist-

**Doubtful State of the Law of Treason Today**

The vacillation of Chief Justice Marshall between the *Bollman* [1] and *Burr* [2] cases and the vacillation of the Court in the *Cramer* [3] and *Haupt* [4] cases leave the law of treason in a somewhat doubtful condition. The difficulties created by the *Burr* case have been obviated to a considerable extent through the punishment of acts ordinarily treasonable in nature under a different label [5] within a formula provided by Chief Justice Marshall himself in the *Bollman* case. The passage reads: "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution . . . must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation." [6]

Clause 2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

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ently demonstrating his allegiance to Japan. "As a matter of law, he expatriated himself as well as that can be done." Id., 746.

[1] *Ex parte Bollman*, 4 Cr. (8 U.S.) 75 (1807).

[2] *United States* v. *Burr*, 4 Cr. (8 U.S.) 469 (1807).

[3] *Cramer* v. *United States*, 325 U.S. 1 (1945).

[4] *Haupt* v. *United States*, 330 U.S. 631 (1947).

[5] Cf. *United States* v. *Rosenberg*, 195 F.2d 583 (C.A. 2), *cert den.*, 344 U.S. 889 (1952), holding that in a prosecution under the Espionage Act for giving aid to a country, not an enemy, an offense distinct from treason, neither the two-witness rule nor the requirement as to the overt act is applicable.

[6] *Ex parte Bollman*, 4 Cr. (8 U.S.) 126, 127 (1807). Justice Frankfurter appended to his opinion in *Cramer* v. *United States*, 325 U.S. 1, 25 n. 38 (1945), a list taken from the Government's brief of all the cases prior to *Cramer* in which construction of the treason clause was involved. The same list, updated, appears in J. Hurst, *The Law of Treason in the United States—Selected Essays* (Westport, Conn.: 1971), 260–267. Professor Hurst was responsible for the historical research underlaying the Government's brief in *Cramer*.

## CORRUPTION OF THE BLOOD AND FORFEITURE

The Confiscation Act of 1862 "to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels" [1] raised issue under Article III, § 3, cl.2. Because of the constitutional doubts of the President the act was accompanied by an explanatory joint resolution which stipulated that only a life estate terminating with the death of the offender could be sold and that at his death his children could take the fee simple by descent as his heirs without deriving any title from the United States. In applying this act, passed in pursuance of the war power and not the power to punish treason,[2] the Court in one case [3] quoted with approval the English distinction between a disability absolute and perpetual and one personal or temporary. Corruption of blood as a result of attainder of treason was cited as an example of the former and was defined as the disability of any of the posterity of the attained person "to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him." [4]

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[1] 12 stat. 589. This act incidentally did not designate rebellion as treason.

[2] *Miller* v. *United States*, 11 Wall. (78 U.S.) 268, 305 (1871).

[3] *Wallach* v. *Van Riswick*, 92 U.S. 202, 213 (1876).

[4] *Lord de la Warre's Case*, 11 Coke Rept. 1a, 77 Eng. Rept. 1145 (1597). A number of cases dealt with the effect of a full pardon by the President of owners of property confiscated under this act. They held that a full pardon relieved the owner of forfeiture as far as the Government was concerned but did not divide the interest acquired by third persons from the Government during the lifetime of the offender. *Ill. Central Railroad* v. *Bosworth*, 133 U.S. 92, 101 (1890); *Knote* v. *United States*, 95 U.S. 149 (1877); *Wallach* v. *Van Riswick*, 92 U.S. 202, 203 (1876); *Armstrong's Foundry*, 6 Wall. (73 U.S.) 766, 769 (1868). There is no direct ruling on the question of whether only citizens can commit treason. In *Carlisle* v. *United States*, 16 Wall. (83 U.S.) 147, 154-155 (1873), the Court declared that aliens while domiciled in this country owe a temporary allegiance to it and may be punished for treason equally with a native-born citizen in the absence of a treaty stipulation to the contrary. This case involved the attempt of certain British subjects to recover claims for property seized under the Captured and Abandoned Property Act, 12 Stat. 820 (1863), which provided for the recovery of property or its value in suits in the Court of Claims by persons who had not rendered aid and comfort to the enemy. Earlier in *United States* v. *Wiltberger*, 5 Wheat. (18 U.S.) 76, 97 (1820), which involved a conviction for manslaughter under an act punishing manslaughter and treason on the high seas, Chief Justice Marshall going beyond the necessities of the case stated that treason "is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary." However, *see In re Shinohara*, Court Martial Orders, No. 19, September 8, 1949, p. 4, Office of the Judge Advocate General of the Navy, reported in 17 Geo. Wash. L. Rev. 283 (1949). In the latter, an enemy alien resident in United States territory (Guam) was held guilty of treason for acts done while the enemy nation of which he was a citizen occupied such territory. Under English precedents, an alien residing in British territory is open to conviction for high treason on the theory that his allegiance to the Crown is not suspended by foreign occupation of the territory. *DeJager* v. *Attorney General of Natal* (1907), A.C., 96 L.T.R. 857. *See also* 18 U.S.C. § 2381.

# ARTICLE IV

## STATES' RELATIONS

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# STATES' RELATIONS

## ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

### SOURCES AND EFFECT OF THIS PROVISION

**Private International Law**

The historical background of this section is furnished by that branch of private law which is variously termed "private international law," "conflict of laws," "comity," This comprises a body of rules, based largely on the writings of jurists and judicial decisions, in accordance with which the courts of one country, or "jurisdiction," will ordinarily, in the absence of a local policy to the contrary, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or "jurisdiction." Most frequently applied examples of these rules include the following: the rule that a marriage which is good in the country where performed (*lex loci*) is good elsewhere; the rule that contracts are to be interpreted in accordance with the laws of the country where entered into (*lex loci contractus*) unless the parties clearly intended otherwise; the rule that immovables may be disposed of only in accordance with the law of the country where situated (*lex rei sitae*);[1] the converse rule that chattels adhere to the person of their owner and hence are disposable by him, even when located elsewhere, in accordance with the law of his domicile (*lex domicilii*); the rule that regardless of where the cause arose, the courts of any country where personal service of the defendant can be effected will take jurisdiction of certain types of personal actions, hence termed "transitory," and accord such remedy as the *lex fori* affords. Still other rules, of first importance in the present connection, determine the recognition which the

[1] *Clark* v. *Graham*, 6 Wheat. (19 U.S.) 577 (1821), is an early case in which the Supreme Court enforced this rule.

judgments of the courts of one country shall receive from those of another country.

So even had the States of the Union remained in a mutual relationship of entire independence, private claims originating in one often would have been assured recognition and enforcement in the others. The Framers felt, however, that the rules of private international law should not be left among the States altogether on a basis of comity and hence subject always to the overruling local policy of the *lex fori* but ought to be in some measure at least placed on the higher plane of constitutional obligation. In fulfillment of this intent the section now under consideration was inserted, and Congress was empowered to enact supplementary and enforcing legislation.[2]

## JUDGMENTS: EFFECT TO BE GIVEN IN FORUM STATE

### In General

Article IV, § 1, has had its principal operation in relation to judgments. Embraced within the relevant discussions are two principal classes of judgments. First, those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the State where rendered, as for example, when an action for debt is brought in the courts of State B on a judgment for money damages rendered in State A; second, those in which the judgment involved was offered, in conformance with the principle of *res judicata*, in defense in a new or collateral proceeding growing out of the same facts as the original suit, as for example, when a decree of divorce granted in State A is offered as barring a suit for divorce by the other party to the marriage in the courts of State B.

The English courts and the different state courts in the United States, while recognizing "foreign judgments *in personam*" which were reducible to money terms as affording a basis for actions in debt, originally accorded them generally only the status of *prima facie* evidence in support thereof, so that the merits of the original controversy could always be opened. When offered in defense, on the other hand, "foreign judgments *in personam*" were regarded as conclusive upon everybody on the theory that, as stated by Chief Justice Marshall, "it is a proceeding *in rem*, to which all the world are parties." [1]

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[2] Congressional legislation under the full faith and credit clause, so far as it is pertinent to adjudication hereunder, is today embraced in 28 U.S.C. §§ 1738–1739. *See also* 28 U.S.C. §§ 1740–1742.

[1] *Mankin* v. *Chandler*, 16 Fed Cas. 625, 626 (No. 9030) (C.C.D. Va. 1823).

**Sec. 1—Full Faith and Credit: Judicial Proceedings**

The pioneer case was *Mills* v. *Duryee,*[2] decided in 1813. In an action brought in the circuit court of the District of Columbia—the equivalent of a state court for this purpose—on a judgment from a New York court, the defendant endeavored to reopen the whole question of the merits of the original case by a plea of "*nil debet.*" It was answered in the words of the first implementing statute of 1790[3] that such records and proceedings were entitled in each State to the same faith and credit as in the State of origin, and that inasmuch as they were records of a court in the State of origin, and so conclusive of the merits of the case there, they were equally so in the forum State. The Court adopted the latter view, saying that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—with regard to the reception of foreign judgments but to amplify and fortify these.[4] And in *Hampton* v. *McConnell*[5] some years later, Chief Justice Marshall went even further, using language which seems to show that he regarded the judgment of a state court as constitutionally entitled to be accorded in the courts of sister States not simply the faith and credit on conclusive evidence but the validity of final judgment.

When, however, the next important case arose, the Court had come under new influences. This was *McElmoyle* v. *Cohen,*[6] in which the issue was whether a statute of limitations of the State of Georgia, which applied only to judgments obtained in courts other than those of Georgia, could constitutionally bar an action in Georgia on a judgment rendered by a court of record of South Carolina. Declining to follow Marshall's lead in *Hampton* v. *McConnell,* the Court held that the Constitution was not intended "materially to interfere with the essential attributes of the *lex fori,*" that the act of Congress only established a rule of evidence, of conclusive evidence to be sure, but still of evidence only; and that it was necessary, in order to carry into effect in a State the judgment of a court of a sister State, to institute a fresh action in the court of the

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[2] 7 Cr. (11 U.S.) 481 (1813). *See also Everett* v. *Everett,* 215 U.S. 203 (1909); *Insurance Company* v. *Harris,* 97 U.S. 331 (1878).

[3] 1 Stat. 122.

[4] On the same basis, a judgment cannot be impeached either in, or out of, the State by showing that it was based on a mistake of law. *American Express Co.* v. *Mullins,* 212 U.S. 311, 312 (1909). *Fauntleroy* v. *Lum,* 210 U.S. 230 (1908); *Hartford Life Ins. Co.* v. *Ibs,* 237 U.S. 662 (1915); *Hartford Life Ins. Co.* v. *Barber,* 245 U.S. 146 (1917).

[5] 3 Wheat. (16 U.S.) 234 (1818).

[6] 13 Pet. (38 U.S.) 312 (1839). *See also Bank of Alabama* v. *Dalton,* 9 How. (50 U.S.) 522, 528 (1850); *Bacon* v. *Howard,* 20 How. (61 U.S.) 22, 25 (1858); *Christmas* v. *Russell,* 5 Wall. (72 U.S.) 290, 301 (1866); *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. 265, 292 (1888), *Great Western Telegraph Co.* v. *Purdy,* 162 U.S. 329 (1896).

former, in strict compliance with its laws; and that, consequently, when remedies were sought in support of the rights accruing in another jurisdiction, they were governed by the *lex fori*. In accord with this holding it has been further held that foreign judgments enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced but only that which the *lex fori* gives them by its own laws, in their character of foreign judgments.[7] A judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court in another State, as it has in the State in which it was rendered.[8]

A judgment enforceable in the State where rendered must be given effect in another State, notwithstanding that the modes of procedure to enforce its collection may not be the same in both States.[9] If the initial court acquired jurisdiction, its judgment is entitled to full faith and credit elsewhere even though the former, by reason of the departure of the defendant with all his property, after having been served, has lost its capacity to enforce it by execution in the State of origin.[10] "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a speciality. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction, . . . or that it has ceased to be obligatory because of payment or other discharge . . . or that it is a cause of action for which the State of the forum has not provided a court . . . ."[11]

On the other hand, the clause is not violated when a judgment is disregarded because it is not conclusive of the issues before a court of the forum. Conversely, no greater effect can be given than is given in the State where rendered. Thus, an interlocutory judg-

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[7] *Cole* v. *Cunningham*, 133 U.S. 107, 112 (1890). *See also Stacy* v. *Thrasher*, 6 How. (47 U.S.) 44, 61 (1848); *Milwaukee County* v. White Co., 296 U.S. 268 (1935).

[8] *Chicago & Alton R. R.* v. *Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887); *Hanley* v. *Donoghue*, 116 U.S. 1, 3 (1885). *See also Green* v. *Van Buskirk*, 7 Wall. (74 U.S.) 139, 140 (1869); *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111 (1912); *Roche* v. *McDonald*, 275 U.S. 449 (1928); *Ohio* v. *Chattanooga Boiler Co.*, 289 U.S. 439 (1933).

[9] *Sistare* v. *Sistare*, 218 U.S. 1 (1910).

[10] *Michigan Trust Co.* v. *Ferry*, 228 U.S. 346 (1913). *See also Fall* v. *Eastin*, 215 U.S. 1 (1909).

[11] *Milwaukee County* v. *White Co.*, 296 U.S. 268, 275–276 (1935).

ment may not be given the effect of a final judgment.[12] Likewise, when a federal court does not attempt to foreclose the state court from hearing all matters of personal defense which landowners might plead, a state court may refuse to accept the former's judgment as determinative of the landowners' liabilities.[13] Similarly, though a confession of judgment upon a note, with a warrant of attorney annexed, in favor of the holder, is in conformity with a state law and usage as declared by the highest court of the State in which the judgment is rendered, the judgement may be collaterally impeached upon the ground that the party in whose behalf it was rendered was not in fact the holder.[14] But a consent decree, which under the law of the State has the same force and effect as a decree *in invitum*, must be given the same effect in the courts of another State.[15]

Subsequent to its departure from *Hampton* v. *McConnell*[16] the Court does not appear to have formulated, by way of substitution, any clear-cut principles for disposing of the contention that a State need not provide a forum for a particular type of judgment of a sister State. Thus, in one case it held that a New York statute forbidding foreign corporations doing a domestic business to sue on causes originating outside the State was constitutionally applicable to prevent such a corporation from suing on a judgment obtained in a sister State.[17] But in a later case it ruled that a Mississippi statute forbidding contracts in cotton futures could not validly close the courts of the State to an action on a judgment obtained in a sister State on such a contract, although the contract in question had been entered into in the forum State and between its citizens.[18]

Following the later rather than the earlier precedent, subsequent cases[19] have held: (1) that a State may adopt such system of

[12] *Board of Public Works* v. *Columbia College*, 17 Wall. (84 U.S.) 521 (1873); *Robertson* v. *Pickrell*, 109 U.S. 608, 610 (1883).

[13] *Kersh Lake Dist.* v. *Johnson*, 309 U.S. 485 (1940). *See also Texas & Pac. Ry. Co.* v. *Southern Pacific Co.*, 137 U.S. 48 (1890).

[14] *National Exchange Bank* v. *Wiley*, 195 U.S. 257, 265 (1904). *See also Grover & Baker Machine Co.* v. *Radcliffe*, 137 U.S. 287 (1890).

[15] *Harding* v. *Harding*, 198 U.S. 317 (1905).

[16] 3 Wheat. (16 U.S.) 234 (1818).

[17] *Anglo-Am. Prov. Co.* v. *Davis Prov. Co., No. 1*, 191 U.S. 373 (1903).

[18] *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908). Justice Holmes who spoke for the Court in both cases, asserted in his opinion in the latter that the New York statute was "directed to jurisdiction," the Mississippi statute to "merits," but four Justices could not grasp the distinction.

[19] *Kenney* v. *Supreme Lodge*, 252 U.S. 411 (1920), and cases there cited. Holmes again spoke for the Court. *See also* Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 Yale L.J. 421, 434 (1919).

courts and form of remedy as it sees fit but cannot, under the guise of merely affecting the remedy, deny enforcement of claims otherwise within the protection of the full faith and credit clause when its courts have general jurisdiction of the subject matter and the parties; [20] (2) that, accordingly, a forum State, which has a shorter period of limitations than the State in which a judgment was granted and later revived, erred in concluding that, whatever the effect of the revivor under the law of the State of origin, it could refuse enforcement of the revived judgment; [21] (3) that the courts of one State have no jurisdiction to enjoin the enforcement of judgments at law obtained in another State, when the same reasons assigned for granting the restraining order were passed upon on a motion for new trial in the action at law and the motion denied; [22] (4) that the constitutional mandate requires credit to be given to a money judgment rendered in a civil cause of action in another State, even though the forum State would have been under no duty to entertain the suit on which the judgment was founded, inasmuch as a State cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on a judgment; [23] and (5) that, similarly, tort claimants in State A, who obtain a judgment against a foreign insurance company, notwithstanding that, prior to judgment, domiciliary State B appointed a liquidator for the company, vested company assets in him, and ordered suits against the company stayed, are entitled to have such judgment recognized in State B for purposes of determining the amount of the claim, although not for determination of what priority, if any, their claim should have.[24]

**Jurisdiction: A Prerequisite to Enforcement of Judgments**

The jurisdictional question arises both in connection with judgments *in personam* against nonresident defendants to whom it is alleged personal service was not obtained in the State originating the judgment and in relation to judgments *in rem* against property or a status alleged not to have been within the jurisdiction of the

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[20] *Broderick* v. *Rosner*, 294 U.S. 629 (1935), approved in *Hughes* v. *Fetter*, 341 U.S. 609 (1951).

[21] *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949); *see also Roche* v. *McDonald*, 275 U.S. 449 (1928).

[22] *Embry* v. *Palmer*, 107 U.S. 3, 13 (1883).

[23] *Titus* v. *Wallick*, 306 U.S. 282, 291–292 (1939).

[24] *Morris* v. *Jones*, 329 U.S. 545 (1947). Moreover, there is no apparent reason why Congress, acting on the implications of Marshall's words in *Hamption* v. *McConnell*, 3 Wheat. (16 U.S.) 234 (1818), should not clothe extrastate judgments of any particular type with the full status of domestic judgments of the same type in the several States. Thus, why should not a judgment for alimony be made directly enforceable in sister States instead of merely furnishing the basis of an action in debt?

court which handed down the original decree.[1] Records and proceedings of courts wanting jurisdiction are not entitled to credit.[2]

***Judgments in Personam.***—When the subject matter of a suit is n rely the defendant's liability, it is necessary that it should appear from the record that the defendant has been brought within the jurisdiction of the court by personal service of process, or by his voluntary appearance, or that he had in some manner authorized the proceeding.[3] Thus, when a state court endeavored to acquire jurisdiction of a nonresident defendant by an attachment of his property within the State and constructive notice to him, its judgment was defective for want of jurisdiction and hence could not afford the basis of an action against the defendant in the court of another State, although it bound him so far as the property attached by virtue of the inherent right of a State to assist its own citizens in obtaining satisfaction of their just claims.[4]

The fact that a nonresident defendant was only temporarily in the State when he was served in the original action does not vitiate the judgment thus obtained and later relied upon as the basis of an action in his home State.[5] Also a judgment rendered in the State of his domicile against a defendant who, pursuant to the statute thereof providing for the service of process on absent defendants, was personally served in another State is entitled to full faith and credit.[6] When the matter of fact or law on which jurisdiction de-

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[1] *Cooper* v. *Reynolds*, 10 Wall. (77 U.S.) 308 (1870); *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71 (1961). Full faith and credit extends to the issue of the original court's jurisdiction, when the second court's inquiry discloses that the question of jurisdiction had been fully and fairly litigated and finally decided in the court which rendered the original judgment. *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Underwriters Natl. Assur. Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Assn.*, 455 U.S. 691 (1982).

[2] *Board of Public Works* v. *Columbia College*, 17 Wall. (84 U.S.) 521, 528 (1873). *See also Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 291 (1888); *Huntington* v. *Attrill*, 146 U.S. 657, 685 (1892); *Brown* v. *Fletcher's Estate*, 210 U.S. 82 (1908); *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111 (1912); *Spokane Inland R.R.* v. *Whitley*, 237 U.S. 487 (1915). However, a denial of credit, founded upon a mere suggestion of want of jurisdiction and unsupported by evidence, violates the clause. *Rogers* v. *Alabama*, 192 U.S. 226, 231 (1904); *Wells Fargo & Co.* v. *Ford*, 238 U.S. 503 (1915).

[3] *Grover & Baker Machine Co.* v. *Radcliffe*, 137 U.S. 287 (1890). *See also Galpin* v. *Page*, 18 Wall. (85 U.S.) 350 (1874); *Old Wayne Life Ass'n* v. *McDonough*, 204 U.S. 8 (1907); *Brown* v. *Fletcher's Estate*, 210 U.S. 82 (1908).

[4] *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). *See*, for a reformulation of this case's due process foundation, *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

[5] *Renaud* v. *Abbot*, 116 U.S. 277 (1886); *Jaster* v. *Currie*, 198 U.S. 144 (1905); *Reynolds* v. *Stockton*, 140 U.S. 254 (1891).

[6] *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940). In the pioneer case of *D'Arcy* v. *Ketchum*, 1 How. (52 U.S.) 165 (1851), the question presented was whether a judgment rendered by a New York court, under a statute which provided that, when joint debtors were sued and one of them was brought into court on a process, a judgment in favor of the plaintiff would entitle him to execute against all, must be ac-

pends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment.[7]

Inasmuch as the principle of *res judicata* applies only to proceedings between the same parties and privies, the plea by defendant in an action based on a judgment that he was not party or privy to the original action raises the question of jurisdiction; while a judgment against a corporation in one State may validly bind a stockholder in another State to the extent of the par value of his holdings,[8] an administrator acting under a grant of administration in one State stands in no sort of relation of privity to an administrator of the same estate in another State.[9] But where a judgment of dismissal was entered in a federal court in an action against one of two joint tortfeasors, in a State in which such a judgment would constitute an estoppel in another action in the same State against the other tortfeasor, such judgment is not entitled to full faith and credit in an action brought against the tortfeasor in another State.[10]

***Service on Foreign Corporations.***—In 1856, the Court decided *Lafayette Ins. Co.* v. *French,*[11] a pioneer case in its general class. Here it was held that "where a corporation chartered by the State of Indiana was allowed by a law of Ohio to transact business in the latter State upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment obtained against the corporation by means of such process" ought to receive in Indiana the same faith and credit as it was entitled to in Ohio.[12] Later cases establish

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corded full faith and credit in Louisiana when offered as a basis of an action in debt against a resident of that State who had not been served by process in the New York action. The Court ruled that the original implementing statute, 1 Stat. 122 (1790), did not reach this type of case, and hence the New York judgment was not enforceable in Louisiana against defendant. Had the Louisiana defendant thereafter ventured to New York, however, he could, as the Constitution then stood, have been subjected to the judgment to the same extent as the New York defendant who had been personally served. Subsequently, the disparity between operation of personal judgment in the home State has been eliminated, because of the adoption of the Fourteenth Amendment. In divorce cases, however, it still persists in some measure. *See* pp. 844–850.

[7] *Adam* v. *Saenger,* 303 U.S. 59, 62 (1938).

[8] *Hancock Nat. Bank* v. *Farnum,* 176 U.S. 640 (1900).

[9] *Stacy* v. *Thrasher,* 6 How. (47 U.S.) 44, 58 (1848).

[10] *Bigelow* v. *Old Dominion Copper Co.,* 225 U.S. 111 (1912).

[11] 18 How. (59 U.S.) 404 (1856).

[12] To the same effect is *Connecticut Mutual Life Ins. Co.* v. *Spratley,* 172 U.S. 602 (1899).

under both the Fourteenth Amendment and Article IV, § 1, that the cause of action must have arisen within the State obtaining service in this way,[13] that service on an officer of a corporation, not its resident agent and not present in the State in an official capacity, will not confer jurisdiction over the corporation,[14] that the question whether the corporation was actually "doing business" in the State may be raised.[15] On the other hand, the fact that the business was interstate is no objection.[16]

***Service on Nonresident Motor Vehicle Owners.***—By analogy to the above cases, it has been held that a State may require nonresident owners of motor vehicles to designate an official within the State as an agent upon whom process may be served in any legal proceedings growing out of their operation of a motor vehicle within the State.[17] While these cases arose under the Fourteenth Amendment alone, unquestionably a judgment validly obtained upon this species of service could be enforced upon the owner of a car through the courts of his home State.

***Judgments in Rem.***—In sustaining the challenge to jurisdiction in cases involving judgments *in personam*, the Court in the main was making only a somewhat more extended application of recognized principles. In order to sustain the same kind of challenge in cases involving judgments *in rem* it has had to make law outright. The leading case is *Thompson* v. *Whitman*.[18] Thompson, sheriff of Monmouth County, New Jersey, acting under a New Jersey statute, had seized a sloop belonging to Whitman and by a proceeding *in rem* had obtained its condemnation and forfeiture in a local court. Later, Whitman, a citizen of New York, brought an action for trespass against Thompson in the United States Circuit Court for the Southern District of New York, and Thompson answered by producing a record of the proceedings before the New Jersey tribunal. Whitman thereupon set up the contention that the New Jersey court had acted without jurisdiction, inasmuch as the sloop which was the subject matter of the proceedings had been seized outside the county to which, by the statute under which it had acted, its jurisdiction was confined.

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[13] *Simon* v. *Southern Railway*, 236 U.S. 115 (1915).

[14] *Goldey* v. *Morning News*, 156 U.S. 518 (1895); *Riverside Mills* v. *Menfee*, 237 U.S. 189 (1915).

[15] *International Harvester* v. *Kentucky*, 234 U.S. 579 (1914). *Riverside Mills* v. *Menefee*, *237 U.S. 189 (1915)*.

[16] *International Harvester* v. *Kentucky*, 234 U.S. 579 (1914).

[17] *Kane* v. *New Jersey*, 242 U.S. 160 (1916); *Hess* v. *Pawloski*, 274 U.S. 352 (1927), limited in *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928).

[18] 18 Wall. (85 U.S.) 457 (1874).

As previously explained, the plea of lack of privity cannot be set up in defense in a sister State against a judgment *in rem.* In a proceeding *in rem,* however, the presence of the *res* within the court's jurisdiction is a prerequisite, and this, it was urged, had not been the case in *Thompson* v. *Whitman.* Could, then, the Court consider this challenge with respect to a judgment which was offered, not as the basis for an action for enforcement through the courts of a sister State but merely as a defense in a collateral action? As the law stood in 1873, it apparently could not.[19] All difficulties, nevertheless, to its consideration of the challenge to jurisdiction in the case were brushed aside by the Court. Whenever, it said, the record of a judgment rendered in a state court is offered "in evidence" by either of the parties to an action in another State, it may be contradicted as to the facts necessary to sustain the former court's jurisdiction; "and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding the claim that they did exist." [20]

**Divorce Decrees: Domicile as the Jurisdictional Prerequisite**

This, however, was only the beginning of the Court's lawmaking in cases *in rem.* The most important class of such cases is that in which the respondent to a suit for divorce offers in defense an earlier decree from the courts of a sister State. By the almost universally accepted view prior to 1906, a proceeding in divorce was one against the marriage status, i.e., *in rem,* and hence might be validly brought by either party in any State where he or she was *bona fide* domiciled; [1] and, conversely, when the plaintiff did not have a *bona fide* domicile in the State, a court could not render a decree binding in other States even if the nonresident defendant entered a personal appearance.[2]

***Divorce Suit: In Rem or in Personam; Judicial Indecision.***—In 1906, however, by a vote of five to four, the Court departed from its earlier ruling, rendered five years previously in *Atherton* v. *Ather-*

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[19] 1 H. Black, *A Treatise on the Law of Judgments* (St Paul: 1891), § 246.

[20] *See also Simmons* v. *Saul,* 138 U.S. 439, 448 (1891). In other words, the challenge to jurisdiction is treated as equivalent to the plea *nul tiel record,* a plea which was recognized even in *Mills* v. *Duryee* as available against an attempted invocation of the full faith and credit clause. What is not pointed out by the Court is that it was also assumed in the earlier case that such a plea could always be rebutted by producing a transcript, properly authenticated in accordance with the act of Congress, of the judgment in the original case. *See also Brown* v. *Fletcher's Estate,* 210, U.S. 82 (1908); *German Savings Society* v. *Dormitzer,* 192 U.S. 125, 128 (1904); *Grover & Baker Machine Co.* v. *Radcliffe,* 137 U.S. 287, 294 (1890).

[1] *Cheever* v. *Wilson,* 9 Wall. (76 U.S.) 108 (1870).

[2] *Andrews* v. *Andrews,* 188 U.S. 14 (1903). *See also German Savings Society* v. *Dormitzer,* 192 U.S. 125 (1904).

*ton*,[3] and in *Haddock* v. *Haddock*,[4] it announced that a divorce proceeding might be viewed as one *in personam*. In the former it was held, in the latter denied, that a divorce granted a husband without personal service upon the wife, who at the time was residing in another State, was entitled to recognition under the full faith and credit clause and the acts of Congress; the difference between the cases consisted solely in the fact that in the *Atherton* case the husband had driven the wife from their joint home by his conduct, while in the *Haddock* case he had deserted her. The court which granted the divorce in *Atherton* v. *Atherton* was held to have had jurisdiction of the marriage status, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. Haddock's suit, on the contrary, was held to be as to the wife *in personam* and so to require personal service upon her or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid in the State where obtained because of the State's inherent power to determine the status of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when the one was in Connecticut and the other in New York, the former was divorced and the latter married. In *Atherton* v. *Atherton* the Court had earlier acknowledged that "a husband without a wife, or a wife without a husband, is unknown to the law."

The practical difficulties and distresses likely to result from such anomalies were pointed out by critics of the decision at the time. In point of fact, they have been largely avoided, because most of the state courts have continued to give judicial recognition and full faith and credit to one another's divorce proceedings on the basis of the older idea that a divorce proceeding is one *in rem*, and that if the applicant is *bona fide* domiciled in the State the court has jurisdiction in this respect. Moreover, until the second of the *Williams* v. *North Carolina* cases [5] was decided in 1945, there had not been manifested the slightest disposition to challenge judicially the power of the States to determine what shall constitute domicile for divorce purposes. Shortly prior thereto, the Court in *Davis* v. *Davis* [6] rejected contentions adverse to the validity of a Virginia

[3] 181 U.S. 155, 162 (1901).
[4] 201 U.S. 562 (1906).
[5] 317 U.S. 287 (1942); 325 U.S. 226 (1945).
[6] 305 U.S. 32 (1938).

decree of which enforcement was sought in the District of Columbia. In this case, a husband, after having obtained in the District a decree of separation subject to payment of alimony, established years later a residence in Virginia and sued there for a divorce. Personally served in the District, where she continued to reside, the wife filed a plea denying that her husband was a resident of Virginia and averred that he was guilty of a fraud on the court in seeking to establish a residence for purposes of jurisdiction. In ruling that the Virginia decree, granting to the husband an absolute divorce minus any alimony payment, was enforceable in the District, the Court stated that in view of the wife's failure, while in Virginia litigating her husband's status to sue, to answer the husband's charges of willful desertion, it would be unreasonable to hold that the husband's domicile in Virginia was not sufficient to entitle him to a divorce effective in the District. The finding of the Virginia court on domicile and jurisdiction was declared to bind the wife. *Davis* v. *Davis* is distinguishable from the *Williams* v. *North Carolina* decisions in that in the former determination of the jurisdictional prerequisite of domicile was made in a contested proceeding while in the *Williams* cases it was not.

***Williams I and Williams II.***—In the *Williams* I and *Williams* II cases, the husband of one marriage and the wife of another left North Carolina, obtained six-week divorce decrees in Nevada, married there, and resumed their residence in North Carolina where both previously had been married and domiciled. Prosecuted for bigamy, the defendants relied upon their Nevada decrees and won the preliminary round of this litigation, that is, in *Williams* I,[7] when a majority of the Justices, overruling *Haddock* v. *Haddock*, declaring that in this case, the Court must assume that the petitioners for divorce had a *bona fide* domicile in Nevada and not that their Nevada domicile was a sham. ". . . [E]ach State, by virtue of its command over the domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of substituted service meet the requirements of due process." Accordingly, a decree granted by Nevada to one, who, it is assumed, is at the time *bona fide* domiciled therein, is binding upon the courts of other States, including North Carolina in which the marriage was performed and where the other party to the marriage is still domiciled when the divorce was decreed. In view of its assumptions, which it justified on the basis of an inadequate

[7] 317 U.S. 287, 298–299 (1942).

record, the Court did not here pass upon the question whether North Carolina had the power to refuse full faith and credit to a Nevada decree because it was based on residence rather than domicile or because, contrary to the findings of the Nevada court, North Carolina found that no *bona fide* domicile had been acquired in Nevada.[8]

Presaging what ruling the Court would make when it did get around to passing upon the latter question, Justice Jackson, dissenting in *Williams* I, protested that "this decision repeals the divorce laws of all the States and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there. . . . While a State can no doubt set up its own standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other States. . . . The effect of the Court's decision today—that we must give extra-territorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first State to pass on the facts necessary to jurisdiction." [9]

Notwithstanding that one of the deserted spouses had died since the initial trial and that another had remarried, North Carolina, without calling into question the status of the latter marriage, began a new prosecution for bigamy; when the defendants appealed the conviction resulting therefrom, the Supreme Court, in *Williams* II,[10] sustained the adjudication of guilt as not denying full faith and credit to the Nevada divorce decree. Reiterating the doctrine that jurisdiction to grant divorce is founded on domicile,[11] a majority of the Court held that a decree of divorce rendered in one State may be collaterally impeached in another by proof that the court which rendered the decree lacked jurisdiction (the parties not having been domiciled therein), even though the record of proceedings in that court purports to show jurisdiction.[12]

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[8] Id., 302.

[9] Id., 311.

[10] 325 U.S. 226, 229 (1945).

[11] *Bell* v. *Bell*, 181 U.S. 175 (1901); *Andrews* v. *Andrews*, 188 U.S. 14 (1903).

[12] Strong dissents were filed which have influenced subsequent holdings. Among these was that of Justice Rutledge which attacked both the consequences of the decision as well as the concept of jurisdictional domicile on which it was founded.

"Unless 'martrimonial domicil,' banished in *Williams* I [by the overruling of *Haddock* v. *Haddock*], has returned renamed ['domicil of origin'] in *Williams* II, every decree becomes vulnerable in every State. Every divorce, wherever granted

***Cases Following Williams II.***—Fears registered by the disenters in the second *Williams* case that the stability of all divorces might be undermined thereby and that thereafter the court of each forum State, by its own independent determination of domicile, might refuse recognition of foreign decrees were temporarily set at rest by the holding in *Sherrer* v. *Sherrer,*[13] wherein Massachusetts, a State of domiciliary origin, was required to accord full faith and credit to a 90-day Florida decree which had been contested by the husband. The latter, upon receiving notice by mail, retained Florida counsel who entered a general appearance and denied all allegations in the complaint, including the wife's residence. At the hearing the husband, though present in person and by counsel, did not offer evidence in rebuttal of the wife's proof of her Florida residence, and when the Florida court ruled that she was a *bona fide* resident, the husband did not appeal. Inasmuch as the findings of the requisite jurisdictional facts, unlike those in the second *Williams* case, were made in proceedings in which the defendant appeared and participated, the requirements of full faith and credit were held to bar him from collaterally attacking such findings in a

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. . . may now be reexamined by every other State, upon the same or different evidence, to redetermine the 'jurisdiction fact,' always the ultimate conclusion of 'domicil.' . . .

"The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common law conception. . . . No legal conception, save possibly 'jurisdiction' . . . afford such possibilities for uncertain application. . . . Apart from the necessity for travel, [to effect a change of domicile, the latter], criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity. . . . When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. . . . [The majority have not held] that denial of credit will be allowed, only if the evidence [as to the place of domicile] is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact 'not unreasonably.' . . . But . . . [the Court] does not define 'not unreasonably.' It vaguely suggests a supervisory function, to be exercised when the denial [of credit] strikes its sensibilities as wrong, by some not stated standard. . . . There will be no 'weighing' [of evidence], . . . only examination for sufficiency." 325 U.S., 248, 251, 255, 258–259.

No less disposed to prophesy undesirable results from this decision was Justice Black in whose dissenting opinion Justice Douglas concurred.

"The full faith and credit clause, as now interpreted, has become a disrupting influence. The Court in effect states that the clause does not apply to divorce actions, and that States alone have the right to determine what effect shall be given to the decrees of other States. If the Court is abandoning the principle that a marriage [valid where made is valid everywhere], a consequence is to subject people to bigamy or adultery prosecutions because they exercise their constitutional right to pass from a State in which they were validly married on to another which refuses to recognize their marriage. Such a consequence violates basic guarantees." Id., 262.

[13] 334 U.S. 343 (1948).

suit instituted by him in his home State of Massachusetts, particularly in the absence of proof that the divorce decree was subject to such collateral attack in a Florida court. Having failed to take advantage of the opportunities afforded him by his appearance in the Florida proceeding, the husband was thereafter precluded from relitigating in another State the issue of his wife's domicile already passed upon by the Florida court.

In *Coe* v. *Coe*,[14] embracing a similar set of facts, the Court applied like reasoning to reach a similar result. Massachusetts again was compelled to recognize the validity of a six-week Nevada decree obtained by a husband who had left Massachusetts after a court of that State had refused him a divorce and had granted his wife separate support. In the Nevada proceeding, the wife appeared personally and by counsel filed a cross-complaint for divorce, admitted the husband's residence, and participated personally in the proceedings. After finding that it had jurisdiction of the plaintiff, defendant, and the subject matter involved, the Nevada court granted the wife a divorce, which was valid, final, and not subject to collateral attack under Nevada law. The husband married again, and on his return to Massachusetts, his ex-wife petitioned the Massachusetts court to adjudge him in contempt for failing to make payments for her separate support under the earlier Massachusetts decree. Inasmuch as there was no intimation that under Massachusetts law a decree of separate support would survive a divorce, recognition of the Nevada decree as valid accordingly necessitated a rejection of the ex-wife's contention.

Appearing to review *Williams* II, and significant for the social consequences produced by the result decreed therein, is the case of *Rice* v. *Rice*.[15] To determine the widowhood status of the party liti-

[14] 334 U.S. 378 (1948). In a dissenting opinion filed in the case of *Sherrer* v. *Sherrer*, but applicable also to the case of *Coe* v. *Coe*, Justice Frankfurter, with Justice Murphy concurring, asserted his inability to accept the proposition advanced by the majority that "regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy had been gone through." 334 U.S., 343, 377.

[15] 336 U.S. 674 (1949). Of four justices dissenting, Black, Douglas, Rutledge, and Jackson, Justice Jackson alone filed a written opinion. To him the decision was "an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece,' but for the first *Williams* case and its progeny, the judgment of the Connecticut court might properly have held that the *Rice* divorce decree was void for every purpose because it was rendered by a State court which never obtained jurisdiction of the nonresident defendant. But if we adhere to the holdings that the Nevada court had power over her for the purpose of blasting her marriage and opening the way to a successor, I do not see the justice of inventing a compensating confusion in the device of divisible divorce by which the parties are half-bound and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife." Id., 676, 679, 680.

gants in relation to inheritance of property of a husband who had deserted his first wife in Connecticut, had obtained an *ex parte* divorce in Nevada, and after remarriage, had died without ever returning to Connecticut, the first wife, joining the second wife and the administrator of his estate as defendants, petitioned a Connecticut court for a declaratory judgment. After having placed upon the first wife the burden of proving that the decedent had not acquired a *bona fide* domicile in Nevada, and after giving proper weight to the claims of power by the Nevada court, the Connecticut court concluded that the evidence sustained the contentions of the first wife, and in so doing, it was upheld by the Supreme Court. The cases of *Sherrer* v. *Sherrer,* and *Coe* v. *Coe,* previously discussed, were declared not to be in point, inasmuch as no personal service was made upon the first wife, nor did she in any way participate in the Nevada proceedings. She was not, therefore, precluded from challenging the findings of the Nevada court that the decedent was, at the time of the divorce, domiciled in that State.[16]

***Claims for Alimony or Property in Forum State.***—In *Esenwein* v. *Commonwealth,*[17] *decided on the same day as the second Williams* case, the Supreme Court also sustained a Pennsylvania court in its refusal to recognize an *ex parte* Nevada decree on the ground that the husband who obtained it never acquired a *bona fide* domicile in the latter State. In this instance, the husband and wife had separated in Pennsylvania, where the wife was granted a support order; after two unsuccessful attempts to win a divorce in that State, the husband departed for Nevada. Upon the receipt of a Nevada decree, the husband thereafter established a residence in Ohio and filed an action in Pennsylvania for total relief from the support order. In a concurring opinion, in which he was joined by Justices Black and Rutledge, Justice Douglas stressed the "basic difference between the problem of marital capacity and the problem of support," and stated that it was "not apparent that the

[16] Vermont violated the clause in sustaining a collateral attack on a Florida divorce decree, the presumption of Florida's jurisdiction over the cause and the parties not having been overcome by extrinsic evidence or the record of the case. *Cook* v. *Cook,* 342 U.S. 126 (1951) The *Sherrer* and *Coe* cases were relied upon. There seems, therefore, to be no doubt of their continued vitality.

A Florida divorce decree was also at the bottom of another case in which the daughter of a divorced man by his first wife and his legatee under his will sought to attack his divorce in the New York courts and thereby indirectly his third marriage. The Court held that inasmuch as the attack would not have been permitted in Florida under the doctrine of *res judicata,* it was not permissible under the full faith and credit clause in New York. On the whole, it appears that the principle of *res judicata* is slowly winning out against the principle of domicile. *Johnson* v. *Muelberger,* 340 U.S. 581 (1951).

[17] 325 U.S. 279 (1945).

spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree," unless the other spouse appeared or was personally served. "The State where the deserted wife is domiciled has a concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized." Or, as succinctly stated by Justice Rutledge, "the jurisdictional foundation for a decree in one State capable of foreclosing an action for maintenance or support in another may be different from that required to alter the marital status with extraterritorial effect." [18]

Three years later, but on this occasion as spokesman for a majority of the Court, Justice Douglas reiterated these views in the case of *Estin* v. *Estin*.[19] Even though it acknowledged the validity of an *ex parte* Nevada decree obtained by a husband, New York was held not to have denied full faith and credit to the decree when, subsequently thereto, it granted the wife a judgment for arrears in alimony founded upon a decree of separation previously awarded to her when both she and her husband after he had resided there a year and upon constructive notice to the wife in New York who entered no appearance, was held to be effective only to change the marital status of both parties in all States of the Union but ineffective on the issue of alimony. Divorce, in other words, was viewed as being divisible; Nevada, in the absence of acquiring jurisdiction over the wife, was held incapable of adjudicating the rights of the wife in the prior New York judgment awarding her alimony. Accordingly, the Nevada decree could not prevent New York from applying its own rule of law which, unlike that of Pennsylvania,[20] does permit a support order to survive a divorce decree.[21]

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[18] Id., 281–283.

[19] 334 U.S. 541 (1948). *See also* the companion case of *Kreiger* v. *Kreiger*, 334 U.S. 555 (1948).

[20] *Esenwein* v. *Commonwealth*, 325 U.S. 279, 280 (1945).

[21] Because the record, in his opinion, did not make it clear whether New York "law" held that no "*ex parte*" divorce decree could terminate a prior New York separate maintenance decree, or merely that no "*ex parte*" decree of divorce *of another State* could, Justice Frankfurter dissented and recommended that the case be remanded for clarification. Justice Jackson dissented on the ground that under New York law, a New York divorce would terminate the wife's right to alimony, and if the Nevada decree is good, it was entitled to no less effect in New York than a local decree. However, for reasons stated in his dissent in the first *Williams* case, 317 U.S. 287, he would have preferred not to give standing to constructive service divorces obtained on short residence. 334 U.S. 541, 549–554 (1948). These two Justices filed similar dissents in the companion case of *Kreiger* v. *Kreiger*, 334 U.S. 555, 557 (1948).

Such a result was justified as accommodating the interests of both New York and Nevada in the broken marriage by restricting each State to matters of her dominant concern, the concern of New York being that of protecting the abandoned wife against impoverishment. In *Simons* v. *Miami National Bank* [22] the Court held that a dower right in the deceased husband's estate is extinguished even though a divorce decree was obtained in a proceeding in which the nonresident wife was served by publication only and did not make a personal appearance.[23] The Court found the principle of *Estin* v. *Estin* [24] was not applicable. In *Simons* the Court rejected the contention that the forum court, in giving recognition to the foreign court's separation decree providing for maintenance and support, has to allow for dower rights in the deceased husband's estate in the forum State.[25] Full faith and credit is not denied to a sister State's separation decree, including an award of monthly alimony, where nothing in the foreign State's separation decree could be construed as creating or preserving any interest in the nature of or in lieu of dower in any property of the decendent, wherever located and where the law of the forum State did not treat such a decree as having such effect nor indicate such an effect irrespective of the existence of the foreign State's decree.[1]

***Decrees Awarding Alimony, Custody of Children.***—Resulting as a by-product of divorce litigation are decrees for the payment of alimony, judgments for accrued and unpaid installments of alimony, and judicial awards of the custody of children, all of which necessitate application of the full faith and credit clause when extrastate enforcement is sought for them. Thus, a judgment in State A for alimony in arrears and payable under a prior judgment of separation which is not by its terms conditional nor subject by the law of State A to modification or recall, and on which execution was directed to issue, is entitled to recognition in the forum State. Although an obligation for accrued alimony could have been modified or set aside in State A prior to its merger in the judgment, such a judgment, by the law of State A, is not lacking in finality.[2] As to the finality of alimony decrees in general, the Court had previously ruled that where such a decree is rendered, payable in future installments, the right to such installments becomes absolute and vested on becoming due, provided no modification of the decree has

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[22] 381 U.S. 81 (1965).
[23] Id., 84–85.
[24] 334 U.S. 541 (1948).
[25] 381 U.S., 84–85.
[1] Id., 85.
[2] *Barber* v. *Barber*, 323 U.S. 77, 84 (1944).

been made prior to the maturity of the installments.[3] However, a judicial order requiring the payment of arrearages in alimony, which exceeded the alimony previously decreed, is invalid for want of due process, the respondent having been given no opportunity to contest it.[4] "A judgment obtained in violation of procedural due process," said Chief Justice Stone, "is not entitled to full faith and credit when sued upon in another jurisdiction." [5]

An example of a custody case was one involving a Florida divorce decree which was granted *ex parte* to a wife who had left her husband in New York, where he was served by publication. The decree carried with it an award of the exclusive custody of the child, whom the day before the husband had secretly seized and brought back to New York. The Court ruled that the decree was adequately honored by a New York court when, in *habeas corpus* proceedings, it gave the father rights of visitation and custody of the child during stated periods and exacted a surety bond of the wife conditioned on her delivery of the child to the father at the proper times,[6] it having not been "shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida laws. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida."

Answering a question left open in the preceding holding as to the binding effect of the *ex parte* award, the Court more recently acknowledged that in a proceeding challenging a mother's right to retain custody of her children, a State is not required to give effect to the decree of another State's court, which never acquired personal jurisdiction over the mother of her children, and which awarded custody to the father as the result of an *ex parte* divorce action in-

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[3] *Sistare* v. *Sistare*, 218 U.S. 1, 11 (1910). *See also Barber* v. *Barber*, 21 How. (62 U.S.) 582 (1859); *Lynde* v. *Lynde*, 181 U.S. 183, 186–187 (1901); *Audubon* v. *Shufeldt*, 181 U.S. 575, 577 (1901); *Bates* v. *Bodie*, 245 U.S. 520 (1918); *Yarborough* v. *Yarborough*, 290 U.S. 202 (1933); *Loughran* v. *Loughran*, 292 U.S. 216 (1934).

[4] *Griffin* v. *Griffin*, 327 U.S. 220 (1946).

[5] Id., 228. An alimony case of a quite extraordinary pattern was that of *Sutton* v. *Leib*. Because of the diverse citizenship of the parties, who had once been husband and wife, the case was brought by the latter in a federal court in Illinois. Her suit was to recover unpaid alimony which was to continue until her remarriage. To be sure, she had, as she confessed, remarried in Nevada, but the marriage had been annulled in New York on the ground that the man was already married, inasmuch as his divorce from his previous wife was null and void, she having neither entered a personal appearance nor been personally served. The Court, speaking by Justice Reed, held that the New York annulment of the Nevada marriage must be given full faith and credit in Illinois but left Illinois to decide for itself the effect of the annulment upon the obligations of petitioner's first husband. *Sutton* v. *Leib*, 342 U.S. 402 (1952).

[6] *Halvey* v. *Halvey*, 330 U.S. 610, 615 (1947).

stituted by him.[7] In *Kovacs* v. *Brewer*,[8] however, the Court indicated that a finding of changed circumstances rendering observance of an absentee foreign custody decree inimical to the best interests of the child is essential to sustain the validity of the forum court's refusal to enforce a foreign decree, rendered with jurisdiction over all the parties but the child, and revising an initial decree by transferring custody from the paternal grandfather to the mother. However, when, as is true in Virginia, agreements by parents as to shared custody of a child do not bind the State's courts, the dismissal by a Virginia court of a *habeas corpus* petition instituted by a father to obtain custody was not *res judicata* in that State; therefore even if the full faith and credit clause were applicable to child custody decrees, it would not require a South Carolina court, in a custody suit instituted by the wife, to recognize a court order not binding in Virginia.[9]

***Status of the Law.***—Upon summation, one may speculate as to whether the doctrine of divisible divorce, as developed by Justice Douglas in *Estin* v. *Estin*,[10] has not become the prevailing standard for determining the enforceability of foreign divorce decrees. If such be the case, it may be tenable to assert that and *ex parte* divorce, founded upon acquisition of domicile by one spouse in the State which granted it, is as effective to destroy the marital status of both parties in the State of domiciliary origin and probably in all other States and therefore to preclude subsequent prosecutions for bigamy but not to alter rights as to property, alimony, or custody of children in the State of domiciliary origin of a spouse who neither was served nor appeared personally.

In any event the accuracy of these conclusions has not been impaired by any decision rendered by the Court since 1948. Thus, in *Armstrong* v. *Armstrong*,[11] an *ex parte* divorce decree obtained

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[7] *May* v. *Anderson*, 345 U.S. 528 (1953). Justices Jackson, Reed, and Minton dissented.

[8] 356 U.S. 604 (1958). Rejecting the implication that recognition must be accorded unless the circumstances have changed, Justice Frankfurter dissented on the ground that in determining what is best for the welfare of the child, the forum court cannot be bound by an absentee, foreign custody decree, "irrespective of whether changes in circumstances are objectively provable."

[9] *Ford* v. *Ford*, 371 U.S. 187, 192–194 (1962). As part of a law dealing with parental kidnapping, Congress, in P.L. 96–611, § 8(a), 94 Stat. 3569, 28 U.S.C. § 1738A, required States to give full faith and credit to state court custody decrees provided the original court had jurisdiction and is the home State of the child.

[10] 334 U.S. 541 (1948).

[11] 350 U.S. 568 (1956).

by the husband in Florida was deemed to have been adequately recognized by an Ohio court when, with both of the parties before it, it disposed of the wife's suit for divorce and alimony with a decree limited solely to an award of alimony.[12] Similarly, a New York court was held not bound by an *ex parte* Nevada divorce decree, rendered without personal jurisdiction over the wife, to the extent that it relieved the husband of all marital obligations, and in an *ex parte* action for separation and alimony instituted by the wife, it was competent to sequester the husband's property in New York to satisfy his obligations to the wife.[13]

**Other Types of Decrees**

***Probate Decrees.***—Many judgments, enforcement of which has given rise to litigation, embrace decrees of courts of probate respecting the distribution of estates. In order that a court have jurisdiction of such a proceeding, the decedent must have been domiciled in the state, and the question whether he was so domiciled at the time of his death may be raised in the court of a sister State.[1] Thus, when a court of State A, in probating a will and issuing letters, in a proceeding to which all distributees were parties, expressly found that the testator's domicile at the time of death was in State A, such adjudication of domicile was held not to bind one subsequently appointed as domiciliary administrator c.t.a. in State B, in which he was liable to be called upon to deal with claims of local creditors and that of the State itself for taxes, he having not been a party to the proceeding in State A. In this situation, it was held, a court of State C, when disposing of local assets claimed by both personal representatives, was free to determine domicile in accordance with the law of State C.[2]

Similarly, there is no such relation of privity between an executor appointed in one State and an administrator c.t.a. appointed in another State as will make a decree against the latter binding upon the former.[3] On the other hand, judicial proceedings in one

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[12] Four Justices, Black, Douglas, Clark, and Chief Justice Warren, disputed the Court's contention that the Florida decree contained no ruling on the wife's entitlement to alimony and mentioned that for want of personal jurisdiction over the wife, the Florida court was not competent to dispose of that issue. Id., 575

[13] *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). Two Justices dissented. Justice Frankfurter was unable to perceive "why dissolution of the marital relation is not so personal as to require personal jurisdiction over the absent spouse, while the denial of alimony . . is." Justice Harlan maintained that inasmuch as the wife did not become a domiciliary of New York until after the Nevada decree, she had no pre-divorce rights in new York which the later was obligated to protect.

[1] *Tilt* v. *Kelsey*, 207 U.S. 43 (1907); *Burbank* v. *Ernst*, 232 U.S. 162 (1914).

[2] *Riley* v. *New York Trust Co.*, 315 U.S. 343 (1942).

[3] *Brown* v. *Fletcher's Estate*, 210 U.S. 82, 90 (1908). *See also Stacy* v. *Thrasher*, 6 How. (47 U.S.) 44, 58 (1848); *McLean* v. *Meek*, 18 How. (59 U.S.) 16, 18 (1856).

State, under which inheritance taxes have been paid and the administration upon the estate has been closed, are denied full faith and credit by the action of a probate court in another State in assuming jurisdiction and assessing inheritance taxes against the beneficiaries of the estate, when under the law of the former State the order of the probate court barring all creditors who had failed to bring in their demand from any further claim against the executors was binding upon all.[4]

What is more important, however, is that the *res* in such a proceeding, that is, the estate, in order to entitle the judgment to recognition under Article IV, § 1, must have been located in the State or legally attached to the person of the decedent. Such a judgment is accordingly valid, generally speaking, to distribute the intangible property of the decedent, though the evidences thereof were actually located elsewhere.[5] This is not so, on the other hand, as to tangibles and realty. In order that the judgment of a probate court distributing these be entitled to recognition under the Constitution, they must have been located in the State; as to tangibles and realty outside the State, the decree of the probate court is entirely at the mercy of the *lex rei sitae*.[6] So, the probate of a will in one State, while conclusive therein, does not displace legal provisions necessary to its validity as a will of real property in other States.[7]

***Adoption Decrees.***—That a statute legitimizing children born out of wedlock does not entitle them by the aid of the full faith and credit clause to share in the property located in another State is not surprising, in view of the general principle—to which, however, there are exceptions—that statutes do not have extraterritorial operation.[8] For the same reason, adoption proceedings in one State

[4] *Tilt* v. *Kelsey*, 207 U.S. 43 (1907). In the case of *Borer* v. *Chapman*, 119 U.S. 587, 599 (1887), involving a complicated set of facts, it was held that a judgment in a probate proceeding, which was merely ancillary to proceedings in another State and which ordered the residue of the estate to be assigned to the legatee and discharged the executor from further liability, did not prevent a creditor, who was not a resident of the State in which the ancillary judgment was rendered, from setting up his claim in the state probate court which had the primary administration of the estate.

[5] *Blodgett* v. *Silberman*, 277 U.S. 1 (1928).

[6] *Kerr* v. *Moon*, 9 Wheat. (22 U.S.) 565 (1824); *McCormick* v. *Sullivant*, 10 Wheat. (23 U.S.) 192 (1825); *Clarke* v. *Clarke*, 178 U.S. 186 (1900). The controlling principle of these cases is not confined to proceedings in probate. A court of equity "not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree." *Fall* v. *Eastin*, 215 U.S. 1, 11 (1909).

[7] *Robertson* v. *Pickrell*, 109 U.S. 608, 611 (1883). *See also Darby* v. *Mayer*, 10 Wheat. (23 U.S.) 465 (1825); *Gasquet* v. *Fenner*, 247 U.S. 16 (1918).

[8] *Olmstead* v. *Olmstead*, 216 U.S. 386 (1910).

are not denied full faith and credit by the law of the sister State which excludes children adopted by proceedings in other States from the right to inherit land therein.[9]

***Garnishment Decrees.***—A proceeding which combines some of the elements of both an *in rem* and an *in personam* action is the proceeding in garnishment cases. Suppose that A owes B and B owes C, and that the two former live in a different State than C. A, while on a brief visit to C's State, is presented with a writ attaching his debt to B and also a summons to appear in court on a named day. The result of the proceedings thus instituted is that a judgment is entered in C's favor against A to the amount of his indebtedness to B. Subsequently A is sued by B in their home State and offers the judgment, which he has in the meantime paid, in defense. It was argued in behalf of B that A's debt to him had a *situs* in their home State and furthermore that C could not have sued B in this same State without formally acquiring a domicile there. Both propositions were, however, rejected by the Court, which held that the judgment in the garnishment proceedings was entitled to full faith and credit as against B's action.[10]

**Penal Judgments: Types Entitled to Recognition**

Finally, the clause has been interpreted in the light of the "incontrovertible maxim" that "the courts of no country execute the penal laws of another." [1] In the leading case of *Huntington* v. *Attrill,*[2] however, the Court so narrowly defined "penal" in this connection as to make it substantially synonymous with "criminal" and on this basis held a judgment which had been recovered under a state statute making the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all of its debts to be entitled under Article IV, § 1, to recognition and enforcement in the courts of sister States. Nor, in general, is a judgment for taxes to be denied full faith and credit in state and federal courts merely because it is for taxes. In *Nelson* v. *George,*[3] in which a prisoner was tried in California and North

[9] *Hood* v. *McGehee,* 237 U.S. 611 (1915).

[10] *Harris* v. *Balk,* 198 U.S. 215 (1905). *See also Chicago, R.I. & P. Ry.* v. *Sturm,* 174 U.S. 710 (1899); *King* v. *Cross,* 175 U.S. 396, 399 (1899); *Louisville & Nashville Railroad* v. *Deer,* 200 U.S. 176 (1906); *Baltimore & Ohio R.R.* v. *Hostetter,* 240 U.S. 620 (1916). *Harris* itself has not survived the due process reformulation of *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). *See Rush* v. *Savchuk,* 444 U.S. 320 (1980).

[1] The *Antelope,* 10 Wheat. (23 U.S.) 66, 123 (1825). *See also Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. 265 (1888).

[2] 146 U.S. 657 (1892). *See also Dennick* v. *Railroad Co.,* 103 U.S. 11 (1881); *Moore* v. *Mitchell,* 281 U.S. 18 (1930); *Milwaukee County* v. *White Co.,* 296 U.S. 268 (1935).

[3] 399 U.S. 224 (1970).

Carolina and convicted and sentenced in both states for various felonies, the Court determined that the full faith and credit clause did not require California to enforce a penal judgment handed down by North Carolina; California was free to consider what effect if any it would give to the North Carolina detainer.[4] Until the obligation to extradite matured, the full faith and credit clause did not require California to enforce the North Carolina penal judgment in any way.[5]

**Fraud as a Defense to Suits on Foreign Judgments**

With regard to whether recognition of a state judgment can be refused by the forum State on other than jurisdictional grounds, there are dicta to the effect that judgments for which extraterritorial operation is demanded under Article IV, § 1 and acts of Congress are "impeachable for manifest fraud." But unless the fraud affected the jurisdiction of the court, the vast weight of authority is against the proposition. Also, it is universally agreed that a judgment may not be impeached for alleged error or irregularity,[1] or as contrary to the public policy of the State where recognition is sought for it under the full faith and credit clauses.[2] Previously listed cases indicate, however, that the Court in fact has permitted local policy to determine the merits of a judgment under the pretext of regulating jurisdiction.[3] Thus in one case, *Cole* v. *Cunningham*,[4] the Court sustained a Massachusetts court in enjoining, in connection with insolvency proceedings instituted in that State, a Massachusetts creditor from continuing in New York courts an action which had been commenced there before the insolvency suit was brought. This was done on the theory that a party within the jurisdiction of a court may be restrained from doing something in another jurisdiction opposed to principles of equity, it having been shown that the creditor was aware of the debtor's embarrassed condition when the New York action was instituted. The injunction unquestionably denied full faith and credit and commanded the assent of only five Justices.

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[4] Id., 229.

[5] Ibid.

[1] *Christmas* v. *Russell*, 5 Wall. (72 U.S.) 290 (1866); *Maxwell* v. *Stewart*, 21 Wall. (88 U.S.) 71 (1875); *Hanley* v. *Donoghue*, 116 U.S. 1 (1885); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265 (1888); *Simmons* v. *Saul*, 138 U.S. 439 (1891); *American Express Co.* v. *Mullins*, 212 U.S. 311 (1909).

[2] *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908).

[3] *Anglo-American Prov. Co.* v. *Davis Prov. Co. No. 1*, 191 U.S. 373 (1903).

[4] 133 U.S. 107 (1890).

## RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

### Development of the Modern Rule

With regard to the extrastate protection of rights which have not matured into final judgments, the full faith and credit clause has never abolished the general principle of the dominance of local policy over the rules of comity.[1] This was stated by Justice Nelson in the *Dred Scott* case, as follows: "No State . . . can enact laws to operate beyond its own dominions . . . Nations, from convenience and comity . . . recognizes [sic] and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself." He added that it was the same with the States of the Union in relation to another. It followed that even though Dred Scott had become a free man in consequence of his having resided in the "free" State of Illinois, he had nevertheless upon his return to Missouri, which had the same power as Illinois to determine its local policy respecting rights acquired extraterritorially, reverted to servitude under the laws and judicial decisions of that State.[2]

In a case decided in 1887, however, the Court remarked: "Without doubt the constitutional requirement, Art. IV, § 1, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." [3] And this proposition was later held to extend to state constitutional provisions.[4] More recently this doctrine has been stated

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[1] *Bank of Augusta* v. *Earle*, 13 Pet. (38 U.S.) 519, 589–596 (1839). *See Kryger* v. *Wilson*, 242 U.S. 171 (1916); *Bond* v. *Hume*, 243 U.S. 15 (1917).

[2] *Scott* v. *Sandford*, 19 How. (60 U.S.) 393, 460 (1857); *Bonaparte* v. *Tax Court*, 104 U.S. 592 (1882), where it was held that a law exempting from taxation certain bonds of the enacting State did not operate extraterritorially by virtue of the full faith and credit clause.

[3] *Chicago & Alton R.R.* v. *Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887).

[4] *Smithsonian Institution* v. *St. John*, 214 U.S. 19 (1909). When, in a state court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the full faith and credit clause. *See also Western Life Indemnity Co.* v. *Rupp*, 235 U.S. 261 (1914), citing *Glenn* v. *Garth*, 147 U.S. 360 (1893), *Lloyd* v. *Matthews*, 155 U.S. 222, 227 (1894); *Banholzer* v. *New York Life Insurance Co.*, 178 U.S. 402 (1900); *Allen* v. *Alleghany Co.*, 196 U.S. 458, 465 (1905); *Texas & N.O.RR Co.* v. *Miller*, 221 U.S. 408 (1911). *See also National Mutual B. & L. Assn.* v. *Brahan*, 193 U.S. 635 (1904); *Johnson* v. *New York Life Ins. Co.*, 187 U.S. 491, 495 (1903); *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.* 243 U.S. 93 (1917).

in a very mitigated form, the Court saying that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause and thus compelling courts of each State to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly.[5] Obviously this doctrine endows the Court with something akin to an arbitral function in the decision of cases to which it is applied.

***Transitory Actions: Death Statutes.***—The initial effort in this direction was made in connection with transitory actions based on statute. Earlier, such actions had rested upon the common law, which was fairly uniform throughout the States, so that there was usually little discrepancy between the law under which the plaintiff from another jurisdiction brought his action (*lex loci*) and the law under which the defendant responded (*lex fori*). In the late seventies, however, the States, abandoning the common law rule on the subject, began passing laws which authorized the representatives of a decedent whose death had resulted from injury to bring an action for damages.[6] The question at once presented itself whether, if such an action was brought in a State other than that in which the injury occurred, it was governed by the statute under which it arose or by the law of the forum State, which might be less favorable to the defendant. Nor was it long before the same question presented itself with respect to transitory action *ex contractu*, where the contract involved had been made under laws peculiar to the State where made, and with those laws in view.

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[5] *Alaska Packers Assn.* v. *Comm.* 294 U.S. 532 (1935); *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145 (1932).

[6] *Dennick* v. *Railroad Co.*, 103 U.S. 11 (1881), was the first so-called "Death Act" case to reach the Supreme Court. *See also Stewart* v. *Baltimore & Ohio R. Co.*, 168 U.S. 445 (1897). Even today the obligation of a State to furnish a forum for the determination of death claims arising in another State under the laws thereof appears to rest on a rather precarious basis. In *Hughes* v. *Fetter*, 341 U.S. 609 (1951), the Court, by a narrow majority, held invalid under the full faith and credit clause a statute of Wisconsin which, as locally interpreted, forbade its courts to entertain suits of this nature; in *First Nat. Bank* v. *United Airlines*, 342 U.S. 396 (1952), a like result was reached under an Illinois statute. More recently, the Court has acknowledged that the full faith and credit clause does not compel the forum state, in an action for wrongful death occurring in another jurisdiction, to apply a longer period of limitations set out in the Wrongful Death Statute of the State in which the fatal injury was sustained. *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953). Justices Jackson, Black, and Minton, in dissenting, advanced the contrary principle that the clause requires that the law where the tort action arose should follow said action in whatever forum it is pursued.

***Actions Upon Contract.***—In *Chicago & Alton R.R.* v. *Wiggins Ferry Co.*,[7] the Court indicated that it was the law under which the contract was made, not the law of the forum State, which should govern. Its utterance on the point was, however, not merely *obiter*, it was based on an error, namely, the false supposition that the Constitution gives "acts" the same extraterritorial operation as the Act of 1790 does "judicial records and proceedings." Notwithstanding which, this *dictum* is today the basis of "the settled rule" that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff's rights of action originated sets thereto, except that courts of sister States cannot be thus prevented from taking jurisdiction in such cases.[8] However, a state court does not violate the full faith and credit clause by mere error in construing the law upon which a transitory action from another State depends;[9] nor is a court of the forum State guilty of a disregard thereof when it entertains a suit based on a statute of another State, albeit the statute in terms limits actions thereunder to courts of the enacting State.[10] Moreover, in actions on contracts made in other States, a State constitutionally may decline to enforce in its courts, as contrary to its own policy, the laws of such State relating to the right to add interest to the recovery as an incidental item of damages.[11]

***Stockholder Corporation Relationship.***—Nor is it alone to defendants in transistory actions that the full faith and credit clause is today a shield and a buckler. Some legal relationships are so complex, the Court holds, that the law under which they were formed ought always to govern them as long as they persist.[12] One such relationship is that of a stockholder and his corporation. Hence, if a question arises as to the liability of the stockholders of a corporation, the courts of the forum State are required by the full faith and credit clause to determine the question in accordance with the constitution, laws and judicial decisions of the corporation's home States.[13] Illustrative applications of the latter rule are

[7] 119 U.S. 615 (1887).

[8] *Northern Pacific Railroad* v. *Babcock*, 154 U.S. 190 (1894); *Atchison, T. & S.F. Ry.* v. *Sowers*, 213 U.S. 55,67 (1909).

[9] *Glenn* v. *Garth*, 147 U.S. 360 (1893).

[10] *Tennessee Coal Co.* v. *George*, 233 U.S. 354 (1914).

[11] *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *John Hancock Ins. Co.* v. *Yates*, 299 U.S. U.S. 178 (1936), distinguished.

[12] *Modern Woodmen* v. *Mixer*, 267 U.S. 544 (1925).

[13] *Converse* v. *Hamilton*, 224 U.S. 243 (1912); *Selig* v. *Hamilton*, 234 U.S. 652 (1914); *Marin* v. *Augedahl*, 247 U.S. 142 (1918).

to be found in the following cases. A New Jersey statute forbidding an action at law to enforce a stockholder's liability arising under the laws of another State and providing that such liability may be enforced only in equity, and that in such a case the corporation, its legal representatives, all its creditors, and stockholders, should be necessary parties, was held not to preclude an action at law in New Jersey by the New York superintendent of banks against 557 New Jersey stockholders in an insolvent New York bank to recover assessments made under the laws of New York.[14] Also, in a suit to enforce double liability, brought in Rhode Island against a stockholder in a Kansas trust company, the courts of Rhode Island were held to be obligated to extend recognition to the statutes and court decisions of Kansas whereunder it is established that a Kansas judgment recovered by a creditor against the trust company is not only conclusive as to the liability of the corporation but also an adjudication binding each stockholder therein. The only defenses available to the stockholder are those which he could make in a suit in Kansas.[15]

***Fraternal Benefit Society: Member Relationship.***—The same principle applies to the relationship which is formed when one takes out a policy in a "fraternal benefit society." Thus in *Royal Arcanum* v. *Green*,[16] in which a fraternal insurance association chartered under the laws of Massachusetts was being sued in the courts of New York by a citizen of the latter State on a contract of insurance made in that State, the Court held that the defendant company was entitled under the full faith and credit clause to have the case determined in accordance with the laws of Massachusetts and its own constitution and by-laws as these had been construed by the Massachusetts courts.

Nor has the Court manifested any disposition to depart from this rule. In *Sovereign Camp* v. *Bolin*,[17] it declared that a State in which a certificate of life membership of a foreign fraternal benefit association is issued, which construes and enforces the certificate according to its own law rather than according to the law of the State in which the association is domiciled, denies full faith and credit to the association's charter embodied in the status of the domiciliary State as interpreted by the latter's court. "The beneficiary certificate was not a mere contract to be construed and en-

[14] *Broderick* v. *Rosner*, 294 U.S. 629 (1935). *See also Thormann* v. *Frame*, 176 U.S. 350, 356 (1900); *Reynolds* v. *Stockton*, 140 U.S. 254, 264 (1891).

[15] *Hancock National Bank* v. *Farnum*, 176 U.S. 640 (1900).

[16] 237 U.S. 531 (1915), followed in *Modern Woodmen* v. *Mixer*, 267 U.S. 544 (1925).

[17] 305 U.S. 66, 75, 79 (1938).

forced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. [Hence] another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of domicile." Consistent therewith, the Court also held, in *Order of Travelers* v. *Wolfe*,[18] that South Dakota, in a suit brought therein by an Ohio citizen against an Ohio benefit society, must give effect to a provision of the constitution of the society prohibiting the bringing of an action on a claim more than six months after disallowance by the society, notwithstanding that South Dakota's period of limitation was six years and that its own statutes voided contract stipulations limiting the time within which rights may be enforced. Objecting to these results, Justice Black dissented on the ground that fraternal insurance companies are not entitled, either by the language of the Constitution, or by the nature of their enterprise, to such unique constitutional protection.

***Insurance Company, Building and Loan Association: Contractual Relationships.***—Whether or not distinguishable by nature of their enterprise, stock and mutual insurance companies and mutual building and loan associations, unlike fraternal benefit societies, have not been accorded the same unique constitutional protection; with few exceptions,[19] they have had controversies arising out of their business relationships settled by application of the law of the forum State. In *National Mutual B. & L. Assn.* v. *Brahan*,[20] the principle applicable to these three forms of business organizations was stated as follows: where a corporation has become localized in a State and has accepted the laws of the State as a condition of doing business there, it cannot abrogate those laws by attempting to make contract stipulations, and there is no violation of the full faith and credit clause in instructing a jury to find according to local law notwithstanding a clause in a contract that it should be construed according to the laws of another State.

Thus, when a Mississippi borrower, having repaid a mortgage loan to a New York building and loan association, sued in a Mississippi court to recover, as usurious, certain charges collected by the association, the usury law of Mississippi rather than that of New

[18] 331 U.S. 586, 588–589, 637 (1947).

[19] *New York Life Ins. Co.* v. *Head*, 234 U.S. 149 (1914); *Aetna Life Ins. Co.* v. *Dunken*, 266 U.S. 389 (1924).

[20] 193 U.S. 635 (1904).

York was held to control. In this case, the loan contract, which was negotiated in Mississippi subject to approval by the New York office, did not expressly state that it was governed by New York law.[21] Similarly, when the New York Life Insurance Company, which had expressly stated in its application and policy forms that they would be controlled by New York law, was sued in Missouri on a policy sold to a resident thereof, the court of that State was sustained in its application of Missouri, rather than New York law.[22] Also, in an action in a federal court in Texas to collect the amount of a life insurance policy which had been made in New York and later changed by instruments assigning beneficial interest, it was held that questions (1) whether the contract remained one governed by the law of New York with respect to rights of assignees, rather than by the law of Texas, (2) whether the public policy of Texas permits recovery by one named beneficiary who has no beneficial interest in the life of the insured, and (3) whether lack of insurable interest becomes material when the insurer acknowledges liability and pays the money into court, were questions of Texas law, to be decided according to Texas decisions.[23] Similarly, a State, by reason of its potential obligation to care for dependents of persons injured or killed within its limits, is conceded to have a substantial interest in insurance policies, wherever issued, which may afford compensation for such losses; accordingly, it is competent, by its own direct action statute, to grant the injured party a direct cause of action against the insurer of the tortfeasor, and to refuse to enforce the law of the State, in which the policy is issued or delivered, which recognizes as binding a policy stipulation which forbids direct actions until after the determination of the liability of the insured tortfeasor.[24]

Consistent with the latter holding are the following two involving mutual insurance companies. In *Pink* v. *A.A.A. Highway Express*,[25] the New York insurance commissioner, as a statutory liq-

[21] Ibid.

[22] *New York Life Ins. Co.* v. *Cravens*, 178 U.S. 389 (1900). *See also American Fire Ins. Co* v. *King Lumber Co.*, 250 U.S. 2 (1919).

[23] *Griffin* v. *McCoach*, 313 U.S. 498 (1941).

[24] *Watson* v. *Employers Liability Corp.*, 348 U.S. 66 (1954). In *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960), three dissenters, Justices Black, and Douglas, and Chief Justice Warren, would have resolved the constitutional issue which the Court avoided, and would have sustained application of the forum State's statute of limitations fixing a period in excess of that set forth in the policy.

[25] 314 U.S. 201, 206–208 (1941). However, a decree of a Montana Supreme Court, insofar as it permitted judgment creditors of a dissolved Iowa surety company to levy execution against local assets to satisfy judgment, as against title to such assets of the Iowa insurance commissioner as statutory liquidator and successor to the dissolved company, was held to deny full faith and credit to the statutes of Iowa. *Clark* v. *Williard*, 292 U.S. 112 (1934).

uidator of an insolvent auto mutual company organized in New York, sued resident Georgia policyholders in a Georgia court to recover assessments alleged to be due by virtue of their membership in it. The Supreme Court held that, although by the law of the State of incorporation, policyholders of a mutual insurance company become members thereof and as such liable to pay assessments adjudged to be required in liquidation proceedings in that State, the courts of another State are not required to enforce such liability against local resident policyholders who did not appear and were not personally served in the foreign liquidation proceedings but are free to decide according to local law the questions whether, by entering into the policies, residents became members of the company. Again, in *State Farm Ins. Co.* v. *Duel*,[1] the Court ruled that an insurance company chartered in State A, which does not treat membership fees as part of premiums, cannot plead denial of full faith and credit when State B, as a condition of entry, requires the company to maintain a reserve computed by including membership fees as well as premiums received in all States. Were the company's contention accepted, "no State," the Court observed, "could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation." It is not apparent, the Court added, that State A has an interest superior to that of State B in the financial soundness and stability of insurance companies doing business in State B.

***Workmen's Compensation Statutes.***—Finally, the relationship of employer and employee, insofar as the obligations of the one and the rights of the other under workmen's compensation acts are concerned, has been the subject of differing and confusing treatment. In an early case, the injury occurred in New Hampshire, resulting in death to a workman who had entered the defendant company's employ in Vermont, the home State of both parties. The Court required the New Hampshire courts to respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job related injuries where the employment relation was formed in Vermont, prescribing a constitutional rule giving priority to the place of the establishment of the employment relationship over the place of injury.[2] The same result was achieved in a subsequent case, but the Court promulgated a new rule, applied thereafter, which emphasized a balancing of the governmental interests of each jurisdiction, rather than the mere ap-

[1] 324 U.S. 154, 159–160 (1945).

[2] *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145 (1932).

plication of the statutory rule of one or another State under full faith and credit.[3] Thus, the Court held that the clause did not preclude California from disregarding a Massachusett's workmen's compensation statute, making its law exclusive of any common law action or any law of any other jurisdiction, and applying its own act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.[4] It is therefore settled that an injured workman may seek a compensation award either in the State in which the injury occurred or in the State in which the employee resided, his employer was principally located, and the employment relation was formed, even if one statute or the other purported to confer an exclusive remedy on the workman.[5]

Less settled is the question whether a second State, with interests in the matter, may supplement a workmen's compensation award provided in the first State. At first, the Court ruled that a Louisiana employee of a Louisiana employer, who was injured on the job in Texas and who received an award under the Texas act, which did not grant further recovery to an employee who received compensation under the laws of another State, could not obtain additional compensation under the Louisiana statute.[6] Shortly, however, the Court departed from this holding, permitting Wisconsin, the State of the injury, to supplement an award pursuant to the laws of Illinois, where the worker resided and where the employment contract had been entered into.[7] Although the second case could have been factually distinguished from the first,[8] the Court instead chose to depart from the principle of the first, saying that only if the laws of the first State making an award contained "unmistakable language" to the effect that those laws were exclusive of any remedy under the laws of any other State would supplementary awards be precluded.[9] While the overwhelming number of

[3] *Alaska Packers Assn.* v. *Comm.*, 294 U.S. 532 (1935). The State where the employment contract was made was permitted to apply its workmen's compensation law despite the provision in the law of the State of injury making its law the exclusive remedy for injuries occurring there. *See* id., 547 (stating the balancing test).

[4] *Pacific Ins. Co.* v. *Comm.*, 306 U.S. 493 (1939).

[5] In addition to *Alaska Packers* and *Pacific Ins.*, *see Carroll* v. *Lanza*, 349 U.S. 408 (1955); *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469 (1947); *Crider* v. *Zurich Ins. Co.*, 380 U.S. 39 (1965); *Nevada* v. *Hall*, 440 U.S. 410, 421–424 (1979).

[6] *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943).

[7] *Industrial Comm.* v. *McCartin*, 330 U.S. 622 (1947).

[8] Employer and employee had entered into a contract of settlement under the Illinois act, the contract expressly providing that it did not affect any rights the employee had under Wisconsin law. Id., 624.

[9] Id., 627–628, 630.

state court decisions since follow *McCartin* and *Magnolia* has been little noticed, all the Justices have recently expressed dissatisfaction with the former case as a rule of the full faith and credit clause, although a majority of the Court followed it and permitted a supplementary award.[10]

***Full Faith and Credit and Statutes of Limitation.***—The full faith and credit clause is not violated by a state statute providing that all suits upon foreign judgments shall be brought within five years after such judgment shall have been obtained, where the statute has been construed by the state courts as barring suits on foreign judgments, only if the plaintiff could not revive his judgment in the state where it was originally obtained.[11]

## FULL FAITH AND CREDIT: MISCELLANY

### Full Faith and Credit in Federal Courts

By the terms of 28 U.S.C. §§ 1738–1739, the rule comprised therein pertains not merely to recognition by state courts of the records and judicial proceedings of courts of sister States but to recognition by "every court within the United States," including recognition of the records and proceedings of the courts of any territory or any country subject to the jurisdiction of the United States. The federal courts are bound to give to the judgments of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.[1] Where suits to enforce the laws of one State are entertained in courts of another on principles of comity, federal district courts sitting in that State may entertain them and should, if they do not infringe federal law or policy.[2] However, the refusal of a territorial

[10] *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261 (1980). For the disapproval of *McCartin*, *see* id., 269–272 (plurality opinion of four), 289 (concurring opinion of three), 291 (dissenting opinion of two). But the four Justice plurality would have instead overruled *Magnolia*, id., 277–286, and adopted the rule of interest balancing used in deciding which State may apply its laws in the first place. The dissenting two Justices would have overruled *McCartin* and followed *Magnolia*. Id., 290. The other Justices considered *Magnolia* the sounder rule but decided to follow *McCartin* because it could be limited to workmen's compensation cases, thus requiring no evaluation of changes throughout the reach of the full faith and credit clause. Id., 286.

[11] *Watkins* v. *Conway*, 385 U.S. 188, 190–191 (1965).

[1] *Cooper* v. *Newell*, 173 U.S. 555, 567 (1899), *See also Pennington* v. *Gibson*, 16 How. (57 U.S.) 65, 81 (1854); *Cheever* v. *Wilson*, 9 Wall. (76 U.S.) 108, 123 (1870); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 291 (1888); *Swift* v. *McPherson*, 232 U.S. 51 (1914); *Baldwin* v. *Traveling Men's Assn.*, 283 U.S. 522 (1931); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932); *Sanders* v. *Fertilizer Works*, 292 U.S. 190 (1934); *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Kremer* v. *Chemical Const. Corp.*, 456 U.S. 461 (1982).

[2] *Milwaukee County* v. *White Co.*, 296 U.S. 268 (1935).

court in Hawaii, having jurisdiction of the action which was on a policy issued by a New York insurance company, to admit evidence that an administrator had been appointed and a suit brought by him on a bond in the federal court in New York wherein no judgment had been entered, did not violate this clause.[3]

The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgment of its courts is coextensive with its territorial jurisdiction.[4]

***Evaluation Of Results Under Provision***

Thus the Court, from according an extrastate operation to statutes and judicial decisions in favor of defendants in transitory actions, proceeded next to confer the same protection upon certain classes of defendants in local actions in which the plaintiff's claim was the outgrowth of a relationship formed extraterritorially. But can the Court stop at this point? If it is true, as Chief Justice Marshall once remarked, that "the Constitution was not made for the benefit of plaintiffs' alone," so also it is true that it was not made for the benefit of defendants alone. The day may come when the Court will approach the question of the relation of the full faith and credit clause to the extrastate operation of laws from the same angle as it today views the broader question of the scope of state legislative power. When and if this day arrives, state statutes and judicial decisions will be given such extraterritorial operation as seems reasonable to the Court to give them. In short, the rule of the dominance of legal policy of the forum State will be superseded by that of judicial review.[1]

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[3] *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308 (1902). *See also Gibson* v. *Lyon*, 115 U.S. 439 (1885).

[4] *Embry* v. *Palmer*, 107 U.S. 3, 9 (1883). *See also Northern Assurance Co.* v. *Grand View Assn.*, 203 U.S. 106 (1906); *Louisville & N.R.R. Co.* v. *Stock Yards Co.*, 212 U.S. 132 (1909); *Atchison, T. & S.F. Ry.* v. *Sowers*, 213 U.S. 55 (1909); *West Side R.R. Co.* v. *Pittsburgh Const. Co.*, 219 U.S. 92 (1911); *Knights of Pythias* v. *Meyer*, 265 U.S. 30, 33 (1924).

[1] Reviewing some of the cases treated in this section, a writer in 1926 said: "It appears, then, that the Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts . . . although the precise circumstances under which it will

The question arises whether the application to date, not by the Court alone but by Congress and the Court, of Article IV, § 1, can be said to have met the expectations of its Framers. In the light of some things said at the time of the framing of the clause this may be doubted. The protest was raised against the clause that, in vesting Congress with power to declare the effect state laws should have outside the enacting State, it enabled the new government to usurp the powers of the States, but the objection went unheeded. The main concern of the Convention, undoubtedly, was to render the judgments of the state courts in civil cases effective throughout the Union. Yet even this object has been by no means completely realized, owing to the doctrine of the Court, that before a judgment of a state court can be enforced in a sister State, a new suit must be brought on it in the courts of the latter, and the further doctrine that with respect to such a suit, the judgment sued on is only evidence; the logical deduction from this proposition is that the sister State is under no constitutional compulsion to give it a forum. These doctrines were first clearly stated in the *McElmoyle* case and flowed directly from the new states' rights premises of the Court, but they are no longer in harmony with the prevailing spirit of constitutional construction nor with the needs of the times. Also, the clause seems always to have been interpreted on the basis of the assumption that the term, "judicial proceedings," refers only to final judgments and does not include intermediate processes and writs, but the assumption would seem to be groundless, and if it is, then Congress has the power under the clause to provide for the service and execution throughout the United States of the judicial processes of the several States.

## SCOPE OF POWERS OF CONGRESS UNDER PROVISION

Under the present system, suit ordinarily has to be brought where the defendant, the alleged wrongdoer, resides, which means generally where no part of the transaction giving rise to the action took place. What could be more irrational? "Granted that no state can of its own volition make its process run beyond its borders . . . is it unreasonable that the United States should by federal action be made a unit in the manner suggested?" [1]

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regard itself as having jurisdiction for this purpose are far from clear." Dodd, "The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws," 39 Harv. L. Rev. 533, 562 (1926). It can hardly be said that the law has been subsequently clarified on this point.

[1] Cook, "The Power of Congress Under the Full Faith and Credit Clause," 28 Yale L.J. 421, 430 (1919).

Indeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the full faith and credit clause. Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

### JUDGMENTS OF FOREIGN STATES

Doubtless Congress, by virtue of its powers in the field of foreign relations, might also lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present the duty to recognize judgments even in national courts rests only on comity and is qualified in the judgment of the Supreme Court, by a strict rule of parity.[2]

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

### STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

#### Origin and Purpose

"The primary purpose of this clause, like the clauses between which it is located . . . was to help fuse into one Nation a collection of independent sovereign States." [1] Precedent for this clause

[2] No right, privilege, or immunity is conferred by the Constitution in respect to judgments of foreign states and nations. *Aetna Life Insurance Co.* v. *Tremblay*, 223 U.S. 185 (1912). *See also Hilton* v. *Guyot*, 159 U.S. 113, 234 (1895), where a French judgment offered in defense was held not a bar to the suit. Four Justices dissented on the ground that "the application of the doctrine of *resjudicata* does not rest in discretion; and it is for the Government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." At the same sitting of the Court, an action in a United States circuit court on a Canadian judgment was sustained on the same ground of reciprocity, *Ritchie* v. *McMullen*, 159 U.S. 235 (1895). *See also Ingenohl* v. *Olsen & Co.*, 273 U.S. 541 (1927), where a decision of the Supreme Court of the Philippine Islands was reversed for refusal to enforce a judgment of the Supreme Court of the British colony of Hong Kong, which was rendered "after a fair trial by a court having jurisdiction of the parties." Another instance of international cooperation in the judicial field is furnished by letters rogatory. *See* 28 U.S.C. § 1781. Several States have similar provisions, 2 J. Moore, *Digest of International Law* (Washington: 1906), 108–109.

[1] *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948).

was a much wordier and a somewhat unclear [2] clause of the Articles of Confederation. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, . . ." [3] In the Convention, the present clause was presented, reported by the Committee on Detail, and adopted all in the language ultimately approved.[4] Little commentary was addressed to it,[5] and we may assume with Justice Miller that "[t]here can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase." [6]

At least four theories have been proffered regarding the purpose of this clause. First, the clause is a guaranty to the citizens of the different States of equal treatment by Congress; in other words, it is a species of equal protection clause binding on the National Government. Though it received some recognition in the *Dred Scott* case,[7] particularly in the opinion of Justice Catron,[8] this theory is

[2] *The Federalist* No. 42 (Modern Library ed. 1937), 276–277 (Madison).

[3] 1 F. Thorpe (ed.), *The Federal and State Constitutions*, H. Doc. No. 357, 59th Cong., 2 sess. (Washington: 1909), 10.

[4] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 173, 187, 443.

[5] "It may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which its is founded." *The Federalist* No. 80 (Modern Library ed. 1937), 518–519 (Hamilton).

[6] *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 75 (1873).

[7] *Scott* v. *Sandford*, 19 How. (60 U.S.) 393 (1857).

[8] Id., 518, 527–529.

today obsolete.[9] Second, the clause is a guaranty to the citizens of each State of the natural and fundamental rights inherent in the citizenship of persons in a free society, the privileges and immunities of free citizens, which no State could deny to citizens of other States, without regard to the manner in which it treated its own citizens. This theory found some expression in a few state cases[10] and best accords with the natural law-natural rights language of Justice Washington in *Corfield* v. *Coryell.*[11]

If it had been accepted by the Court, this theory might well have endowed the Supreme Court with a reviewing power over restrictive state legislation as broad as that which it later came to exercise under the due process and equal protection clauses of the Fourteenth Amendment, but it was firmly rejected by the Court.[12] Third, the clause guarantees to the citizen of any State the rights which he enjoys as such even when he is sojourning in another State; that is, it enables him to carry with him his rights of State citizenship throughout the Union, unembarrassed by state lines. This theory, too, the Court rejected.[13] Fourth, the clause merely forbids any State to discriminate against citizens of other States in favor of its own. It is this narrow interpretation which has become the settled one. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting

[9] Today, the due process clause of the Fifth Amendment imposes equal protection standards on the Federal Government. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Shapiro* v. *Thompson*, 394 U.S. 618, 641–642 (1969).

[10] *Campbell* v. *Morris*, 3 Harr. & McHen. 288 (Md. 1797); *Murray* v. *McCarty*, 2 Munf. 373 (Va. 1811); *Livingston* v. *Van Ingen*, 9 Johns. Case. 507 (N.Y. 1812); *Douglas* v. *Stephens*, 1, Del. Ch. 465 (1821); *Smith* v. *Moody*, 26 Ind. 299 (1866).

[11] 6 Fed. Cas. 546, 550 (No. 3230) (C.C.E.D. Pa. 1823). (Justice Washington on circuit), quoted *infra, pp.* 875–876. "At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington." *Hague* v. *CIO*, 307 U.S. 496, 511 (1939) (Justice Roberts for the Court). This view of the clause was asserted by Justices Field and Bradley, *Slaughter House Cases*, 16 Wall. (83 U.S.) 97, 117–118 (1873) (dissenting opinions); *Butchers Union Co.* v. *Crescent City Co.*, 111 U.S. 746, 760 (1884) (Justice Field concurring), *but see infra*, n. 14, and was possibly understood so by Chief Justice Taney. *Scott* v. *Sandford*, 19 How. (60 U.S.) 393, 423 (1857). And *see* id., 580 (Justice Curtis dissenting). The natural rights concept of privileges and immunities was strongly held by abolitionists and their congressional allies who drafted the similar clause into § 1 of the Fourteenth Amendment. Graham, "Our 'Declaratory' Fourteenth Amendment," in H. Graham, *Everyman's Constitution—Historical Essays on the Fourteenth Amendment, The 'Conspiracy Theory', and American Constitutionalism* (Madison: 1968), 295.

[12] *McKane* v. *Durston*, 153 U.S. 684, 687 (1894); and *see* cases cited *infra*, n. 14.

[13] *City of Detroit* v. *Osborne*, 135 U.S. 492 (1890).

from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." [14]

The recent cases emphasize that interpretation of the clause is tied to maintenance of the Union. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." [15]

Hostile discrimination against all nonresidents infringes the clause,[16] but controversies between a State and its own citizens are not covered by the provision.[17]

**How Implemented**

This clause is self-executory, that is to say, its enforcement is dependent upon the judicial process. It does not authorize penal legislation by Congress. Federal statutes prohibiting conspiracies to deprive any person of rights or privileges secured by state laws,[18] or punishing infractions by individuals of the right of citizens to reside peacefully in the several States and to have free ingress into and egress from such States,[19] have been held void.

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[14] *Paul* v. *Virginia*, 8 Wall. (75 U.S.) 168, 180 (1869) (Justice Field for the Court; *see supra*, n. 11); *and see Slaughter House Cases*, 16 Wall. (83 U.S.) 36, 77 (1873); *Chambers* v. *Baltimore & O.R.R.*, 207 U.S. 142 (1907); *Whitfield* v. *Ohio*, 297 U.S. 431 (1936).

[15] *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371, 383 (1978). See also *Austin* v. *New Hampshire*, 420 U.S. 656, 660–665 (1975) (clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." Id., 662); *Hicklin* v. *Orbeck*, 437 U.S. 518, 523–524 (1978).

[16] *Blake* v. *McClung*, 172 U.S. 239, 246 (1898); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).

[17] *Bradwell* v. *Illinois*, 16 Wall. (83 U.S.) 130, 138 (1873); *Cove* v. *Cunningham*, 133 U.S. 107 (1890). *But see Zobel* v. *Williams*, 457 U.S. 55, 71 (1982) (Justice O'Connor concurring).

[18] *United States* v. *Harris*, 106 U.S. 629, 643 (1883). *See also Baldwin* v. *Franks*, 120 U.S. 678 (1887).

[19] *United States* v. *Wheeler*, 254 U.S. 281 (1920).

### Citizens of Each State

A question much mooted before the Civil War was whether the term could be held to include free Negroes. In the *Dred Scott* case,[1] the Court answered it in the negative. "Citizens of each State," Chief Justice Taney argued, meant citizens of the United States as understood at the time the Constitution was adopted, and Negroes were not then regarded as capable of citizenship. The only category of national citizenship added under the Constitution comprised aliens, naturalized in accordance with acts of Congress.[2] In dissent, Justice Curtis not only denied the Chief Justice's assertion that there were no Negro citizens of States in 1789 but further argued that while Congress alone could determine what classes of aliens should be naturalized, the several States retained the right to extend citizenship to classes of persons born within their borders who had not previously enjoyed citizenship and that one upon whom state citizenship was thus conferred became a citizen of the State in the full sense of the Constitution.[3] So far as persons born in the United States, and subject to the jurisdiction thereof are concerned, the question was put at rest by the Fourteenth Amendment.

***Corporations.***—At a comparatively early date the claim was made that a corporation chartered by a State and consisting of its citizens was entitled to the benefits of the comity clause in the transaction of business in other States. It was argued that the Court was bound to look beyond the act of incorporation and see who were the incorporators. If it found these to consist solely of citizens of the incorporating State, it was bound to permit them through the agency of the corporation to exercise in other States such privileges and immunities as the citizens thereof enjoyed. In *Bank of Augusta* v. *Earle,*[4] this view was rejected. The Supreme Court held that the comity clause was never intended "to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself." [5] A similar result was reached in

[1] *Scott* v. *Sandford,* 19 How. (60 U.S.) 393 (1857).
[2] Id., 403–411.
[3] Id., 572–590.
[4] 13 Pet. (38 U.S.) 519 (1839).
[5] Id., 586.

*Paul* v. *Virginia*,[6] but by a different course of reasoning. The Court there held that a corporation—in this instance, an insurance company—was "the mere creation of local law" and could "have no legal existence beyond the limits of the sovereignty" [7] which created it; even recognition of its existence by other States rested exclusively in their discretion. More recent cases have held that this discretion is qualified by other provisions of the Constitution notably the commerce clause and the Fourteenth Amendment.[8] By reason of its similarity to the corporate form of organization, a Massachusetts trust has been denied the protection of this clause.[9]

**All Privileges and Immunities of Citizens in the Several States**

The classical judicial exposition of the meaning of this phrase is that of Justice Washington in *Corfield* v. *Coryell*,[1] which was decided by him on circuit in 1823. The question at issue was the validity of a New Jersey statute which prohibited "any person who is not, at the time, an actual inhabitant and resident in this State" from raking or gathering "clams, oysters or shells" in any of the waters of the State, on board any vessel "not wholly owned by some person, inhabitant of and actually residing in this State. . . . The inquiry is," wrote Justice Washington, "what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, . . ." [2] He specified the following rights as answering this description: "Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government must justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefits of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an ex-

[6] 8 Wall. (75 U.S.) 168 (1869).
[7] Id., 181.
[8] *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891).
[9] *Hemphill* v. *Orloff*, 277 U.S. 537 (1928).
[1] 6 Fed. Cas. 546 (No. 3,230) (C.C.E.D. Pa., 1823).
[2] Id., 551-552.

emption from higher taxes or impositions than are paid by the other citizens of the State; . . . ." [3]

After thus defining broadly the private and personal rights which were protected, Justice Washington went on to distinguish them from the right to a share in the public patrimony of the State. "[W]e cannot accede" the opinion proceeds, "to the proposition . . . that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own citizens." [4] The right of a State to the fisheries within its borders he then held to be in the nature of a property right, held by the State "for the use of the citizens thereof;" the State was under no obligation to grant "co-tenancy in the common property of the State, to the citizens of all the other States." [5] The precise holding of this case was confirmed in *McCready* v. *Virginia*; [6] the logic of *Geer* v. *Connecticut* [7] extended the same rule to wild game, and *Hudson Water Co.* v. *McCarter* [8] applied it to the running water of a State. In *Toomer* v. *Witsell*, [9] however, the Court refused to apply this rule to free-swimming fish caught in the three-mile belt off the coast of South Carolina. It held instead that "commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause" and that a severely discriminatory license fee exacted from nonresidences was unconstitutional. [10]

The virtual demise, however, of the state ownership theory of animals and natural resources [11] compelled the Court to review

[3] Id., 552.
[4] Ibid.
[5] Ibid.
[6] 94 U.S. 391 (1877).
[7] 161 U.S. 519 (1896).
[8] 209 U.S. 349 (1908).
[9] 334 U.S. 385 (1948).
[10] Id., 403. In *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), an Alaska statute providing for the licensing of commercial fishermen in territorial waters and levying a license fee of $50.00 on nonresident and only $5.00 on resident fishermen was held void under Art. IV, § 2 on the authority of *Toomer* v. *Witsell*.
[11] The cases arose in the commerce clause context. *See Douglas* v. *Seacoast Products*, 431 U.S. 265, 284 (1977) (dictum). *Geer* v. *Connecticut*, 161 U.S. 519 (1896), was overruled in *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908), was overruled in *Sporhase* v. *Nebraska, ex rel. Douglas*, 458 U.S. 941 (1982).

and revise its mode of analysis of state restrictions that distinguished between residents and nonresidents [12] in respect to hunting and fishing and working with natural resources. A two-pronged test emerged. First, the Court held, it must be determined whether an activity in which a nonresident wishes to engage is within the protection of the clause. Such an activity must be "fundamental," must, that is, be essential or basic, "interference with which would frustrate the purposes of the formation of the Union, . . ." Justice Washington's opinion on Circuit in *Coryell* afforded the Court the standard; while recognizing that the opinion relied on notions of natural rights, the Court thought he used the term "fundamental" in the modern sense as well. Such activities as the pursuit of common callings within the State, the ownership and disposition of privately held property within the State, and the access to the courts of the State, had been recognized in previous cases as fundamental and protected against unreasonable burdening; but sport and recreational hunting, the issue in the particular case, was not a fundamental activity. It had nothing to do with one's livelihood and implicated no other interest recognized as fundamental.[13]

Second, finding a fundamental interest protected under the clause, in the particular case the right to pursue an occupation or common calling, the Court employed a two-pronged analysis to determine whether the State's distinction between residents and nonresidents was justified. Thus, the State was compelled to show that nonresidents constituted a peculiar source of the evil at which the statute was aimed and that the discrimination bore a substantial relationship to the particular "evil" they are said to represent, e.g., that it is "closely tailored" to meet the actual problem. An Alaska statute giving residents preference over nonresidents in hiring for work on the oil and gas pipelines within the State failed both elements of the test.[14]

[12] Although the clause specifically refers to "citizens," the Court treats the terms "citizens" and "residents" as "essentially interchangeable." *Austin* v. *New Hampshire*, 420 U.S. 656, 662 n. 8 (1975); *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 n. 8 (1978).

[13] *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371 (1978). The quotation is id., 387. In *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973), the Court voided a requirement that a woman be a resident of the State in order to qualify for an abortion in the State. Although the opinion speaks of "medical services," it may be limited to abortions which *Roe* v. *Wade*, 410 U.S. 113 (1973), recognized to be a fundamental right.

[14] *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). Activity relating to pursuit of an occupation or common calling the Court recognized had long been held to be protected by the clause. The burden of showing constitutional justification was clearly placed on the State, id., 526–528, rather than giving the statute the ordinary presumption of constitutionality. *See Mullaney* v. *Anderson*, 342 U.S. 415, 418 (1952).

Universal practice has also established a political exception to the clause to which the Court has given its approval. "A State may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office." [15]

**Discrimination in Private Rights**

Not only has judicial construction of the comity clause excluded certain privileges of a public nature from its protection, but the courts also have established the proposition that the purely private and personal rights to which the clause admittedly extends are not in all cases beyond the reach of state legislation which differentiates citizens and noncitizens. Broadly speaking, these rights are held subject to the reasonable exercise by a State of its police power, and the Court has recognized that there are cases in which discrimination against nonresidents may be reasonably resorted to by a State in aid of its own public health, safety and welfare. To that end a State may reserve the right to sell insurance to persons who have resided within the State for a prescribed period of time.[1] It may require a nonresident who does business within the State [2] or who uses the highways of the State [3] to consent, expressly or by implication, to service of process on an agent within the State. Without violating this section, a State may limit the dower rights of a nonresident to lands of which the husband died seized while giving a resident dower in all lands held during the marriage,[4] or may leave the rights of nonresident married persons in respect of property within the State to be governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.[5] But a State may not give a preference to resident creditors in the administration of the property of an insolvent foreign corporation.[6]

[15] *Blake* v. *McClung*, 172 U.S. 239, 256 (1898). Of course as to suffrage, *see Dunn* v. *Blumstein*, 405 U.S. 330 (1972), but not as to candidacy, the principle is now qualified under the equal protection clause of the Fourteenth Amendment. *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371, 383 (1978) (citing *Kanapaux* v. *Ellisor*, 419 U.S. 891 (1974); *Chimento* v. *Stark*, 353 F. Supp. 1211 (D.C.D. N.H.), *aff'd*. 414 U.S. 802 (1973)).

[1] *LaTourette* v. *McMaster*, 248 U.S. 465 (1919).

[2] *Doherty & Co.* v. *Goodman*, 294 U.S. 623 (1935).

[3] *Hess* v. *Pawloski*, 274 U.S. 352, 356 (1927).

[4] *Ferry* v. *Spokane P. & S. Ry. Co.*, 258 U.S. 314 (1922), followed in *Ferry* v. *Corbett*, 258 U.S. 609 (1922).

[5] *Conner* v. *Elliott*, 18 How. (59 U.S.) 591, 593 (1856).

[6] *Blake* v. *McClung*, 172 U.S. 239, 248 (1898).

An act of the Confederate Government, enforced by a State, to sequester a debt owed by one of its residents to a citizen of another State was held to be a flagrant violation of this clause.[7]

**Access to Courts**

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each State to the citizens of all other States to the same extent that it is allowed to its own citizens.[1] The constitutional requirement is satisfied if the nonresident is given access to the courts of the State upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically the same as those accorded to resident citizens.[2] The Supreme Court upheld a state statute of limitations which prevented a nonresident from suing in the State's courts after expiration of the time for suit in the place where the cause of action arose [3] and another such statute which suspended its operation as to resident plaintiffs, but not as to nonresidents, during the period of the defendant's absence from the State.[4] A state law making it discretionary with the courts to entertain an action by a nonresident of the State against a foreign corporation doing business in the State was sustained since it was applicable alike to citizens and noncitizens residing out of the State.[5] A statute permitting a suit in the courts of the State for wrongful death occurring outside the State, only if the decedent was a resident of the State, was sustained, because it operated equally upon representatives of the deceased whether citizens or noncitizens.[6] Being patently nondiscriminatory, a Uniform Reciprocal State Law to secure the attendance of witnesses from within or without a State in criminal proceedings, whereunder an Illinois resident, while temporarily in Florida, was summoned to appear at a hearing for determination as to whether he should be surrendered to a New York officer for testimony in the latter State is not violative of this clause.[7]

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[7] *Williams* v. *Bruffy*, 96 U.S. 176, 184 (1878).

[1] *Chambers* v. *Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907); *McKnett* v. *St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934).

[2] *Canadian Northern Ry. Co.* v. *Eggen*, 252 U.S. 553 (1920).

[3] Id., 563.

[4] *Chemung Canal Bank* v. *Lowery*, 93 U.S. 72, 76 (1876).

[5] *Douglas* v. *New York, N.H. & H. R. Co.*, 279 U.S. 377 (1929).

[6] *Chambers* v. *Baltimore & Ohio R.R.*, 207 U.S. 142 (1907).

[7] *New York* v. *O'Neill*, 359 U.S. 1 (1959). Justices Douglas and Black dissented.

### Taxation

In the exercise of its taxing power, a State may not discriminate substantially between residents and nonresidents. In *Ward* v. *Maryland*,[8] the Court set aside a state law which imposed specific taxes upon nonresidents for the privilege of selling within the State goods which were produced in other States. Also found to be incompatible with the comity clause was a Tennessee license tax, the amount of which was dependent upon whether the person taxed had his chief office within or without the State.[9] In *Travis* v. *Yale & Towne Mfg. Co.*[10] the Court, while sustaining the right of a State to tax income accruing within its borders to nonresidents,[11] held the particular tax void because it denied to nonresidents exemptions which were allowed to residents. The "terms 'resident' and 'citizen' are not synonymous," wrote Justice Pitney, ". . . but a general taxing scheme . . . if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other States; . . ." [12] Where there were no discriminations between citizens and noncitizens, a state statute taxing the business of hiring persons within the State for labor outside the State was sustained.[13] This section of the Constitution does not prevent a territorial government, exercising powers delegated by Congress, from imposing a discriminatory license tax on nonresident fishermen operating within its waters.[14]

However, what at first glance may appear to be a discrimination may turn out not to be when the entire system of taxation prevailing in the enacting State is considered. On the basis of over-all fairness, the Court sustained a Connecticut statute which required nonresident stockholders to pay a state tax measured by the full market value of their stock while resident stockholders were subject to local taxation on the market value of that stock reduced by the value of the real estate owned by the corporation.[15] Occasional

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[8] 12 Wall. (79 U.S.) 418, 424 (1871). *See also Downham* v. *Alexandria Council*, 10 Wall. (77 U.S.) 173, 175 (1870).

[9] *Chalker* v. *Birmingham & Nw. Ry. Co.*, 249 U.S. 522 (1919).

[10] 252 U.S. 60 (1920).

[11] Id., 62–64. *See also Shaffer* v. *Carter*, 252 U.S. 37 (1920). In *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), the Court held void a state commuter income tax, inasmuch as the State imposed no income tax on its own residents and thus the tax fell exclusively on nonresidents' income and was not offset even approximately by other taxes imposed upon residents alone.

[12] 252 U.S. 60, 78–79 (1920).

[13] *Williams* v. *Fears*, 179 U.S. 270, 274 (1900).

[14] *Haavik* v. *Alaska Packers Assn.*, 263 U.S. 510 (1924).

[15] *Travellers' Inc. Co.* v. *Connecticut*, 185 U.S. 364, 371 (1902).

or accidental inequality to a nonresident taxpayer is not sufficient to defeat a scheme of taxation whose operation is generally equitable.[16] In an early case the Court brushed aside as frivolous the contention that a State violated this clause by subjecting one of its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.[17]

Clause 2. A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

## INTERSTATE RENDITION

### Duty to Surrender Fugitives From Justice

Although this provision is not in its nature self-executing, and there is no express grant to Congress of power to carry it into effect, that body passed a law shortly after the Constitution was adopted, imposing upon the Governor of each State the duty to deliver up fugitives from justice found in such State.[1] The Supreme Court has accepted this contemporaneous construction as establishing the validity of this legislation.[2] The duty to surrender is not absolute and unqualified; if the laws of the State to which the fugitive has fled have been put in force against him, and he is imprisoned there, the demands of those laws may be satisfied before the duty of obedience to the requisition arises.[3] In *Kentucky* v. *Denni-*

[16] *Maxwell* v. *Bugbee*, 250 U.S. 525 (1919).

[17] *Kirtland* v. *Hotchkiss*, 100 U.S. 491, 499 (1879). *Cf. Colgate* v. *Harvey*, 296 U.S. 404 (1935), in which discriminatory taxation of bank deposits outside the State owned by a citizen of the State was held to infringe a privilege of national citizenship, in contravention of the Fourteenth Amendment. The decision in *Colgate* v. *Harvey* was overruled in *Madden* v. *Kentucky*, 309 U.S. 83, 93 (1940).

[1] 1 Stat. 302 (1793), 18 U.S.C. § 3182.

[2] *Roberts* v. *Reilly*, 116 U.S. 80, 94 (1885). *See also Innes* v. *Tobin*, 240 U.S. 127 (1916). Said Justice Story: "[T]he natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution;" and again ". . . it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby." *Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539, 616, 618–619 (1842).

[3] *Taylor* v. *Taintor*, 16 Wall. (83 U.S.) 366, 371 (1873).

*son* [4] the Court held, moreover, that this statute was merely declaratory of a moral duty; that the Federal Government "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; . . .," [5] and consequently that a federal court could not issue a mandamus to compel the governor of one State to surrender a fugitive to another. In 1934 Congress plugged the loophole exposed by this decision by making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution in certain cases.[6]

***Fugitive From Justice: Defined.***—To be a fugitive from justice within the meaning of this clause, it is not necessary that the party charged should have left the State after an indictment found or for the purpose of avoiding a prosecution anticipated or begun. It is sufficient that the accused, having committed a crime within one State and having left the jurisdiction before being subjected to criminal process, is found within another State.[7] The motive which induced the departure is immaterial.[8] Even if he were brought involuntarily into the State where found by requisition from another State, he may be surrendered to a third State upon an extradition warrant.[9] A person indicted a second time for the same offense is nonetheless a fugitive from justice by reason of the fact that after dismissal of the first indictment, on which he was originally indicted, he left the State with the knowledge of, or without objection by, state authorities.[10] But a defendant cannot be extradited if he was only constructively present in the demanding State at the time of the commission of the crime charged.[11] For the purpose of determining who is a fugitive from justice, the words "treason, felony or other crime" embrace every act forbidden and made punishable by a law of a State,[12] including misdemeanors.[13]

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[4] 24 How. (65 U.S.) 66 (1861); *cf. Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539, 612 (1842).

[5] 24 How. (65 U.S.) 66, 107 (1861). Note, however, the dictum in *FERC* v. *Mississippi*, 456 U.S. 742, 761–765 (1982), that the quoted language "is not representative of the law today."

[6] 48 Stat. 782 (1934), 18 U.S.C. § 1073.

[7] *Roberts* v. *Reilly*, 116 U.S. 80 (1885). *See also Strassheim* v. *Daily*, 221 U.S. 280 (1911); *Appleyard* v. *Massachusetts*, 203 U.S. 222 (1906); *Ex parte Reggel*, 114 U.S. 642, 650 (1885).

[8] *Drew* v. *Thaw*, 235 U.S. 432, 439 (1914).

[9] *Innes* v. *Tobin*, 240 U.S. 127 (1916).

[10] *Bassing* v. *Cady*, 208 U.S. 386 (1908).

[11] *Hyatt* v. *People ex rel. Corkran*, 188 U.S. 691 (1903).

[12] *Kentucky* v. *Dennison*, 24 How. (65 U.S.) 66, 103 (1861).

[13] *Taylor* v. *Taintor*, 16 Wall. (83 U.S.) 366, 375 (1873).

***Procedure for Removal.***—Only after a person has been charged with a crime in the regular course of judicial proceedings is the governor of a State entitled to make demand for his return from another State.[14] The person demanded has no constitutional right to be heard before the governor of the State in which he is found on the question whether he has been substantially charged with crime and is a fugitive from justice.[15] The constitutionally required surrender is not to be interfered with by *habeas corpus* upon speculations as to what ought to be the result of a trial.[16] Nor is it proper thereby to inquire into the motives controlling the actions of the governors of the demanding and surrendering States.[17] Matters of defense, such as the running of the statute of limitations,[18] or the contention that continued confinement in the prison of the demanding State would amount to cruel and unjust punishment,[19] cannot be heard on *habeas corpus* but should be tested in the courts of the demanding State, where all parties may be heard, where all pertinent testimony will be readily available, and where suitable relief, if any, may be fashioned. A defendant will, however, be discharged on *habeas corpus* if he shows by clear and satisfactory evidence that he was outside the demanding State at the time of the crime.[20] If, however, the evidence is conflicting, *habeas corpus* is not a proper proceeding to try the question of alibi.[21] The *habeas* court's role is, therefore, very limited.[22]

***Trial of Fugitives After Removal.***—There is nothing in the Constitution or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though he was brought from another State by unlawful violence,[23] or by abuse of legal process,[24]

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[14] *Kentucky* v. *Dennison*, 24 How. (65 U.S.) 66, 104 (1861); *Pierce* v. *Creecy*, 210 U.S. 387 (1908). *See also Matter of Strauss*, 197 U.S. 324, 325 (1905); *Marbles* v. *Creecy*, 215 U.S. 63 (1909); *Strassheim* v. *Daily*, 221 U.S. 280 (1911).

[15] *Munsey* v. *Clough*, 196 U.S. 364 (1905); *Pettibone* v. *Nichols*, 203 U.S. 192 (1906).

[16] *Drew* v. *Thaw*, 235 U.S. 432 (1914).

[17] *Pettibone* v. *Nichols*, 203 U.S. 192 (1906).

[18] *Biddinger* v. *Commissioner of Police*, 245 U.S. 128 (1917). *See also Rodman* v. *Pothier*, 264 U.S. 399 (1924).

[19] *Sweeney* v. *Woodall*, 344 U.S. 86 (1952).

[20] *Hyatt* v. *People ex rel. Corkran*, 188 U.S. 691 (1903). *See also South Carolina* v. *Bailey*, 289 U.S. 412 (1933).

[21] *Munsey* v. *Clough*, 196 U.S. 364, 375 (1905).

[22] *Michigan* v. *Doran*, 439 U.S. 282, 289 (1978).

[23] *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886); *Mahon* v. *Justice*, 127 U.S. 700, 707, 712, 714 (1888).

[24] *Cook* v. *Hart*, 146 U.S. 183, 193 (1892); *Pettibone* v. *Nichols*, 203 U.S. 192, 215 (1906).

and a fugitive lawfully extradited from another State may be tried for an offense other than that for which he was surrendered.[25] The rule is different, however, with respect to fugitives surrendered by a foreign government, pursuant to treaty. In that case the offender may be tried only "for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." [26]

Clause 3. No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

### FUGITIVES FROM LABOR

This clause contemplated the existence of a positive unqualified right on the part of the owner of a slave which no state law could in any way regulate, control, or restrain. Consequently the owner of a slave had the same right to seize and repossess him in another State, as the local laws of his own State conferred upon him, and a state law which penalized such seizure was held unconstitutional.[1] Congress had the power and the duty, which it exercised by the Act of February 12, 1793,[2] to carry into effect the rights given by this section,[3] and the States had no concurrent power to legislate on the subject.[4] However, a state statute providing a penalty for harboring a fugitive slave was held not to conflict with this clause since it did not affect the right or remedy either of the master or the slave; by it the State simply prescribed a rule of conduct for its own citizens in the exercise of its police power.[5]

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[25] *Lascelles* v. *Georgia*, 148 U.S. 537, 543 (1893).

[26] *United States* v. *Rauscher*, 119 U.S. 407, 430 (1886).

[1] *Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539, 612 (1842).

[2] 1 Stat. 302 (1793).

[3] *Jones* v. *Van Zandt*, 5 How. (46 U.S.) 215, 229 (1847); *Ableman* v. *Booth*, 21 How. (62 U.S.) 506 (1859).

[4] *Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539, 625 (1842).

[5] *Moore* v. *Illinois*, 14 How. (55 U.S.) 13, 17 (1853).

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned was well as of the Congress.

### DOCTRINE OF THE EQUALITY OF STATES

"Equality of constitutional right and power is the condition of all the States of the Union, old and new." [1] This doctrine, now a truism of constitutional law, did not find favor in the Constitutional Convention. That body struck out from this section, as reported by the Committee on Detail, two sections to the effect that "new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States concerning the public debt which shall be subsisting." [2] Opposing this action, Madison insisted that "the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States." [3] Nonetheless, after further expressions of opinion *pro* and *con,* the Convention voted nine States to two to delete the requirement of equality.[4] Prior to this time, however, Georgia and Virginia had ceded to the United States large territories held by them, upon condition that new States should be formed therefrom and admitted to the Union on an equal footing with the original States.[5]

With the admission of Louisiana in 1812, the principle of equality was extended to States created out of territory purchased from a foreign power.[6] By the Joint Resolution of December 29, 1845, Texas "was admitted into the Union on an equal footing with the original States in all respects whatever." [7] Again and again, in

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[1] *Escanaba Co.* v. *Chicago,* 107 U.S. 678, 689 (1883).

[2] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven; rev. ed. 1937), 454.

[3] Ibid.

[4] Ibid. The present provision was then adopted as a substitute. Id., 455.

[5] *Pollard* v. *Hagan,* 3 How. (44 U.S.) 212, 221 (1845).

[6] 2 Stat. 701, 703 (1812).

[7] Justice Harlan, speaking for the Court, in *United States* v. *Texas,* 143 U.S. 621, 634 (1892); 9 Stat. 108.

adjudicating the rights and duties of States admitted after 1789, the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union.[8] Finally, in 1911, it invalidated a restriction on the change of location of the State capital, which Congress had imposed as a condition for the admission of Oklahoma, on the ground that Congress may not embrace in an enabling act conditions relating wholly to matters under state control.[9] In an opinion, from which Justices Holmes and McKenna dissented, Justice Lurton argued: "The power is to admit 'new States into *this* Union,' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission." [10]

Until recently, however, the requirement of equality has applied primarily to political standing and sovereignty rather than to economic or property rights.[11] Broadly speaking, every new State is entitled to exercise all the powers of government which belong to the original States of the Union.[12] It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its limits even as to federal lands, except where the Federal Government has reserved [13] or the State has ceded some degree of jurisdiction to the United States, and, of course, no State can enact a law which would conflict with the constitutional powers of the United States. Consequently, it has jurisdiction to tax private activities carried on within the public domain (although not to tax the Federal lands), if the tax does not constitute an unconstitutional burden on the Federal Government.[14] Statutes applicable to territories, e.g., the

[8] *Permoli* v. *First Municipality*, 3 How. (44 U.S.) 589, 609 (1845); *McCabe* v. *Atchison, T. & S.F. Ry Co.*, 235 U.S. 151 (1914); *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387, 434 (1892); *Knight* v. *U.S. Land Association*, 142 U.S. 161, 183 (1891); *Weber* v. *Harbor Commissioners*, 18 Wall. (85 U.S.) 57, 65 (1873).

[9] *Coyle* v. *Smith*, 221 U.S. 559 (1911).

[10] Id., 567.

[11] *United States* v. *Texas*, 339 U.S. 707, 716 (1950); *Stearns* v. *Minnesota*, 179 U.S. 223, 245 (1900).

[12] *Pollard* v. *Hagan*, 3 How. (44 U.S.) 212, 223 (1845); *McCabe* v. *Atchison T. & S.F. Ry. Co.*, 235 U.S. 151 (1914).

[13] *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 167 (1886).

[14] *Wilson* v. *Cook*, 327 U.S. 474 (1946).

Northwest Territory Ordinance of 1787, cease to have any operative force when the territory, or any part thereof, is admitted to the Union, except as adopted by state law.[15] When the enabling act contains no exclusion of jurisdiction as to crimes committed on Indian reservations by persons other than Indians, state courts are vested with jurisdiction.[16] But the constitutional authority of Congress to regulate commerce with Indian tribes is not inconsistent with the equality of new States,[17] and conditions inserted in the New Mexico Enabling Act forbidding the introduction of liquor into Indian territory were therefore valid.[18]

Admission of a State on an equal footing with the original States involves the adoption as citizens of the United States of those whom Congress makes members of the political community and who are recognized as such in the formation of the new State.[19]

**Judicial Proceedings Pending on Admission of New States**

Whenever a territory is admitted into the Union, the cases pending in the territorial court which are of exclusive federal cognizance are transferred to the federal court having jurisdiction over the area; cases not cognizable in the federal courts are transferred to the tribunals of the new State, and those over which federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by the party possessing the option under existing law.[20] Where Congress neglected to make provision for disposition of certain pending cases in an enabling act for the admission of a State to the Union, a subsequent act supplying the omission was held valid.[21] After a case, begun in a United States court of a territory, is transferred to a state court under the operation of the enabling act and the state constitution, the appellate procedure is governed by the state statutes and procedures.[22]

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[15] *Permoli* v. *First Municipality*, 3 How. (44 U.S.) 589, 609 (1845); *Sands* v. *Manistee River Imp. Co.*, 123 U.S. 288, 296 (1887); *see also Withers* v. *Buckley*, 20 How. (61 U.S.) 84, 92 (1858); *Huse* v. *Glover*, 119 U.S. 543 (1886); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 9 (1888); *Cincinnati* v. *Louisville & Nashville R.R. Co.*, 223 U.S. 390 (1912).

[16] *Draper* v. *United States*, 164 U.S. 240 (1896), following *United States* v. *McBratney*, 104 U.S. 621 (1882).

[17] *Dick* v. *United States*, 208 U.S. 340 (1908); *Ex parte Webb*, 225 U.S. 663 (1912).

[18] *United States* v. *Sandoval*, 231 U.S. 28 (1913).

[19] *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135, 170 (1892).

[20] *Baker* v. *Morton*, 12 Wall. (79 U.S.) 150, 153 (1871).

[21] *Freeborn* v. *Smith*, 2 Wall. (69 U.S.) 160 (1865).

[22] *John* v. *Paullin*, 231 U.S. 583 (1913).

The new State, without the express or implied assent of Congress, cannot enact that the records of the former territorial court of appeals should become records of its own courts or provide by law for proceedings based thereon.[23]

**Property Rights of States to Soil Under Navigable Waters**

Holding that a "mere agreement in reference to property" involved "no question of equality of status," the Supreme Court upheld, in *Stearns* v. *Minnesota,*[1] a promise exacted from Minnesota upon its admission to the Union which was interpreted to limit its right to tax lands held by the United States at the time of admission and subsequently granted to a railroad. The "equal footing" doctrine has had an important effect, however, on the property rights of new States to soil under navigable waters. In *Pollard* v. *Hagan,*[2] the Court held that the original States had reserved to themselves the ownership of the shores of navigable waters and the soils under them, and that under the principle of equality the title to the soils of navigable water passes to a new State upon admission. After refusing to extend the inland-water rule of this case to the three mile marginal belt under the ocean along the coast,[3] the Court applied the principle of the *Pollard* case in reverse in *United States* v. *Texas.*[4] Since the original States had been found not to own the soil under the three mile belt, Texas, which concededly did own this soil before its annexation to the United States, was held to have surrendered its dominion and sovereignty over it, upon entering the Union on terms of equality with the existing States. To this extent, the earlier rule that unless otherwise declared by Congress the title to every species of property owned by a territory passes to the State upon admission[5] has been qualified. However, when Congress, through passage of the Submerged Lands Act of 1953,[6] surrendered its paramount rights to natural resources in the marginal seas to certain States, without any corresponding cession to all States, the transfer was held to entail no abdication of na-

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[23] *Hunt* v. *Palao,* 4 How. (45 U.S.) 589 (1846). *Cf. Benner* v. *Porter,* 9 How. (50 U.S.) 235, 246 (1850).

[1] 179 U.S. 223, 245 (1900).

[2] 3 How. (44 U.S.) 212, 223 (1845). *See also Martin* v. *Waddell,* 16 pet. (41 U.S.) 367, 410 (1842).

[3] *United States* v. *California,* 332 U.S. 19, 38 (1947); *United States* v. *Louisiana,* 339 U.S. 699 (1950).

[4] 339 U.S. 707, 716 (1950). *See United States* v. *Maine,* 420, U.S. 515 (1975) (unanimously reaffirming the *California, Louisiana,* and *Texas* cases).

[5] *Brown* v. *Grant,* 116 U.S. 207, 212 (1886).

[6] 67 Stat. 29, 43 U.S.C. §§ 1301-1315.

tional sovereignty over control and use of the oceans in a manner destructive of the equality of the States.[7]

While the territorial status continues, the United States has power to convey property rights, such as rights in soil below the high-water mark along navigable waters,[8] or the right to fish in designated waters,[9] which will be binding on the State. But a treaty with an Indian tribe which gave hunting rights on unoccupied lands of the United States, which rights should cease when the United States parted with its title to any of the land, was held to be repealed by the admission to the Union of the territory in which the hunting lands were situated.[10]

Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

## PROPERTY AND TERRITORY: POWERS OF CONGRESS PROPERTY OF THE UNITED STATES

### Methods of Disposing Thereof

The Constitution is silent as to the methods of disposing of property of the United States. In *United States* v. *Gratiot,*[1] in which the validity of a lease of lead mines on government lands was put in issue, the contention was advanced that "disposal is not letting or leasing," and that Congress has no power "to give or authorize leases." The Court sustained the leases, saying "the disposal must be left to the discretion of Congress."[2] Nearly a century

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[7] *Alabama* v. *Texas,* 347 U.S. 272, 274–277, 281 (1954). Justice Black and Douglas dissented.

[8] *Shively* v. *Bowlby,* 152 U.S. 1, 47 (1894). *See also Joy* v. *St. Louis,* 201 U.S. 332 (1906).

[9] *United States* v. *Winans,* 198 U.S. 371, 378 (1905); *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919). A fishing right granted by treaty to Indians does not necessarily preclude the application to Indians of state game laws regulating the time and manner of taking fish. *New York ex rel. Kennedy* v. *Becker,* 241 U.S. 556 (1916). *See also Metlakatla Indians* v. *Egan,* 369 U.S. 45, 54, 57–59 (1962); *Kake Village* v. *Egan,* 369 U.S. 60, 64–65, 67–69, 75–76 (1962). But it has been held to be violated by the exaction of a license fee which is both regulatory and revenue producing. *Tulee* v. *Washington,* 315 U.S. 681 (1942).

[10] *Ward* v. *Race Horse,* 163 U.S. 504, 510, 514 (1896).

[1] 14 Pet. (39 U.S.) 526 (1840).

[2] Id., 533, 538.

later this power to dispose of public property was relied upon to uphold the generation and sale of electricity by the Tennessee Valley Authority. The reasoning of the Court ran thus: the potential electrical energy made available by the construction of a dam in the exercise of its constitutional powers is property which the United States is entitled to reduce to possession; to that end it may install the equipment necessary to generate such energy. In order to widen the market and make a more advantageous disposition of the product, it may construct transmission lines and may enter into a contract with a private company for the interchange of electric energy.[3]

**Public Lands: Federal and State Powers Thereover**

No appropriation of public lands may be made for any purpose except by authority of Congress.[1] However, the long-continued practice of withdrawing land from the public domain by Executive Orders for the purpose of creating Indian reservations has raised an implied delegation of authority from Congress to take such action.[2] The comprehensive authority of Congress over public lands includes the power to prescribe the times, conditions, and mode of transfer thereof and to designate the persons to whom the transfer shall be made,[3] to declare the dignity and effect of titles emanating from the United States,[4] to determine the validity of grants which antedate the government's acquisition of the property,[5] to exempt lands acquired under the homestead laws from previously contracted debts,[6] to withdraw land from settlement and to prohibit grazing thereon,[7] to prevent unlawful occupation of public property and to declare what are nuisances, as affecting such property, and provide for their abatement,[8] and to prohibit the introduction of

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[3] *Ashwander* v. *TVA*, 297 U.S. 288, 335–340 (1936). *See also Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938).

[1] *United States* v. *Fitzgerald*, 15 Pet. (40 U.S.) 407, 421 (1841). *See also California* v. *Deseret Water, Oil & Irrigation Co.*, 243 U.S. 415 (1917); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917).

[2] *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *United States* v. *Midwest Oil Co.*, 236 U.S. 459,469 (1915).

[3] *Gibson* v. *Chouteau*, 13 Wall. (80 U.S.) 92, 99 (1872); *see also Irvine* v. *Marshall*, 20 How. (61 U.S.) 558 (1858); *Emblem* v. *Lincoln Land Co.*, 184 U.S. 660, 664 (1902).

[4] *Bagnell* v. *Broderick*, 13 Pet. (38 U.S.) 436, 450 (1839). *See also Field* v. *Seabury*, 19 How. (60 U.S.) 323, 332 (1857).

[5] *Tameling* v. *United States Freehold & Immigration Co.*, 93 U.S. 644, 663 (1877). *See also Maxwell Land-Grant Case*, 121 U.S. 325, 366 (1887).

[6] *Ruddy* v. *Rossi*, 248 U.S. 104 (1918).

[7] *Light* v. *United States*, 220 U.S. 523 (1911). *See also The Yosemite Valley Case*, 15 Wall. (82 U.S.) 77 (1873).

[8] *Camfield* v. *United States*, 167 U.S. 518, 525 (1897). *See also Jourdan* v. *Barrett*, 4 How. (45 U.S.) 169 (1846); *United States* v. *Waddell*, 112 U.S. 76 (1884).

liquor on lands purchased and used for an Indian colony.[9] Congress may limit the disposition of the public domain to a manner consistent with its views of public policy. A restriction inserted in a grant of public lands to a municipality which prohibited the grantee from selling or leasing to a private corporation the right to sell or sublet water or electric energy supplied by the facilities constructed on such land was held valid.[10]

Unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands, the Court restated the applicable principles governing Congress' power under this clause. It empowers Congress to act as both proprietor and legislature over the public domain; Congress has complete power to make those "needful rules" which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the clause, its legislation overrides conflicting state laws.[11]

No State can tax public lands of the United States within its borders,[12] nor can state legislation interfere with the power of Congress under this clause or embarrass its exercise.[13] Thus, by virtue of a Treaty of 1868, according self-government to Navajos living on an Indian Reservation in Arizona, the tribal court, rather than the courts of that State, had jurisdiction over a suit for a debt owed by an Indian resident thereof to a non-Indian conducting a store on the Reservation under federal license.[14] The question whether title to land which has once been the property of the United States has passed from it must be resolved by the laws of the United States; after title has passed, "that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."[15] In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.[16] But a state statute enacted subsequently to a

[9] *United States* v. *McGowan*, 302 U.S. 535 (1938).

[10] *United States* v. *City of San Francisco*, 310 U.S. 16 (1940).

[11] *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

[12] *Van Brocklin* v. *Tennessee*, 117 U.S. 151 (1886); *cf. Wilson* v. *Cook*, 327 U.S. 474 (1946).

[13] *Gibson* v. *Choutau*, 13 Wall. (80 U.S.) 92, 99 (1872). *See also Irvine* v. *Marshall*, 20 How. (61 U.S.) 558 (1858); *Emblem* v. *Lincoln Land Co.*, 184 U.S. 660, 664 (1902).

[14] *Williams* v. *Lee*, 358 U.S. 217 (1959).

[15] *Wilcox* v. *McConnel*, 13 Pet. (38 U.S.) 498, 517 (1839).

[16] *Oklahoma* v. *Texas*, 258 U.S. 574, 595 (1922).

federal grant cannot operate to vest in the State rights which either remained in the United States or passed to its grantee.[17]

**Territories: Powers of Congress Thereover**

In the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act.[1] It may legislate directly with respect to the local affairs of a territory or it may transfer that function to a legislature elected by the citizens thereof,[2] which will then be invested with all legislative power except as limited by the Constitution of the United States and acts of Congress.[3] In 1886, Congress prohibited the enactment by territorial legislatures of local or special laws on enumerated subjects.[4] The constitutional guarantees of private rights are applicable in territories which have been made a part of the United States by congressional action [5] but not in unincorporated territories.[6] Congress may establish, or may authorize the territorial legislature to create, legislative courts whose jurisdiction is derived from statutes enacted pursuant to this section other than from Article III.[7] Such courts

[17] *United States* v. *Oregon*, 295 U.S. 1, 28 (1935).

[1] *Simms* v. *Simms*, 175 U.S. 162, 168 (1899). *See also United States* v. *McMillan*, 165 U.S. 504, 510 (1897); *El Paso & N.E. Ry.* v. *Gutierrez*, 215 U.S. 87 (1909); *First Nat. Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880).

[2] *Binns* v. *United States*, 194 U.S. 486, 491 (1904). *See also Sere* v. *Pitot*, 6 Cr. (10 U.S.) 332, 336 (1810); *Murphy* v. *Ramsey*, 114 U.S. 15, 44 (1885).

[3] *Walker* v. *New Mexico & S.P.R. Co.*, 165 U.S. 593, 604 (1897); *Simms* v. *Simms*, 175 U.S. 162, 163 (1899); *Wagoner* v. *Evans*, 170 U.S. 588, 591 (1898).

[4] 24 Stat. 170 (1886).

[5] *Downes* v. *Bidwell*, 182 U.S. 244, 271 (1901). *See also Mormon Church* v. *United States*, 136 U.S. 1, 14 (1890); *ICC* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912).

[6] *Dorr* v. *United States*, 195 U.S. 138, 149 (1904). *See also Balzac* v. *Porto Rico*, 258 U.S. 298 (1922). The Court's recent pronouncements have done little to remedy ambiguity of its opinions respecting the rights of the inhabitants of Puerto Rico. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 599 (1976). It seemed at one point to question the continuing vitality of the *Insular Cases*, id., 600 n. 31, but overall it appears to be following a path of case-by-case determination of the applicability of particular provisions, *See* ibid. (equal protection principles); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (procedural due process); *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979) (search and seizure). *See also Califano* v. *Torres*, 435 U.S. 1, 4 n. 6 (1978). Four Justices have argued for full application of the Bill of Rights. *Torres* v. *Puerto Rico*, *supra*, 474. But *Harris* v. *Rosario*, 446 U.S. 651 (1980), remarked that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."

[7] *American Insurance Co.* v. *Canter*, 1 Pet. (26 U.S.) 511, 546 (1828). *See also Clinton* v. *Englebrecht*, 13 Wall. (80 U.S.) 434–447 (1872); *Hornbuckle* v. *Toombs*, 18 Wall. (85 U.S.) 648, 655 (1874); *Reynolds* v. *United States*, 98 U.S. 145, 154 (1879); *The "City of Panama,"* 101 U.S. 453, 460 (1880); *McAllister* v. *United States*, 141 U.S. 174, 180 (1891); *United States* v. *McMillan*, 165 U.S. 504, 510 (1897); *Romeu* v. *Todd*, 206 U.S. 358, 368 (1907).

may exercise admiralty jurisdiction despite the fact that such jurisdiction may be exercised in the States only by constitutional courts.[8]

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

### GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT

The first clause of this section, in somewhat different langauage, was contained in the Virginia Plan introduced in the Convention and was obviously attributable to Madison.[1] Through the various permutations into its final form,[2] the object of the clause seems clearly to have been more than an authorization for the Federal Government to protect States against foreign invasion or internal insurrection,[3] a power seemingly already conferred in any

[8] *American Ins. Co.* v. *Canter*, 1 Pet. (26 U.S.) 511, 545 (1828).

[1] "Resd. that a Republican government . . . ought to be guaranteed by the United States to each state." 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 22. In a letter in April, 1787, to Randolph, who formally presented the Virginia Plan to the Convention, Madison had suggested that "an article ought to be inserted expressly guaranteeing the tranquility of the states against internal as well as external danger . . . Unless the Union be organized efficiently on republican principles innovations of a much more objectionable form may be obtruded." 2 *Writings of James Madison*, G. Hunt ed. (New York: 1900), 336. On the background of the clause, *see* W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: 1972), ch. 1.

[2] Thus, on June 11, the language of the provision was on Madison's motion changed to: "Resolved that a republican constitution and its existing laws ought to be guaranteed to each state by the United States." 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 193–194, 206. Then, on July 18, Gouverneur Morris objected to this language on the ground that "[h]e should be very unwilling that such laws as exist in R. Island ought to be guaranteed to each State of the Union." 2 id., 47. Madison then suggested language "that the Constitutional authority of the States shall be guaranteed to them respectively against domestic as well as foreign violence," whereas Randolph wanted to add to this the language "and that no State be at liberty to form any other than a Republican Govt." Wilson then moved, "as a better expression of the idea," almost the present language of the section, which was adopted. Id., 47–49.

[3] Thus, Randolph on June 11, supporting Madison's version pending then, said that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." 1 id., 206. Again, on July 18, when Wilson and Mason indicated their understanding that the object of the proposal was "merely" to protect States against violence, Randolph asserted: "The Resoln. has 2 Objects. 1. to secure Republican government. 2. to suppress domestic commotions. He urged the necessity of both these provisions."

case.[4] No one can now resurrect the full meaning of the clause and intent which moved the Framers to adopt it, but with the exception of the reliance for a brief period during Reconstruction the authority contained within the confines of the clause has been largely unexplored.[5]

In *Luther* v. *Borden,*[6] the Supreme Court established the doctrine that questions arising under this section are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." [7] *Texas* v. *White* [8] held that the action of the President in setting up provisional governments at the conclusion of the war was justified, if at all, only as an exercise of his powers as Commander-in-Chief and that such governments were to be regarded merely as provisional regimes to perform the functions of government pending action by Congress. On the ground that the issues were not justiciable, the Court in the early part of this century refused to pass on a number of challenges to state governmental reforms and thus made the clause in effect noncognizable by the courts in any matter,[9] a state from which the Court's opinion in *Baker* v. *Carr,*[10] despite its substantial curbing of the political question doctrine, did not release it.

Similarly, in *Luther* v. *Borden,*[11] the Court indicated that it rested with Congress to determine upon the means proper to fulfull

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2 id., 47. Following speakers alluded to the dangers of monarchy being created peacefully as necessitating the provision. Id., 48. *See* W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: 1972), ch. 2.

[4] *See* Article I, § 8, cl. 15.

[5] *See generally* W. Wiecek. *The Guarantee Clause of the U.S. Constitution* (Ithaca: 1972).

[6] 7 How. (48 U.S.) 1 (1849).

[7] Id., 42.

[8] 7 Wall. (74 U.S.) 700, 729 (1869). In *Georgia* v. *Stanton,* 6 Wall. (73 U.S.) 50 (1868), the State attempted to attack Reconstruction legislation on the premise that it already had a republican form of government and that Congress was thus not authorized to act. The Court viewed the congressional decision as determinative.

[9] *Pacific States Tel. & Tel. Co.* v. *Oregon,* 223 U.S. 118 (1912); *Kiernan* v. *City of Portland,* 223 U.S. 151 (1912); *Davis* v. *Ohio,* 241 U.S. 565 (1916); *Ohio* v. *Akron Park District,* 281 U.S. 74 (1930); *O'Neill* v. *Leamer,* 239 U.S. 244 (1915); *Highland Farms Dairy* v. *Agnew,* 300 U.S. 608 (1937). *See* the discussion of the political question doctrine, *supra,* pp. 659–669. But in certain earlier cases the Court had disposed of guaranty clause questions on the merits. *Forsyth* v. *Hammond,* 166 U.S. 506 (1897); *Minor* v. *Happersett,* 21 Wall. (88 U.S.) 162 (1875).

[10] 369 U.S. 186, 218–232 (1962). In the Court's view, guaranty clause questions were nonjusticiable because resolution of them had been committed to Congress and not because they involved matters of state governmental structure.

[11] 7 How. (48 U.S.) 1 (1849).

the guarantee of protection to the States against domestic violence. Chief Justice Taney declared that Congress might have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere, but that instead Congress had by the act of February 28, 1795,[12] authorized the President to call out the militia in case of insurrection against the government of any State. It followed, said Taney, that the President "must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress",[13] which determination was not subject to review by the courts.

In recent years, the authority of the United States to use troops and other forces in the States has not generally been derived from this clause and it has been of little importance.[14]

[12] 1 Stat. 424.

[13] *Luther* v. *Borden*, 7 How. (48 U.S.) 1, 43 (1849).

[14] *Supra*, pp. 472-473, 557-561.

# ARTICLE V

## MODE OF AMENDMENT

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# MODE OF AMENDMENT

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## AMENDMENT OF THE CONSTITUTION

### Scope of the Amending Power

When this Article was before the Constitutional Convention, a motion to insert a provision that "no State shall without its consent be affected in its internal policy" was made and rejected.[1] A further attempt to impose a substantive limitation on the amending power was made in 1861, when Congress submitted to the States a proposal to bar any future amendments which would authorize Congress to "interfere, within any State, with the domestic institutions thereof . . . ."[2] Three States ratified this article

[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 630.

[2] 57 *Cong. Globe* 1263 (1861).

before the outbreak of the Civil War made it academic.[3] Members of Congress opposed passage by Congress of the Thirteenth Amendment on the basis that the amending process could not be utilized to work such a major change in the internal affairs of the States but the protest was in vain.[4] Many years later the validity of both the Eighteenth and Nineteenth Amendments was challenged because of their content. The arguments against the former took a wide range. Counsel urged that the power of amendment is limited to the correction of errors in the framing of the Constitution and that it does not comprehend the adoption of additional or supplementary provisions. They contended further that ordinary legislation cannot be embodied in a constitutional amendment and that Congress cannot constitutionally propose any amendment which involves the exercise or relinquishment of the sovereign powers of a State.[5] The Nineteenth Amendment was attacked on the narrower ground that a State which had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing, i.e., persons chosen by voters whom the State itself had not authorized to vote for Senators.[6] Brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid.

**Proposing a Constitutional Amendment**

Thirty-three proposed amendments to the Constitution have been submitted to the States pursuant to this Article, all of them upon the vote of the requisite majorities in Congress and none, of course, by the alternative convention method. In the Convention, much controversy surrounded the issue of the process by which the document then being drawn should be amended. At first, it was voted that "provision ought to be made for the amendment [of the Constitution] whensoever it shall seem necessary" without the agency of Congress being at all involved.[1] Acting upon this instruction, the Committee on Detail submitted a section providing that upon the application of the legislatures of two-thirds of the States Congress was to call a convention for purpose of amending the Con-

[3] H. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, H. Doc. 353, pt. 2, 54th Congress, 2d sess. (Washington: 1897), 363.

[4] 66 *Cong. Globe* 921, 1424-1425, 1444-1447, 1483-1488 (1864).

[5] *National Prohibition Cases*, 253 U.S. 350 (1920).

[6] *Leser* v. *Garnett*, 258 U.S. 130 (1922).

[1] 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 22, 202-203, 237; 2 id., 85.

stitution.[2] Adopted,[3] the section was soon reconsidered on the motion of Framers of quite different points of view, some who worried that the provision would allow two-thirds of the States to subvert the others [4] and some who thought that Congress would be the first to perceive the need for amendment and that to leave the matter to the discretion of the States would mean that no alterations but those increasing the powers of the States would ever be proposed.[5] Madison's proposal was adopted, empowering Congress to propose amendments either on its own initiative or upon application by the legislatures of two-thirds of the States.[6] When this provision came back from the Committee on Style, however, Gouverneur Morris and Gerry succeeded in inserting the language providing for a convention upon the application of the legislatures of two-thirds of the States.[7]

***Proposals by Congress.***—Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to. When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument.[8] Instead, the House decided to propose them as supplementary articles, a method followed since.[9] It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals.[10] In the *National Prohibition Cases,*[11] the Court ruled that in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire member-

[2] Id., 188.
[3] Id., 467–468.
[4] Id., 557–558 (Gerry).
[5] Id., 558 (Hamilton).
[6] Id., 559.
[7] Id., 629–630. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the State as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum etc. which in Constitutional regulations ought to be as much as possible avoided."
[8] 1 *Annals of Congress* 433–436 (1789).
[9] Id., 717.
[10] Id., 430.
[11] 253 U.S. 350, 386 (1920).

ship.[12] The approval of the President is not necessary for a proposed amendment.[13]

***The Convention Alternative.***—Because it has never successfully been invoked, the convention method of amendment is surrounded by a lengthy list of questions.[14] When and how is a convention to be convened? Must the applications of the requisite number of States be identical or ask for substantially the same amendment or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions and others lurk to be revealed on deeper consideration.[15] This method has been close to utilization several times. Only one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators.[16] Two States were lacking in a petition drive for a constitutional limitation on income tax rates.[17] The drive for an amendment to limit the Supreme Court's legislative apportionment decisions came within one State of the required number.[18] Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the States there will be a response by Congress.

***Ratification.***—Congress may, in proposing an amendment, set a reasonable time limit for its ratification. Two amendments proposed in 1789, one submitted in 1810 and another in 1861, and most recently the Equal Rights Amendment in 1982 failed of ratification. In *Dillon* v. *Gloss,*[19] the Court intimated that proposals which

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[12] Ibid.

[13] *Hollingsworth* v. *Virginia*, 3 Dall. (3 U.S.) 378 (1798).

[14] The matter is treated comprehensively in C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st sess. (Comm. Print; House Judiciary Committee) (1957).

[15] Ibid. *See also Federal Constitutional Convention*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 90th Congress, 1st sess. (1967).

[16] C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st sess. (Comm. Print; House Judiciary Committee) (1957), 7, 89.

[17] Id., 8–9, 89.

[18] R. Dixon, *Democratic Representation—Reapportionment in Law and Politics* (New York: 1968), 426–432. More recently, state calls for a convention to propose a balanced budget amendment have numbered but two short of the requisite total, but the time spread involved raises questions about Congress' obligation to count all of the petitions.

[19] 256 U.S. 368, 375 (1921).

were clearly out of date were no longer open for ratification. However, in *Coleman* v. *Miller*,[20] it refused to pass upon the question whether the proposed child labor amendment, submitted to the States in 1924, was open to ratification thirteen years later. This it held to be a political question which Congress would have to resolve in the event three fourths of the States ever gave their assent to the proposal. Beginning with the Eighteenth Amendment, save for the Nineteenth, Congress has included language in all proposals stating that the amendment should be inoperative unless ratified within seven years.[21] In *Dillon* v. *Gloss*,[22] the Court sustained this proviso on the ground that it gave effect to the implication of Article V that ratification "must be within some reasonable time after the proposal." Whether once it has provided for a seven-year ratification period Congress may thereafter extend the period without necessitating action by already-ratified States embroiled Congress, the States, and the courts in argument with respect to the proposed Equal Rights Amendment.[23] Proponents argued and opponents doubted that the fixing of a time limit and the extending of it were powers committed exclusively to Congress under the political question doctrine and that in any event Congress had power to extend. It was argued that inasmuch as the fixing of a reasonable time was within Congress' power and that Congress could fix the time either in advance or at some later point, based upon its evaluation of the social and other bases of the necessities of the amendment, Congress did not do violence to the Constitution when, once having fixed the time, it subsequently extended the time. Proponents recognized that if the time limit was fixed in the text of the amendment Congress could not alter it because the time limit as well as the substantive provisions of the proposal had been subject to ratification by a number of States, making it unalterable by Congress except through the amending process again. Opponents argued that Congress, having by a two-thirds vote sent the amendment and its authorizing resolution to the States, had put the matter beyond

[20] 307 U.S. 433 (1939).

[21] Seven-year periods were included in the texts of the proposals of the 18th, 20th, 21st, and 22d amendments; apparently concluding in proposing the 23d that putting the time limit in the text merely cluttered up the amendment, Congress in it and subsequent amendments including the time limits in the authorizing resolution. After the extension debate over the Equal Rights proposal, Congress once again inserted into the text of the amendment the time limit with respect to the proposal of voting representation in Congress of the District of Columbia.

[22] 256 U.S. 368, 375 (1921).

[23] See *Equal Rights Amendment Extension*, Hearings before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d sess. (1978); *Equal Rights Amendment Extension*, Hearings before the House Judiciary Subcommittee on Civil and Constitutional Rights, 95th Congress, 1st/2d sess. (1977–78).

changing by passage of a simple resolution, that States had either acted upon the entire package or at least that they had or could have acted affirmatively upon the promise of Congress that if the amendment had not been ratified within the prescribed period it would expire and their assent would not be compelled for longer than they had intended. Congress did pass a resolution extending by three years the period for ratification.[24]

Litigation followed and a federal district court, finding the issue to be justiciable, held that Congress did not have the power to extend, but before the Supreme Court could review the decision the extended time period expired and mooted the matter.[25]

Also much disputed during consideration of the proposed Equal Rights Amendment was the question whether once a State had ratified it could thereafter withdraw or rescind its ratification, precluding Congress from counting that State toward completion of ratification. Four States had rescinded their ratifications and a fifth had declared that its ratification would be void unless the amendment was ratified within the original time limit.[1] The issue was not without its history. The Fourteenth Amendment was ratified by the legislatures of Ohio and New Jersey, both of which subsequently passed rescinding resolutions. Contemporaneously, the legislatures of Georgia, North Carolina, and South Carolina rejected ratification resolutions. Pursuant to the Act of March 2, 1867,[2] the governments of those States were reconstituted and the new legislatures ratified. Thus, there were presented both the question of the validity of a withdrawal and the question of the validity of a ratification following rejection. Congress requested the Secretary of State[3] to report on the number of States ratifying the proposal and the Secretary's response specifically noted the actions of the Ohio and New Jersey legislatures. The Secretary then issued a proclamation reciting that 29 States, including the two that had rescind-

[24] J.J. Res. 638, 95th Congress, 2d sess. (1978); 92 Stat. 3799.

[25] *Idaho* v. *Freeman*, 529 F. Supp. 1107 (D.C.D. Idaho, 1981), *prob. juris. noted*, 455 U.S. 918 (1982), *vacated and remanded to dismiss*, 459 U.S. 809 (1982).

[1] Nebraska (March 15, 1973), Tennessee (April 23, 1974), and Idaho (February 8, 1977) all passed rescission resolutions without dispute about the actual passage. The Kentucky rescission was attached to another bill and was vetoed by the Lieutenant Governor, acting as Governor, citing grounds that included a state constitutional provision prohibiting the legislature from passing a law dealing with more than one subject and a senate rule prohibiting the introduction of new bills within the last ten days of a session. Both the resolution and the veto message were sent by the Kentucky Secretary of State to the General Services Administration. South Dakota was the fifth State.

[2] 14 Stat. 428.

[3] The Secretary was then responsible for receiving notices of ratification and proclaiming adoption. *See infra*, *pp.* 909–912.

ed and the three which had ratified after first rejecting, had ratified, which was one more than the necessary three-fourths. He noted the attempted withdrawal of Ohio and New Jersey and observed that it was doubtful whether such attempts were effectual in withdrawing consent.[4] He therefore certified the amendment to be in force if the rescissions by Ohio and New Jersey were invalid. The next day Congress adopted a resolution listing all 29 States, including Ohio and New Jersey, as having ratified and concluded that the ratification process was completed.[5] The Secretary of State then proclaimed the Amendment as part of the Constitution.

In *Coleman* v. *Miller*,[6] the congressional action was interpreted as going directly to the merits of withdrawal after ratification and of ratification after rejection. "Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification." Although rescission was hotly debated with respect to the Equal Rights Amendment, the failure of ratification meant that nothing definitive emerged from the debate. The questions that must be resolved are whether the matter is justiciable, that is, whether under the political question doctrine resolution of the issue is committed exclusively to Congress,[7] and whether or not there is judicial review of what Congress' power is in respect to deciding the matter of rescission. The Fourteenth Amendment precedent and *Coleman* v. *Miller* combine to appear to say, but not without doubt, that resolution is a political question committed to Congress.

Finding that resolution of the question is committed to Congress merely locates the situs of the power, however, and says nothing about what the resolution should be. That Congress in the past has refused to accept rescissions is but the starting point, inasmuch as, unlike courts, Congress operates under no principle of *stare decisis* so that the decisions of one Congress on a subject do not bind future Congresses. If Congress were to be faced with a decision about the validity of rescission, to what standards should it look?

[4] 15 Stat. 706, 707.

[5] 15 Stat. 709.

[6] 307 U.S. 433, 488–450 (1939) (plurality opinion). For an alternative construction of the precedent, see Corwin & Ramsey, "The Constitutional Law of Constitutional Amendment," 27 Notre Dame Law. 185, 201–204 (1951). The legislature of New York attempted to withdraw its ratification of the 15th Amendment; although the Secretary of State listed New York among the ratifying States, noted the withdrawal resolution, there were ratifications from three-fourths of the States without New York. 16 Stat. 1131.

[7] *Infra*, *pp.* 910–912.

That a question of constitutional interpretation may be "poltical" in the sense of being committed to one or to both of the "political" branches is not, of course, a judgment that in its resolution the political branch may decide without recourse to principle. Resolution of political questions is not subject to judicial review. So that the prospect of court overruling is not one with which the decisionmaker need trouble himself. But both legislators and executive are bound by oath to observe the Constitution [8] and consequently it is with the original document that the search for an answer must begin.

At the same time, it may well be that the Constitution affords no answer; it may not speak to the issue. Generally, in the exercise of judicial review, courts view the actions of the legislative and executive branches in terms not of the wisdom or desirability or propriety of their actions but in terms of the comportment of those actions with the constitutional grants of power and constraints upon those powers; if an action is within a granted power and violates no restriction, the courts will not interfere. How the legislature or the executive decides to deal with a question within the confines of the powers each constitutionally have is beyond judicial control.

Therefore, if the Constitution commits decision on an issue to, say, Congress, and imposes no standards to govern or control the reaching of that decision, in its resolution Congress may be restrained only by its sense of propriety or wisdom or desirability, i.e., may be free to make a determination solely as a policy matter. The reason that these issues are not justiciable is not only that they are committed to a branch for decision without intervention by the courts but also that the Constitution does not contain an answer. This interpretation, in the context of amending the Constitution, may be what Chief Justice Hughes was deciding for the plurality of the Court in *Coleman*.[9]

[8] Article VI, parag. 3. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States* v. *Nixon*, 418 U.S. 683, 703 (1974).

[9] *Coleman* v. *Miller*, 307 U.S. 433, 450, 453 (1939). Thus, considering the question of ratification after rejection, the Chief Justice found "no basis in either Constitution or statute" to warrant the judiciary in restraining state officers from notifying Congress of a State's ratification, so that it could decide to accept or reject. "Article 5, speaking solely of ratification, contains no provision as to rejection." And in considering whether the Court could specify a reasonable time for an amendment to be before the State before it lost its validity as a proposal, Chief Justice Hughes asked: "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute." His discussion of what Congress could look to in fixing a reasonable time, id., 453–454, is overwhelmingly policy-oriented. On this approach generally, see Henkin, "Is There a 'Political Question' Doctrine?," 85 Yale L.J. 597 (1976).

Article V may be read to contain a governing constitutional principle, however. Thus, it can be argued that as written the provision contains only language respecting ratification and that inexorably once a State acts favorably on a resolution of ratification it has exhausted its jurisdiction over the subject and cannot rescind,[10] nor can Congress even authorize a State to rescind.[11] This conclusion is premised on Madison's argument that a State may not ratify conditionally, that it must adopt "*in toto* and *for ever*." [12] While the Madison principle may be unexceptionable in the context in which it was stated, it may be doubted that it transfers readily to the significantly different issue of rescission.

A more pertinent principle would seem to be that expressed in *Dillon* v. *Gloss*,[13] one of the pre-*Coleman* cases dealing with the amendment process. In that case, the action of Congress in fixing a seven-year-period within which ratification was to occur or the proposal would expire was attacked as vitiating the amendment. The Court, finding no express provision in Article V, nonetheless thought it "reasonably implied" therein "that the ratification must be within some reasonable time after the proposal." Three reasons underlay the Court's finding of this implication and they are suggestive on the question of rescission. "First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively

[10] *See*, e.g., the debate between Senator Conkling and Senator Davis on this point in 89 *Cong. Globe* 1477–1481 (1870).

[11] "Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment," Memorandum of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, in *Equal Rights Amendment Extension*, Hearings before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d sess. (1978), 80, 91–99.

[12] During the debate in New York on ratification of the Constitution, it was suggested that the State approve the document on condition that certain amendments the delegates thought necessary be adopted. Madison wrote: "The Constitution requires an adoption in toto and for ever. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any condition whatever must viciate the ratification." 5 *The Papers of Alexander Hamilton*, H. Syrett ed. (New York: 1962), 184.

[13] 256 U.S. 368 (1921).

the same period, which, of course, ratification scattered through a long series of years would not do." [14]

Although addressed to a different issue, the Court's discussion of the length of time an amendment may reasonably pend before losing its viability is suggestive with respect to rescission. That is, first, with proposal and ratification as successive steps in a single endeavor, second, with the necessity of amendment forming the basis for adoption of the proposal, and, third, especially with the implication that an amendment's adoption should be "sufficiently contemporaneous" in the requisite number of States "to reflect the will of the people in all sections at relatively the same period," it would raise a large question were the ratification process to be one in which there was counted one or more States which at the same time other States were acting affirmatively were acting to withdraw their expression of judgment that amendment was necessary. The "decisive expression of the people's will" that is to bind all might well in those or similar circumstances be found lacking. Employment of this analysis would not necessarily lead in specific circumstances to failures of ratification; the particular facts surrounding the passage of rescission resolutions, for example, might lead Congress to conclude that the requisite "contemporaneous" "expression of the people's will" was not undermined by the action.

And employment of this analysis would still seem, under the precedents, to leave to Congress the crucial determination of the success or failure of ratification. At the same time it was positing this analysis in the context of passing on the question of Congress' power to fix a time limit, the Court in *Dillon* v. *Gloss* observed that Article V left to Congress the authority "to deal with subsidiary matters of detail as the public interest and changing conditions may require." [15] And in *Coleman* v. *Miller*, Chief Justice Hughes

[14] Id., 374-375. The Court derived these three factors not only from the structure of Article V but as well from the following consideration. "Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending the instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three fourths of the states shall be taken as a decisive expression of the people's will and be binding on all." Id., 374.

[15] Id., 375–376. It should be noted that the Court seemed to retain the power for itself to pass on the congressional decision, saying "[o]f the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt" and noting later than no question existed that the seven-year period was reasonable. Ibid.

went further in respect to these "matters of detail" being "within the congressional province" in the resolution of which the decision by Congress "would not be subject to review by the courts." [16]

Thus, it may be that if the *Dillon* v. *Gloss* construction is found persuasive, Congress would have constitutional standards to guide its decision on the validity of rescission. At the same time, if the precedents reviewed above are adhered to, and strictly applied, it appears that the congressional determination to permit or to disallow rescission would not be subject to judicial review.

Congress has complete freedom of choice between the two methods of ratification recognized by Article V—by the legislatures of the States or by conventions in the States. In *United States* v. *Speague*,[17] counsel advanced the contention that the Tenth Amendment recognized a distinction between powers reserved to the States and powers reserved to the people, and that state legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several States. The Eighteenth Amendment being of the latter character, the ratification by state legislatures, so the argument ran, was invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exception into it by implication.

The term "legislatures" as used in Article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several States. It does not comprehend the popular referendum which has subsequently become a part of the legislative process in many of the States, nor may a State validly condition ratification of a proposed constitutional amendment on its approval by such a referendum.[18] In the words of the Court: "[T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." [19]

[16] 307 U.S. 433, 452-454 (1939). It is, as noted above, not entirely clear to what extent the Hughes plurality exempted from judicial review congressional determinations made in the amending process. Justice Black's concurrence thought the Court "treated the amending process of the Constitution in some respects as subject to judicial review, in others as subject to the final authority of Congress" and urged that the *Dillon* v. *Gloss* "reasonable time" construction be disapproved. Id., 456, 458.

[17] 282 U.S. 716 (1931).

[18] *Hawke* v. *Smith*, 253 U.S. 221, 231 (1920).

[19] *Leser* v. *Garnett*, 258 U.S. 130, 137 (1922).

***Authentication and Proclamation.***—Formerly, official notice from a state legislature, duly authenticated, that it had ratified a proposed amendment went to the Secretary of State, upon whom it was binding, "being certified by his proclamation, [was] conclusive upon the courts" as against any objection which might be subsequently raised as to the regularity of the legislative procedure by which ratification was brought about.[20] This function of the Secretary, purely ministerial in character, was, however, derived from an act of Congress, and has been transferred to a functionary called Administrator of General Services.[21] In *Dillon* v. *Gloss*,[22] the Supreme Court held that the Eighteenth Amendment became operative on the date of ratification by the thirty-sixth State, rather than on the later date of the proclamation issued by the Secretary of State, and doubtless the same rule holds as to a similar proclamation by the Administrator.

**Judicial Review Under Article V**

Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several States was conclusive upon the courts,[1] it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in *Coleman* v. *Miller*.[2] This case came up on a writ of *certiorari* to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labor amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that the amendment had been previously rejected by the state legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the States, and (3) that the lieutenant governor had no right to cast the deciding vote in the Kansas Senate in favor of ratification.

[20] Ibid.

[21] 65 Stat. 710–711, § 3; 1 U.S.C. § 112.

[22] 256 U.S. 368, 376 (1921).

[1] *Leser* v. *Garnett*, 258 U.S. 130 (1922).

[2] 307 U.S. 433 (1939). *Cf. Fairchild* v. *Hughes*, 258 U.S. 126 (1922), wherein the Court held that a private citizen could not sue in the federal courts to secure an indirect determination of the validity of a constitutional amendment about to be adopted.

Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement with regard to the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." [3] In an opinion reported as "the opinion of the Court," but in which it appears that only two Justices joined Chief Justice Hughes who wrote it, it was declared that the writ of mandamus was properly denied, because the question whether a reasonable time had elapsed since submission of the proposal was a nonjusticiable political question, the kinds of considerations entering into deciding being fit for Congress to evaluate, and the question of the effect of a previous rejection upon a ratification was similarly nonjusticiable, because the 1868 Fourteenth Amendment precedent of congressional determination "has been accepted." [4] But with respect to the contention that the lieutenant governor should not have been permitted to cast the deciding vote in favor of ratification, the Court found itself evenly divided, thus accepting the judgment of the Kansas Supreme Court that the state officer had acted validly.[5] However, the unexplained deci-

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[3] *Coleman* v. *Miller*, 307 U.S. 433, 456, 459 (1939) (Justices Black, Roberts, Frankfurter, and Douglas concurring). Because the four believed that the parties lacked standing to bring the action, id., 456, 460 (Justice Frankfurter dissenting on this point, joined by the other three Justices), the further discussion of the applicability of the political question doctrine is, strictly speaking, dicta. Justice Stevens, then a circuit judge, also felt free to disregard the opinion because a majority of the Court in *Coleman* "refused to accept that position." *Dyer* v. *Blair*, 390 F. Supp. 1291, 1299-1300 (D.C.N.D.Ill. 1975) (three-judge court). *See also Idaho* v. *Freeman*, 529 F. Supp. 1107, 1125-1126 (D.C.D.Idaho, 1981), *vacated and remanded to dismiss*, 459 U.S. 809 (1982).

[4] *Coleman* v. *Miller*, 307 U.S. 433, 447-456 (1939) (Chief Justice Hughes joined by Justices Stone and Reed).

[5] Justices Black, Roberts, Frankfurter, and Douglas thought this issue was nonjusticiable too. Id., 456. Although all nine Justices joined the rest of the decision, see id., 470, 474 (Justice Butler, joined by Justice McReynolds, dissenting), one Justice did not participate in deciding the issue of the lieutenant governor's participation; apparently, Justice McReynolds was the absent Member. Note, 28 Geo. L. J. 199, 200 n. 7 (19). Thus, Chief Justice Hughes and Justices Stone, Reed, and Butler would have been the four finding the issue justiciable.

sion by Chief Justice Hughes and his two concurring Justices that the issue of the lieutenant' governor's vote was justiciable indicates at the least that their position was in disagreement with the view of the other four Justices in the majority that all questions surrounding constitutional amendments are nonjusticiable.[6]

However, *Coleman* does stand as authority for the proposition that at least some decisions with respect to the proposal and ratifications of constitutional amendments are exclusively within the purview of Congress, either because they are textually committed to Congress or because the courts lack adequate criteria of determination to pass on them.[7] But to what extent the political question doctrine encompasses the amendment process and what the standards may be to resolve that particular issue remain elusive of answers.

[6] The strongest argument to the effect that constitutional amendment questions are justiciable is Rees, "Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension," 58 Tex. L. Rev. 875, 886–901 (1980), and his student note, Comment, "Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court," 37 La. L. Rev. 896 (1977). Much of the scholarly argument is collected in the ERA time extension hearings. See *supra*, p. 903 n. 23. The only recent judicial precedent directly on point found justiciability on at least some questions. *Dyer* v. *Blair*, 390 F. Supp. 1291 (D.C.N.D.Ill., 1975) (three-judge court); *Idaho* v. *Freeman*, 529 F. Supp. 1107 (D.C.D.Idaho, 1981), *vacated and remanded to dismiss*, 459 U.S. 809 (1982).

[7] In *Baker* v. *Carr*, 369 U.S. 186, 214 (1962), the Court, in explaining the political question doctrine and categorizing cases, observed that *Coleman* v. *Miller* "held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." Both characteristics were features that the Court in *Baker*, *supra*, 217, identified as elements of political questions, e.g., "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." Later formulations have adhered to this way of expressing the matter. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *O'Brien* v. *Brown*, 409 U.S. 1 (1972); *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). However, it could be argued that, whatever the Court may *say*, what it *did*, particularly in *Powell* but also in *Baker*, largely drains the political question doctrine of its force. *But see Goldwater* v. *Carter*, 444 U.S. 996, 1002 (1979) (opinion of Justices Rehnquist, Stewart, Stevens, and Chief Justice Burger) (relying heavily upon *Coleman* v. *Miller* to find an issue of treaty termination nonjusticiable). Compare id., 1001 (Justice Powell concurring) (viewing *Coleman* v. *Miller* as limited to its context).

# ARTICLE VI

## PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

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# PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

## ARTICLE VI

Clause 1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

### PRIOR DEBTS

There are no annotations to this clause.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

### NATIONAL SUPREMACY

#### Marshall's Interpretation of the National Supremacy Clause

Although the Supreme Court had held prior to Marshall's appointment to the Bench, that the supremacy clause rendered null and void a state constitutional or statutory provision which was inconsistent with a treaty executed by the Federal Government,[1] it was left for him to develop the full significance of the clause as applied to acts of Congress. By his vigorous opinions in *McCulloch* v. *Maryland* [2] and *Gibbons* v. *Ogden* [3] he gave the principle a vitality which survived a century of vacillation under the doctrine of dual federalism. In the former case, he asserted broadly that "the States have no power, by taxation or otherwise, to retard, impede, burden,

[1] *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199 (1796).
[2] 4 Wheat. (17 U.S.) 316 (1819).
[3] 9 Wheat. (22 U.S.) 1 (1824).

or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared." [4] From this he concluded that a state tax upon notes issued by a branch of the Bank of the United States was void.

In *Gibbons* v. *Ogden*, the Court held that certain statutes of New York granting an exclusive right to use steam navigation on the waters of the State were null and void insofar as they applied to vessels licensed by the United States to engage in coastal trade. Said the Chief Justice: "In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of an act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." [5]

### Task of the Supreme Court Under the Clause: Preemption

In applying the supremacy clause to subjects which have been regulated by Congress, the primary task of the Court is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute. When Congress legislates with regard to a subject, the extent and nature of the legal consequences of the regulation are federal questions, the answers to which are to be derived from a consideration of the language and policy of the state. If Congress expressly provides for exclusive federal dominion or if it expressly provides for concurrent federal-state jurisdiction,

[4] 4 Wheat. (17 U.S.) 436 (1819).

[5] 9 Wheat. (22 U.S.), 210–211 (1824). *See* the Court's discussion of *Gibbons* in *Douglas* v. *Seacoast Products*, 431 U.S. 265, 274–279 (1977).

the task of the Court is simplified, though, of course, there may still be doubtful areas in which interpretation will be necessary. Where Congress is silent, however, the Court must itself decide whether the effect of the federal legislation is to oust state jurisdiction.[6]

**The Operation of the Supremacy Clause**

When Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield.[1] Although the preemptive effect of federal legislation is best known in areas governed by the commerce clause, the same effect is present, of course, whenever Congress legislates constitutionally.[2] And the operation of the supremacy clause may be seen as well when the authority of Congress is not express but implied, not plenary but dependent upon state acceptance. The latter may be seen in a series of cases concerning the validity of state legislation enacted to bring the States within the various programs authorized by Congress pursuant to the Social Security Act.[3] State participation in the programs is voluntary, technically speaking, and no State is compelled to enact legislation comporting with the requirements of federal law. Once, however, a State is participating, its legislation which is contrary to federal requirements is void under the supremacy clause.[4]

***Federal Immunity Laws and State Courts.***—An example of the former circumstance is the operation of federal immunity acts [5] to preclude the use in state courts of incriminating statements and testimony given by a witness before a committee of Congress or a federal grand jury.[6] Because Congress in pursuance of its para-

[6] Treatment of preemption principles and standards is set out under the commerce clause, which is the greatest source of preemptive authority. *Supra*, *pp.* 281–292.

[1] E.g., *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1, 210–211 (1824). *See Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1945); *Nash* v. *Florida Industrial Comm.* 389 U.S. 235 (1967); *Lee* v. *Florida*, 392 U.S. 378 (1968); *Perez* v. *Campbell*, 402 U.S. 637 (1971).

[2] On the commerce clause preemption, *see supra*, *pp.* 281–292. For other areas in which preemption has been an issue, the index should be consulted.

[3] By the Social Security Act of 1935, 49 Stat. 620, 42 U.S.C. § 301 *et seq.*, Congress established a series of programs operative in those States which joined the system and enacted the requisite complying legislation. Although participation is voluntary, the federal tax program underlying in effect induces state participation.

[4] *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Lewis* v. *Martin*, 397 U.S. 552 (1970); *King* v. *Smith*, 392 U.S. 309 (1968). *See also Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975); *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). But note *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 11, 17–18 (1981).

[5] Which operate to compel witnesses to testify even over self-incrimination claims by giving them an equivalent immunity. *Infra*, *pp.* 1252–1255.

[6] *Adams* v. *Maryland*, 347 U.S. 179 (1954).

mount authority to provide for the national defense, as complemented by the necessary and proper clause, is competent to compel testimony of persons which is needful for legislation, it is competent to obtain such testimony over a witness's self-incrimination claim by immunizing him from prosecution on evidence thus revealed not only in federal courts but in state courts as well.[7]

***Priority of National Claims Over State Claims.***—Anticipating his argument in *McCulloch* v. *Maryland*,[8] Chief Justice Marshall in 1805 upheld an act of 1792 asserting for the United States a priority of its claims over those of the States against a debtor in bankruptcy.[9] Consistent therewith, federal enactments providing that taxes due to the United States by an insolvent shall have priority in payment over taxes due by him to a State also have been sustained.[10] Similarly, the Federal Government was held entitled to prevail over a citizen enjoying a preference under state law as creditor of an enemy alien bank in the process of liquidation by state authorities.[11] A federal law providing that when a veteran dies in a federal hospital without a will or heirs his personal property shall vest in the United States as trustee for the General Post Fund was held to operate automatically without prior agreement of the veteran with the United States for such disposition and to take precedence over a state claim founded on its escheat law.[12]

**Obligation of State Courts Under the Supremacy Clause**

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation "is imperative upon the state judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They

[7] *Ullmann* v. *United States*, 350 U.S. 422, 434–436 (1956). *See also Reina* v. *United States*, 364 U.S. 507, 510 (1960).

[8] 4 Wheat. (17 U.S.) 316 (1819).

[9] *United States* v. *Fisher*, 2 Cr. (6 U.S.) 358 (1805).

[10] *Spokane County* v. *United States*, 279 U.S. 80, 87 (1929). A state requirement that notice of a federal tax lien be filed in conformity with state law in a state office in order to be accorded priority was held to be controlling only insofar as Congress by law had made it so. Remedies for collection of federal taxes are independent of legislative action of the States. *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291 (1961). *See also United States* v. *Buffalo Savings Bank*, 371 U.S. 228 (1963) (State may not avoid priority rules of a federal tax lien by providing that the discharge of state tax liens are to be part of the expenses of a mortgage foreclosure sale); *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84 (1963) (Matter of federal law whether a lien created by state law has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien).

[11] *Brownell* v. *Singer*, 347 U.S. 403 (1954).

[12] *United States* v. *Oregon*, 366 U.S. 643 (1961).

were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.' " [1] State courts are bound then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and congressional enactments and treaties but as well the interpretations of their meanings by the United States Supreme Court.[2] The existence of inferior federal courts sitting in the States and exercising often concurrent jurisdiction of subjects has created problems with regard to the degree to which state courts are bound by their rulings. Though the Supreme Court has directed and encouraged the lower federal courts to create a corpus of federal common law,[3] it has not spoken to the effect of such lower court rulings on state courts. The state courts themselves are divided, with many contending that they are only obligated to follow United States Supreme Court rulings.[4] Nonetheless, state courts give federal court rulings varying degrees of consideration, referring to them as "persuasive and entitled to great weight," [5] or "highly persuasive," [6] or "persuasive," [7] or "merely persuasive," [8] as well as deeming them meriting "respectful consideration." [9] On the other hand, it may be that a federal court ruling is simply ignored.[10]

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[1] *Martin* v. *Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 335 (1816). State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction. *Claflin* v. *Houseman*, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa* v. *Katt*, 330 U.S. 386 (1947). *Supra*, *pp.* 765–767.

[2] *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

[3] *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *Textile Workers of America* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972).

[4] Compare *State* v. *Coleman*, 46 N.J. 16, 214 A. 2d 393 (1965), with *Commonwealth* v. *Negri*, 419 Pa. 117, 213 A. 2d 670 (1965).

[5] *Home Ins. Co.* v. *Northern Pacific R.R.*, 18 Wash. 2d 798, 808, 140 P. 2d 507, 511 (1943).

[6] *State* v. *Cissna*, 168 Ark. 565, 569, 270 S. W. 963, 964 (1925).

[7] *Staley* v. *Illinois Central R.R.*, 268 Ill. 356, 374, 109 N. E. 342, 348 (1915).

[8] *Rohr Aircraft Corp.* v. *County of San Diego*, 51 Cal. 2d 759, 764, 336 P. 2d 521, 524 (1959).

[9] *Brown* v. *Palmer Clay Products Co.*, 290 Mass. 108, 110, 195 N. E. 122, 123 (1935).

[10] In one example, a Chicago ordinance was held unconstitutional in a declaratory judgment action. *Landry* v. *Daley*, 280 F. Supp. 968 (D.C.N.D. Ill. 1968). Subsequently, a defendant unconnected with the federal court action who had been charged and convicted of violating the same ordinance had his conviction affirmed by the State's highest court with no mention of the federal decision. *City of Chicago* v. *Lawrence*, 42 Ill. 2d 461, 248 N. E. 2d 71 (1969), *appeal dismd. & cert. den.*, 396 U.S. 39 (1969). In a *habeas corpus* action, it was held that state courts and inferior federal courts are parallel with each other and that neither is paramount; therefore, in the ordinary case, a state court is not bound by a decision of the lower federal

### Supremacy Clause Versus the Tenth Amendment

The logic of the supremacy clause would seem to require that the powers of Congress be determined by the fair reading of the express and implied grants contained in the Constitution itself, without reference to the powers of the States. For a century after Marshall's death, however, the Court proceeded on the theory that the Tenth Amendment had the effect of withdrawing various matters of internal police from the reach of power expressly committed to Congress. This point of view was originally put forward in *New York City* v. *Miln,*[1] which was first argued but not decided before Marshall's death. The *Miln* case involved a New York statute which required the captains of vessels entering New York Harbor with aliens aboard to make a report in writing to the Mayor of the City, giving certain prescribed information. It might have been distinguished from *Gibbons* v. *Ogden* on the ground that the statute involved in the earlier case conflicted with an act of Congress, whereas the Court found that no such conflict existed in this case. But the Court was unwilling to rest its decision on that distinction.

Speaking for the majority, Justice Barbour seized the opportunity to proclaim a new doctrine. "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive." [2] Justice Story, in dissent, stated that Marshall had heard the previous argument and reached the conclusion that the New York statute was unconstitutional.[3]

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court. *United States ex rel. Lawrence* v. *Woods,* 432 F. 2d 1072 (C.A. 7, 1970), *cert. den.,* 402 U.S. 983 (1971).

[1] 11 Pet. (36 U.S.) 102 (1837).

[2] Id., 139.

[3] Id., 161.

The conception of a "complete, unqualified and exclusive" police power residing in the States and limiting the powers of the National Government was endorsed by Chief Justice Taney ten years later in the *License Cases.*[4] In upholding state laws requiring licenses for the sale of alcoholic beverages, including those imported from other States or from foreign countries, he set up the Supreme Court as the final arbiter in drawing the line between the mutually exclusive, reciprocally limiting fields of power occupied by the national and state Governments.[5]

Until recently, it appeared that in fact and in theory the Court had repudiated this doctrine,[6] but in *National League of Cities* v. *Usery,*[7] it revived part of this state police power limitation upon the exercise of delegated federal power. However, the decision was by a closely divided Court and subsequent interpretations give little assurance that the case will play a major role in federal-state relations.

Following the demise of the "doctrine of dual federalism" in the 1930's, the Court confronted the question whether Congress had the power to regulate state conduct and activities to the same extent, primarily under the commerce clause, as it did to regulate private conduct and activities to the exclusion of state law.[8] In *United States* v. *California,*[9] upholding the validity of the application of a federal safety law to a state-owned railroad being operated as a non-profit entity, the Court, speaking through Justice Stone, denied the existence of an implied limitation upon Congress' "plenary power to regulate commerce" when a state instrumentality was involved. "The state can no more deny the power if its exercise has been authorized by Congress than can an individual." While the State in operating the railroad was acting as a sovereign and within the powers reserved to the States, the Court said, its exercise was "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished

[4] 5 How. (46 U.S.) 504 (1847).

[5] Id., 573–574.

[6] Representative cases include *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *United States* v. *Darby*, 312 U.S. 100 (1941).

[7] 426 U.S. 833 (1976).

[8] On the doctrine of "dual federalism," see the commentary by the originator of the phrase, Professor Corwin. E. Corwin, *The Twilight of the Supreme Court—A History of Our Constitutional Theory* (Yale: 1934), 10–51; *The Commerce Power Versus Status Rights* (Princeton: 1936), 115–172; *A Constitution of Powers in a Secular State* (Charlottesville: 1951), 1–28.

[9] 297 U.S. 175 (1936).

to the extent of the grants of power to the federal government in the Constitution." [10] A series of cases followed in which the Court refused to construct any state immunity from regulation when Congress acted pursuant to a delegated power.[11] The culmination of this series had been thought to be *Maryland* v. *Wirtz* [12] in which the Court upheld the constitutionality of applying the federal wage and hour law to nonprofessional employees of state-operated schools and hospitals. In an opinion by Justice Harlan, the Court saw a clear connection between working conditions in these institutions and interstate commerce. Labor conditions in schools and hospitals affect commerce; strikes and work stoppages involving such employees interrupt and burden the flow across state lines of goods purchased by state agencies and the wages paid have a substantial effect. The commerce clause being thus applicable, the Justice wrote, Congress was not constitutionally required to "yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general 'doctrine implied in the Federal Constitution that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." ' . . . [I]t is clear that the Federal Government when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. . . . [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." [13]

*Wirtz* was specifically reaffirmed in *Fry* v. *United States* [14] in which the Court upheld the constitutionality of presidentially im-

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[10] Id., 183–185.

[11] *California* v. *United States*, 320 U.S. 577 (1944) (federal regulation of shipping terminal facilities owned by State); *California* v. *Taylor*, 353 U.S. 553 1957) (Railway Labor Act applies on state-owned railroad); *Case* v. *Bowles*, 327 U.S. 92 (1946); *Hubler* v. *Twin Falls County*, 327 U.S. 103 (1946) (federal wartime price regulations applied to state transactions; Congress' power effectively to wage war); *Board of Trustees* v. *United States*, 289 U.S. 48 (1933) (State university required to pay federal customs duties on imported educational equipment); *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U.S. 508 (1941) (federal condemnation of state lands for flood control project); *Sanitary District* v. *United States*, 206 U.S. 405 (1925) (prohibition of State from diverting water from Great Lakes).

[12] 392 U.S. 183 (1968). Justices Douglas and Stewart dissented. Id., 201.

[13] Id., 195, 196–197.

[14] 421 U.S. 542 (1975).

posed wage and salary controls, pursuant to congressional statute, on all state governmental employees. In dissent, however, Justice Rehnquist propounded a doctrine which was to obtain majority approval in *League of Cities.*[15] In that opinion, he said for the Court: "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[16] The standard apparently, in judging between permissible and impermissible federal regulation, is whether there is federal interference with "functions essential to separate and independent existence."[17] In the context of this case, state decisions with respect to the pay of their employees and the hours to be worked were essential aspects of their "freedom to structure integral operations in areas of traditional governmental functions."[18] The line of cases, exemplified by *United States* v. *California,* was distinguished and preserved on the basis that the state activities there regulated were so unlike the traditional activities of a State that Congress could reach them;[19] *Case* v. *Bowles* was held distinguishable on the basis that Congress had acted pursuant to its war powers and to have rejected the power would have impaired national defense;[20] *Fry* was distinguished on

[15] Id. 549. Essentially, the Justice was required to establish an affirmative constitutional barrier to congressional action. Id, 552–553. That is, if one asserts only the absence of congressional authority, one's chances of success are dim because of the breadth of the commerce power. But when he asserts that, say, the First or Fifth Amendment bars congressional action concededly within its commerce power, one interposes an affirmative constitutional defense that has a chance of success. It was the Justice's view that the State was "asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." Id., 553. But whence the affirmative barrier? "[I]t is not the Tenth Amendment *by its terms*. . . ." Id., 557 (emphasis supplied). Rather, the Amendment was an example of the Framers' understanding that the sovereignty of the States imposed an implied affirmative barrier to the assertion of otherwise valid congressional powers. Id., 557–559. But the difficulty with this construction is that the equivalence sought to be established by Justice Rehnquist lies *not* between an individual asserting a constitutional limit on delegated powers and a State asserting the same thing but *is* rather between an individual asserting a lack of authority and a State asserting a lack of authority; this equivalence is evident on the face of the Tenth Amendment which states that the powers not delegated to the United States "are reserved to the States respectively, *or to the people.*" (emphasis supplied). The States are thereby accorded no greater interest in restraining the exercise of nondelegated power than are the people. *See Massachusetts* v. *Mellon,* 262 U.S. 447 (1823).

[16] *National League of Cities* v. *Usery,* 426 U.S. 833, 845 (1976).

[17] Ibid.

[18] Id., 852.

[19] Id., 854.

[20] Id., 854 n. 18.

the bases that it was emergency legislation tailored to combat a serious national emergency, the means were limited in time and effect, the freeze did not displace state discretion in structuring operations or force a restructuring, and, the federal action "operated to reduce the pressure upon state budgets rather than increase them."[21] *Wirtz* was overruled; it permitted Congress to intrude into the conduct of integral and traditional state governmental functions and could not therefore stand.[22]

How much of a restriction upon congressional power *League of Cities* may prove to be is difficult to assess. First, its principle does not reach to state regulation of private conduct that affects interstate commerce, even as to such matters as state jurisdiction over land within its borders.[23] Second, it does not immunize state conduct of a business operation, activity not like "traditional governmental activities."[24] Third, it does not preclude Congress from regulating the way States regulate private activities within the State, even though such state activity is certainly traditional governmental action, on the theory that because Congress could displace or preempt state regulation it may require the States to regulate in a certain way if they wish to continue to act in this field.[25] Fourth, it does not limit Congress when it acts in an emergency or pursuant to its war powers, so that Congress may indeed reach even traditional governmental activity.[1] Fifth, it does not apply at all to Congress' enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.[2] Sixth, it apparently has no application to the exercise of Congress' spending power with conditions attached.[3] Seventh, not because of the way the Court framed the statement of its doctrinal position, which is absolutest, but because of the way it accommodated precedent and because of Justice Blackmun's concurrence, it may be that Congress is enabled to reach traditional

[21] Id., 852–853.

[22] Id., 853–855.

[23] *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981).

[24] *United Transp. Union* v. *Long Island Rail Road Co.*, 455 U.S. 678 (1982).

[25] *FERC* v. *Mississippi*, 456 U.S. 742 (1982).

[1] *National League of Cities* v. *Usery*, 426 U.S. 833, 854 n. 18 (1976).

[2] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *City of Rome* v. *United States*., 446 U.S. 156, 178–180 (1980).

[3] In *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 n. 13 (1981), the Court suggested rather ambiguously that *League of Cities* may restrict the federal spending power, citing its reservation of the cases in *League of Cities*, 426 U.S. 852 n. 17, but citing also spending clause cases indicating a rational basis standard of review of conditioned spending. The lower courts have rejected arguments of *League of Cities* application. E.g., *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (D.C.E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978); *New Hampshire* v. *Marshall*, 616 F. 2d 240 (C.A. 1), *cert. den.*, 449 U.S. 806 (1980).

governmental activities not involving employer-employee relations or is enabled to reach even these relations if the effect is "to reduce the pressures upon state budgets rather than increase them." [4] In his concurrence, Justice Blackmun suggested his lack of agreement with "certain possible implications" of the opinion and recast it as a "balancing approach" which "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." [5] It remains to be seen whether *League of Cities* becomes settled constitutional doctrine or whether it too succumbs to the fate of the cases so long controverted in the "dual federalism" dispute.

**Federal Instrumentalities and Personnel and State Police Power**

Federal instrumentalities and agencies have never enjoyed the same degree of immunity from state police regulation as from state taxation. The Court has looked to the nature of each regulation to determine whether it is compatible with the functions committed by Congress to the federal agency. This problem has arisen most often with reference to the applicability of state laws to the operation of national banks. Two correlative propositions have governed the decisions in these cases. The first was stated by Justice Miller in *First National Bank* v. *Commonwealth*.[1] "[National banks are] subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts are all based on State law. It is only when the State law incapacitates the banks discharging their duties to the government that it becomes unconstitutional." [2] In *Davis* v. *Elmira Savings Bank*,[3] the Court stated the second proposition thus: "National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the pur-

[4] *National League of Cities* v. *Usery*, 426 U.S. 833, 846–851 (1976). The quotation in the text is at id., 853 (one of the elements distinguishing the case from *Fry*).

[5] Id., 856.

[1] 9 Wall. (76 U.S.) 353 (1870).

[2] Id., 362.

[3] 161 U.S. 275 (1896).

pose of the national legislation, or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created." [4]

Similarly, a state law, insofar as it forbids national banks to use the word "saving" or "savings" in their business and advertising is void by reason of conflict with the Federal Reserve Act authorizing such banks to receive savings deposits.[5] However, federal incorporation of a railroad company of itself does not operate to exempt it from control by a State as to business consummated wholly therein.[6] Also, Treasury Department regulations, designed to implement the federal borrowing power (Art. I, § 8, cl. 2) by making United States Savings Bonds attractive to investors and conferring exclusive title thereto upon a surviving joint owner, override contrary state community property laws whereunder a one-half interest in such property remains part of the estate of a decedent co-owner.[7] Similarly, the Patent Office having been granted by Congress an unqualifed authorization to license and regulate the conduct throughout the United States of nonlawyers as patent agents, a State, under the guise of prohibiting unauthorized practice of law, is preempted from enjoining such activities of a licensed agent as entail the rendering of legal opinions as to patentability or infringement of patent rights and the preparation and prosecution of application for patents.[8]

The extent to which States may go in regulating contractors who furnish goods or services to the Federal Government is not as clearly established as is their right to tax such dealers. In 1943, a closely divided Court sustained the refusal of the Pennsylvania Milk Control Commission to renew the license of a milk dealer who, in violation of state law, had sold milk to the United States for consumption by troops at an army camp located on land belonging to the State, at prices below the minimum established by the Commission.[9] The majority was unable to find in congressional legislation, or in the Constitution, unaided by congressional enactment, any immunity from such price fixing regulations. On the same day, a different majority held that California could not penal-

[4] Id., 283.

[5] *Franklin Nat. Bank* v. *New York*, 347 U.S. 373 (1954). Dissenting, Justice Reed contended that a federal statute authorizing national banks to accept savings deposits does not support the implication that such banks, as an incident to operating savings departments, are privileged to use "savings" in their advertising.

[6] *Reagan* v. *Mercantile Trust Co.*, 154 U.S. 413 (1894).

[7] *Free* v. *Bland*, 369 U.S. 663 (1962).

[8] *Sperry* v. *Florida*, 373 U.S. 379 (1963).

[9] *Penn Dairies* v. *Milk Control Comm.*, 318 U.S. 261 (1943).

ize a milk dealer for selling milk to the War Department at less than the minimum price fixed by state law where the sales and deliveries were made in a territory which had been ceded to the Federal Government by the State and were subject to the exclusive jurisdiction of the former.[10] On the other hand, by virtue of its conflict with standards set forth in the Armed Services Procurement Act, 41 U.S.C. § 152, for determining the letting of contracts to responsible bidders, a state law licensing contractors cannot be enforced against one selected by federal authorities for work on an Air Force base.[11]

**The Doctrine of Federal Exemption From State Taxation**

***McCulloch* v. *Maryland.***—Five years after the decision in *McCulloch* v. *Maryland* that a State may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in *Osborn* v. *United States Bank*.[1] In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was "contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the Court." [2] To which Marshall replied: "It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance." [3] Secondly,

[10] *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285 (1943). Again, in *Paul* v. *United States*, 371 U.S. 245 (1963), the Court ruled that California minimum wholesale price regulations are inapplicable to milk purchased strictly for military consumption (mess hall) or resale at commissaries, for such regulations, if enforced, would defeat the armed forces procurement policy of acquiring supplies at the lowest price through competitive bidding. Whether the California prices would apply to purchases of milk from nonappropriated funds for use at military clubs or for resale at post exchanges would depend upon a finding, upon remand of the case, that California's milk price control law was in effect when the federal enclaves were acquired. If the state law did not antedate such acquisition, its application to such purchases would depend upon whether the U.S. has exclusive jurisdiction over the enclaves. The *Penn Dairies* case was distinguished by the fact that federal procurement regulations then applicable permitted purchases on the open market when competition was foreclosed by local price controls. Dissenting in part, Justices Stewart, Harlan, and Goldberg believed that a fair construction of the statutes applicable to the procurement of milk for commissaries would support the conclusion that Congress intended such procurement to be subject to state price regulations.

[11] *Leslie Miller, Inc.* v. *Arkansas*, 353 U.S. 187 (1956).

[1] 9 Wheat. (22 U.S.) 738 (1824).

[2] Id., 865.

[3] Ibid.

the appellants relied "greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government, . . . . Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors." [4] Marshall accepted this analogy but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the Government were entitled to immunity from taxation upon such transactions.[5] Thus, not only was the decision of *McCulloch* v. *Maryland* reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

***Applicability of Doctrine to Federal Securities.***—The first significant extension of the doctrine of the immunity of federal instrumentalities from state taxation came in *Weston* v. *Charleston*,[6] where Chief Justice Marshall also found in the supremacy clause a bar to state taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from state taxation.[7] A modified version of this section remains on the statute books today.[8] The right of Congress to exempt legal tender notes to the same extent as bonds was sustained in *Bank* v. *Supervisors* [9] over the objection that such notes circulate as money and should be taxable in the same way as coin. But a state tax on checks issued by the Treasurer of the United States for interest accrued upon government bonds was sustained since it did not in any way affect the credit of the National Government.[10] Similarly, the assessment for an *ad valorem* property tax of an open account for money due under a federal contract,[11] and the inclusion of the value of United States bonds owed by a decedent, in measuring an inheritance tax,[12] were held valid, since neither tax would substan-

[4] Id., 866.

[5] Id., 867.

[6] 2 Pet. (27 U.S.) 449 (1829), followed in *New York ex rel. Bank of Commerce* v. *New York City*, 2 Bl. (67 U.S.) 620 (1863).

[7] 12 Stat. 709, 710, § 1 (1863).

[8] 31 U.S.C. § 3124.

[9] 7 Wall. (74 U.S.) 26 (1868).

[10] *Hibernia Savings Society* v. *San Francisco*, 200 U.S. 310, 315 (1906).

[11] *Smith* v. *Davis*, 323 U.S. 111 (1944).

[12] *Plummer* v. *Coler*, 178 U.S. 115 (1900); *Blodgett* v. *Silberman*, 277 U.S. 1, 12 (1928).

tially embarrass the power of the United States to secure credit. Also, a state property tax levied on mutual savings banks and federal savings and loan associations and measured by the amount of their capital, surplus, or reserve and undivided profits, but without deduction of the value of their United States securities, was void as a tax on obligations of the Federal Government. Apart from the fact that the ownership interest of depositors in such institutions was different from that of corporate stockholders, the tax was imposed on the banks which were solely liable for payment thereof.[13]

Income from federal securities is also beyond the reach of the state taxing power as the cases now stand.[14] Nor can such a tax be imposed indirectly upon the stockholders on such part of the corporate dividends as corresponds to the part of the corporation's income which is not assessed, i.e., income from tax exempt bonds.[15] A State may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property of net income of the corporation, including tax exempt United States securities or the income derived therefrom.[16] The designation of a tax is not controlling.[17] Where a so-called "license tax" upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.[18]

***Taxation of Government Contractors.***—In the course of his opinion in *Osborn* v. *United States Bank,*[19] Chief Justice Marshall posed the question: "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." [20] Today, the question insofar as taxation is concerned is an-

[13] *Society for Savings* v. *Bowers,* 349 U.S. 143 (1955).

[14] *Northwestern Mutual L. Ins. Co.* v. *Wisconsin,* 275 U.S. 136, 140 (1927).

[15] *Miller* v. *Milwaukee,* 272 U.S. 713 (1927).

[16] *Provident Institution* v. *Massachusetts,* 6 Wall. (73 U.S.) 611 (1868); *Society for Savings* v. *Coite,* 6 Wall. (73 U.S.) 594 (1868); *Hamilton Company* v. *Massachusetts,* 6 Wall. (73 U.S.) 632 (1868); *Home Ins. Co.* v. *New York,* 134 U.S. 594 (1890); *Werner Machine Co.* v. *Director of Taxation,* 350 U.S. 492 (1956).

[17] *Macallen* v. *Massachusetts,* 279 U.S. 620, 625 (1929).

[18] *Northwestern Mutual L. Ins. Co.* v. *Wisconsin,* 275 U.S. 136 (1927).

[19] 9 Wheat. (22 U.S.) 738 (1824).

[20] Id., 867.

swered in the affirmative. While the early cases looked toward immunity,[21] in *James* v. *Dravo Contracting Co.*,[22] by a 5-to-4 vote, the Court established the modern doctrine. Upholding a state tax on the gross receipts of a contractor providing services to the Federal Government, the Court said that " '[I]t is not necessary to cripple [the State's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' " [23] A state-imposed sales tax upon the purchase of goods by a private firm having a cost-plus contract with the Federal Government was sustained, it not being critical to the tax's validity that it would be passed on to the Government.[24] Previously, it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line, who was engaged in carrying the mails as an independent contractor [25] and an excise tax on gasoline sold to a contractor with the Government and used to operate machinery in the construction of levees on the Mississippi River.[1] While the decisions have not set an unwavering line,[2] the Court has in recent years hewed to a very restrictive doctrine of immunity. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government

[21] The dissent in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 161 (1937), observed that the Court was overruling "a century of precedents." *See*, e.g., *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (voiding a state privilege tax on dealers in gasoline as applied to sales by a dealer to the Federal Government for use by Coast Guard). It was in *Panhandle* that Justice Holmes uttered his riposte to Chief Justice Marshall: "The power to tax is not the power to destroy while this Court sits." Id., 223 (dissenting).

[22] 302 U.S. 134 (1937).

[23] Id., 150, quoting *Willcuts* v. *Bunn*, 282 U.S. 216, 225 (1931).

[24] *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941), overruling *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928), and *Graves* v. *Texas Co.*, 298 U.S. 393 (1936). *See also Curry* v. *United States*, 314 U.S. 14 (1941). "The Constitution. . . does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." *United States* v. *Boyd*, 378 U.S. 39, 44 (1964) (sustaining sales and use taxes on contractors using tangible personal property to carry out government cost-plus contract).

[25] *Alward* v. *Johnson*, 282 U.S. 509 (1931).

[1] *Trinityfarm Const. Co.* v. *Grosjean*, 291 U.S. 466 (1934).

[2] *United States* v. *Allegheny County*, 322 U.S. 174 (1944) (voiding property tax that included in assessment the value of federal machinery held by private party); *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 (1954) (voiding gross receipts sales tax applied to contractor purchasing article under agreement whereby he was to act as agent for Government and title to articles purchased passed directly from vendor to United States).

that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." [3] Thus, the case sustained a state gross receipts tax and a use tax imposed upon contractors with the Federal Government which operated on "advanced funding," drawing on federal deposits so that only federal funds were expended by the contractors to meet their obligations.[4]

Of course, Congress may statutorily provide for immunity from taxation of federal contractors generally or in particular programs.[5]

***Taxation of Salaries of Employees of Federal Agencies.***—Of a piece with *James* v. *Dravo Contracting Co.* was the decision in *Graves* v. *New York ex rel. O'Keefe*,[6] handed down two years later, Repudiating the theory "that a tax on income is legally or economically a tax on its source," the Court held that a State could levy a nondiscriminatory income tax upon the salary of an employee of a government corporation. In the opinion of the Court, Justice Stone intimated that Congress could not validly confer such an immunity upon federal employees. "The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes; and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." [7] Chief Justice Hughes concurred

[3] *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982).

[4] "[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." Id., 734

[5] *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 161 (1937); *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 234 (1952); *United States* v. *New Mexico*, 455 U.S. 720, 737 (1982). *Roane-Anderson* held that a section of the Atomic Energy Act barred the collection of state sales and use taxes in connection with sales to private companies of personal property used by them in fulfilling their contracts with the AEC. Thereafter, Congress repealed the section for the express purpose of placing AEC contractors on the same footing as other federal contractors and the Court upheld imposition of the taxes. *United States* v. *Boyd*, 378 U.S. 39 (1964).

[6] 306 U.S. 466 (1939), followed in *State Comm.* v. *Van Cott*, 306 U.S. 511 (1939). This case overruled by implication *Dobbins* v. *Erie County*, 16 Pet. (41 U.S.) 435 (1842), and *New York ex rel. Rogers* v. *Graves*, 299 U.S. 401 (1937), which held the income of federal employees to be immune from State taxation.

[7] 306 U.S., 487.

in the result without opinion. Justices Butler and McReynolds dissented and Justice Frankfurter wrote a concurring opinion in which he reserved judgment as to "whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live." [8]

***Ad Valorem Taxes Under the Doctrine.***—Property owned by a federally chartered corporation engaged in private business is subject to state and local *ad valorem* taxes. This was conceded in *McCulloch* v. *Maryland,*[9] and confirmed a half century later with respect to railroads incorporated by Congress.[10] Similarly, a property tax may be levied against the lands under water which are owned by a person holding a license under the Federal Water Power Act.[11] However, when privately owned property erected by lessees on tax exempt state lands is taxed by a county at less than full value, and houses erected by contractors on land leased from a federal Air Force base are taxed at full value, the latter tax, solely by reason of the discrimination against the United States and its lessees, is rendered void.[12] Likewise, when under state laws, a school district does not tax private lessees of state and municipal realty, whose leases are subject to termination at the lessor's option in the event of sale, but does levy a tax, measured by the entire value of the realty, on lessees of United States property utilized for private purposes and whose leases are terminable at the option of the United States in an emergency or upon sale, the discrimination voided the tax collected from the latter. "A state tax may not discriminate against the Government or those with whom it deals" in the absence of significant differences justifying levy of higher taxes on lesses of federal property.[13]

[8] Id. 492.

[9] 4 Wheat. (17 U.S.) 316, 426 (1819).

[10] *Thomson* v. *Pacific Railroad,* 9 Wall. (76 U.S.) 579, 588, (1870); *Union Pacific R. Co.* v. *Peniston,* 18 Wall. (85 U.S.) 5, 31 (1873).

[11] *Susquehanna Power Co.* v. *Tax Comm.* (No. 1), 283 U.S. 291 (1931).

[12] *Moses Lake Homes* v. *Grant County,* 365 U.S. 744 (1961).

[13] *Phillips Chemical Co.* v. *Dumas School Dist.,* 361 U.S. 376, 383, 387 (1960). In *Offutt Housing Co.* v. *Sarpy County,* 351 U.S. 253 (1956), a housing company was held liable for county personal property taxes on the ground that the Government had consented to State taxation of the company's interest as lessee. Upon its completion of housing accommodations at an Air Force Base, the company had leased the houses and the furniture therein from the Federal Government. Four dissenters, Justices Douglas, Reed, Burton, and Harlan, contended that the cited legislation (61 Stat. 774-776) did not clearly manifest a congressional assent to local taxation of property in federal enclaves.

Land conveyed by the United States to a corporation for dry dock purposes was subject to a general property tax, despite a reservation in the conveyance of a right to free use of the dry dock and a provision for forfeiture in case of the continued unfitness of the dry dock for use or the use of land for other purposes.[14] Also, where equitable title has passed to the purchaser of land from the Government, a State may tax the equitable owner on the full value thereof, despite retention of legal title;[15] but, in the case of reclamation entries, the tax may not be collected until the equitable title passes.[16] In the pioneer case of *Van Brocklin* v. *Tennessee*,[17] the State was denied the right to sell for taxes lands which the United States owned at the time the taxes were levied, but in which it had ceased to have any interest at the time of sale. Similarly, a State cannot assess land in the hands of private owners for benefits from a road improvement completed while it was owned by the United States.[18]

In 1944, with two dissents, the Court held that where the Government purchased movable machinery and leased it to a private contractor the lessee could not be taxed on the full value of the equipment.[19] Twelve years later, and with a like number of Justices dissenting, the Court upheld the following taxes imposed on federal contractors: (1) a municipal tax levied pursuant to a state law which stipulated that when tax exempt real property is used by a private firm for profit, the latter is subject to taxation to the same extent as if it owned the property, and based upon the value of real property, a factory, owned by the United States and made available under a lease permitting the contracting corporation to deduct such taxes from rentals paid by it; the tax was collectible only by direct action against the contractor for a debt owed, and was not applicable to federal properties on which payments in lieu of taxes are made; (2) a municipal tax, levied under the authority of the same state law, based on the value of the realty owned by the United States, and collected from a cost-plus-fixed-fee contractor, who paid no rent but agreed not to include any part of the cost of the facilities furnished by the Government in the price of goods supplied under the contract; (3) another municipal tax levied in the

[14] *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U.S. 375 (1904).

[15] *Northern Pacific R. Co.* v. *Myers*, 172 U.S. 589 (1899); *New Brunswick* v. *United States*, 276 U.S. 547 (1928).

[16] *Irwin* v. *Wright*, 258 U.S. 219 (1922).

[17] 117 U.S. 151 (1886).

[18] *Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643 (1925).

[19] *United States* v. *Allegheny County*, 322 U.S. 174 (1944). Justices Roberts and Frankfurter dissented.

same State against a federal subcontractor, and computed on the value of materials and work in process in his possession, notwithstanding that title thereto had passed to the United States following his receipt of installment payments.[20]

In sustaining the first tax, the Court held that it was imposed, not on the Government or on its property, but upon a private lessee, that it was computed by the value of the use to the contractor of the federally leased property, and that it was nondiscriminatory; that is, it was designed to equalize the tax burden carried by private business using exempt property with that of similar businesses using taxed property. Distinguishing the *Allegheny* case, the Court maintained that in this older decision, the tax invalidated was imposed directly on federal property and that the question of the legality of a privilege on use and possession of such property had been expressly reserved therein. Also insofar as the economic incidents of such tax on private use curtails the net rental accruing to the Government, such burden was viewed as insufficient to vitiate the tax.[21]

Deeming the second and third taxes similar to the first, the Court sustained them as taxes on the privilege of using federal property in the conduct of private business for profit. With reference to the second, the Court emphasized that the Government had reserved no right of control over the contractor and, hence, the latter could not be viewed as an agent of the Government entitled to the immunity derivable from that status.[22] As to the third tax, the Court asserted that there was no difference between taxing a private party for the privilege of using property he possesses, and taxing him for possessing property which he uses; for, in both instances, the use was private profit. Moreover, the economic burden thrust upon the Government was viewed as even more remote than in the administration of the first two taxes.[23]

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[20] *United States* v. *City of Detroit*, 355 U.S. 466 (1958). The Court more recently has stated that *Allegheny County* "in large part was overruled" by *Detroit. United States* v. *New Mexico*, 455 U.S. 720, 732 (1982).

[21] 355 U.S. 478, 482, 483.

[22] *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958).

[23] *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958). In *United States* v. *County of Fresno*, 429 U.S. 452 (1977), these cases were reaffirmed and applied to sustain a tax imposed on the possessory interests of United States Forest Service employees in housing located in national forests within the county and supplied to the employees by the Forest Service as part of their compensation. A State or local government may raise revenues on the basis of property owned by the United States as long as it is in possession or use by the private citizen that is being taxed.

***Federal Property and Functions.***—Property owned by the United States is, of course, wholly immune from state taxation.[24] No State can regulate, by the imposition of an inspection fee, any activity carried on by the United States directly through its own agents and employees.[25] An early case whose authority is now uncertain held invalid a flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business.[1]

***Federally Chartered Finance Agencies: Statutory Exemptions.***—Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent.[2] Immediately after the Supreme Court construed the statute authorizing the States to tax national bank shares as allowing a tax on the preferred shares of such a bank held by the Reconstruction Finance Corporation,[3] Congress passed a law exempting such shares from taxation. The Court upheld this measure, saying: "When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will." [4] In *Pittman* v. *Home Owners' Corporation,*[5] the Court sustained the power of Congress under the necessary and proper clause to immunize the activities of the Corporation from state taxation; and in *Federal Land Bank* v. *Bismarck Co.,*[6] the like result was reached with respect to an attempt by the State to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by foreclosure or mortgages.

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[24] *Clallam County* v. *United States,* 263 U.S. 341 (1923). *See also Cleveland* v. *United States,* 323 U.S. 329, 333 (1945); *United States* v. *Mississippi Tax Comm.,* 412 U.S. 363 (1973); *United States* v. *Mississippi Tax Comm.,* 421 U.S. 599 (1975).

[25] *Mayo* v. *United States,* 319 U.S. 441 (1943). A municipal tax on the privilege of working within the city, levied at the rate of one percent of earnings, although not deemed to be an income tax under state law, was sustained as such when collected from employees of a naval ordinance plant by reason of federal assent to that type of tax expressed in the Buck Act. 4 U.S.C. §§ 105–110. *Howard* v. *Commissioners,* 344 U.S. 624 (1953).

[1] *Telegraph Co.* v. *Texas,* 105 U.S. 460, 464 (1882).

[2] *Des Moines Bank* v. *Fairweather,* 263 U.S. 103, 106 (1923); *Owensboro National Bank* v. *Owensboro,* 173 U.S. 664, 669 (1899); *First Nat. Bank* v. *Adams,* 258 U.S. 362 (1922); *Michigan Nat. Bank* v. *Michigan,* 365 U.S. 467 (1961).

[3] *Baltimore Nat. Bank* v. *Tax Comm.,* 297 U.S. 209 (1936).

[4] *Maricopa County* v. *Valley Bank,* 318 U.S. 357, 362, (1943).

[5] 308 U.S. 21 (1939).

[6] 314 U.S. 95 (1941).

The State's principal argument proceeded thus: "Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositories and fiscal agents for the federal government and providing a market for government bonds; all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore §26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions." [7] The Court rejected this argument and invalidated the tax saying: "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental . . . It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental." [8]

Similarly, the lease by a federal land bank of oil and gas in a mineral estate, which it had reserved in land originally acquired through foreclosure and thereafter had conveyed to a third party, was held immune from a state personal property tax levied on the lease and on the royalties accruing thereunder. The fact that at the time of the conveyance and lease, the bank had recouped its entire loss resulting from the foreclosure did not operate to convert the mineral estate and lease into a non-governmental activity no longer entitled to exemption.[9] However, in the absence of federal legislation, a state law laying a percentage tax on the users of safety deposit services, measured by the bank's charges therefore, was held valid as applied to national banks. The tax, being on the user, did not, the Court held, impose an intrinsically unconstitutional burden on a federal instrumentality.[10]

***Royalties.***—In 1928 the Court went so far as to hold that a State could not tax as income royalties for the use of a patent issued by the United States.[11] This proposition was soon overruled

[7] Id., 101.
[8] Id., 102.
[9] *Fed. Land Bank* v. *Kiowa County*, 368 U.S. 146 (1961).
[10] *Colorado Bank* v. *Bedford*, 310 U.S. 41 (1940).
[11] *Long* v. *Rockwood*, 277 U.S. 142 (1928).

in *Fox Film Corp.* v. *Doyal*,[12] where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Likewise a State may lay a franchise tax on corporations, measured by the net income from all sources and applicable to income from copyright royalties.[13]

***Immunity of Lessees of Indian Lands.***—Another line of anomalous decisions conferring tax immunity upon lessees of restricted Indian lands was overruled in 1949. The first of these cases, *Choctaw, O. & G. R. Co.* v. *Harrison*,[14] held that a gross production tax on oil, gas, and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next the Court held the lease itself a federal instrumentality immune from taxation.[15] A modified gross production tax imposed in lieu of all *ad valorem* taxes was invalidated in two *per curiam* decisions.[16] In *Gillespie* v. *Oklahoma*,[17] a tax upon net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the State was held inapplicable to oil produced on restricted Indian lands.[18] In harmony with the trend to restricting immunity implied from the Constitution to activities of the Government itself, the Court overruled all these decisions in *Oklahoma Tax Comm.* v. *Texas Co.* and held that a lessee of mineral rights in restricted Indian lands was subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant him immunity.[19]

**Summation and Evaluation**

Although *McCulloch* v. *Maryland* and *Gibbons* v. *Ogden* were expressions of a single thesis, the supremacy of the National Gov-

[12] 286 U.S. 123 (1932).

[13] *Educational Films Corp.* v. *Ward*, 282 U.S. 379 (1931).

[14] 235 U.S. 292 (1914).

[15] *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522 (1916).

[16] *Howard* v. *Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co.* v. *Howard*, 248 U.S. 549 (1919).

[17] 257 U.S. 501 (1922).

[18] *Oklahoma* v. *Barnsdall Corp.*, 296 U.S. 521 (1936).

[19] 336 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity lessees of Indian lands from state taxation, which he found to stem from early rulings that tribal lands are themselves immune. *The Kansas Indians*, 5 Wall. (72 U.S.) 737 (1867); *The New York Indians*, 5 Wall. (72 U.S.) 761 (1867). One of the first steps taken to curtail the scope of the immunity was *Shaw* v. *Oil Corp.*, 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to state taxation. Congress soon upset the decision, however, and its act was sustained in *Board of Comm.* v. *Seber*, 318 U.S. 705 (1943).

ernment, their development after Marshall's death has been sharply divergent. During the period when *Gibbons* v. *Ogden* was eclipsed by the theory of dual federalism, the doctrine of *McCulloch* v. *Maryland* was not merely followed but greatly extended as a restraint on state interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the more extreme positions taken in reliance upon *McCulloch* v. *Maryland*. Today, the application of the supremacy clause is becoming, to an ever increasing degree, a matter of statutory interpretation; a determination whether state regulations can be reconciled with the language and policy of federal enactments. In the field of taxation, the Court has all but wiped out the private immunities previously implied from the Constitution without explicit legislative command. Broadly speaking, the immunity which remains is limited to activities of the Government itself, and to that which is explicitly created by statute, e.g., that granted to federal securities and to fiscal institutions chartered by Congress. But the term, activities, will be broadly construed.

Clause 3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## OATH OF OFFICE

### Power of Congress in Respect to Oaths

Congress may require no other oath of fidelity to the Constitution, but it may superadd to this oath such other oath of office as its wisdom may require.[1] It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law,[2] and the same rule holds in the case of the States.[3]

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[1] *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 416 (1819).

[2] *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 337 (1867).

[3] *Cummings* v. *Missouri*, 4 Wall. (71 U.S.) 277, 323 (1867). *See also Bond* v. *Floyd*, 385 U.S. 116 (1966), where the Supreme Court held that antiwar statements made

Cl. 3—Oath of Office

### National Duties of State Officers

Commenting in *The Federalist* on the requirement that state officers, as well as members of the state legislatures, shall be bound by oath or affirmation to support the Constitution, Hamilton wrote: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends;* and it will be rendered auxiliary to the enforcement of its laws." The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention: "They [the States] are the instruments upon which the Union must frequently depend for the support and execution of their powers . . ." [4] Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,[5] and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789 [6] left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different States and in concurrent possession of the rest. By other sections of the same act state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, while any justice of the peace or other magistrates of any of the States was authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. Even as late as 1839, Congress authorized all pecuniary penalties and forfeitures under the laws of the United States to be sued for before any court of competent jurisdiction in the State where the cause of action arose or where the offender might be found.[7] Pursuant also of the same idea of treating state governmental organs as available to the National Government for administrative purposes, the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one State to another exclusively to the state ex-

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by a newly elected member of the Georgia House of Representatives were not inconsistent with the oath of office, pledging support to the federal constitution.

[4] *The Federalist* No. 27 (Modern Library ed. 1937), 169–170 (emphasis in original); 1 M. Farrand, *Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 404.

[5] *See* Article I, § 3, cl. 1; § 4, cl. 1; § 10; Article II, § 1, cl. 2; Article III, § 2, cl. 2; Article IV, §§ 1, 2; Article V; Amendments 13, 14, 15, 17, 19, 25, and 26.

[6] 1 Stat. 73 (1789).

[7] 5 Stat. 322, § 3 (1839).

ecutives.[8] Certain later acts empowered state courts to entertain criminal prosecutions for forging paper of the Bank of the United States and for counterfeiting coins of the United States,[9] while still others conferred on state judges authority to admit aliens to national citizenship and provided penalties in case such judges should utter false certificates of naturalization—provisions which are still on the statute books.[10]

With the rise of the doctrine of States Rights and of the equal sovereignty of the States with the National Government, the availability of the former as instruments of the latter in the execution of its power came to be questioned.[11] In *Prigg* v. *Pennsylvania*,[12] decided in 1842, the constitutionality of the provision of the act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in *Kentucky* v. *Dennison*,[13] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it "the duty" of the Chief Executive of a State to render up a fugitive from justice upon the demand of the Chief Executive of State from which the fugitive had fled. The court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In the *Prigg* case the Court, speaking by Justice Story, said: "[S]tate magistrates may, if they choose, exercise the authority, [conferred by the act] unless prohibited by state legislation." [14]

In the *Dennison* case, "the duty" of state executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty." Said Chief Justice Taney for the Court: "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitu-

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[8] 1 Stat. 302 (1793).

[9] 2 Stat. 404 (1806).

[10] *See* 2 J. Kent, *Commentaries on American Law*, J. Gould ed. (Boston: 14th ed. 1896), 64-65; 34 Stat. 596, 602 (1906), 8 U.S.C. § 1421. *See also Holmgren* v. *United States*, 217 U.S. 509 (1910).

[11] For the development of opinion, especially on the part of state courts, adverse to the validity of such legislation, *see* 1 J. Kent, *Commentaries on American Law* (New York: 1826), 396-404.

[12] 16 Pet. (41 U.S.) 539 (1842).

[13] 24 How. (65 U.S.) 66 (1861).

[14] 16 Pet. (41 U.S.) 539, 622 (1842).

tion, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State. It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution." [15]

Eighteen years later, in *Ex parte Siebold,*[16] the Court sustained the right of Congress, under Article I, § 4, paragraph 1 of the Constitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. While the doctrine of the holding is expressly confined to cases in which the National Government and the States enjoy "a concurrent power over the same subject matter," no attempt was made to catalogue such cases. Moreover, the outlook of Justice Bradley's opinion for the Court is decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns, even in a matter in which they are mutually concerned." To this Justice Bradley replied: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and fears and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." [17]

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[15] 24 How. (65 U.S.) 66, 107–108 (1861). Note the suggestion in *FERC* v. *Mississippi*, 456 U.S. 742, 761–765 (1982), controverted by a strong dissent, that the language of *Dennison* and *Prigg* "is not representative of the law today." *But compare Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 692–696 (1979).

[16] 100 U.S. 371 (1880).

[17] Id., 392.

Three years earlier, the Court, speaking also by Justice Bradley, sustained a provision of the Bankruptcy Act of 1867 giving assignees a right to sue in state courts to recover the assets of a bankrupt. Said the Court: The statutes of the United States are as much the law of the land in any State as are those of the State; and although exclusive jurisdiction for their enforcement may be given to the federal courts, yet where it is not given, either expressly or by necessary implication, the state courts having competent jurisdiction in other respects, may be resorted to.[18]

The Selective Service Act of 1917 [19] was enforced to a great extent through state "employees who functioned under State supervision"; [20] and state officials were frequently employed by the National Government in the enforcement of National Prohibition.[21] Nowadays, there is constant cooperation, both in peacetime and in wartime, in many fields between national and state officers and official bodies.[22] This relationship obviously calls for the active fidelity of both categories of officialdom to the Constitution.

[18] *Claflin* v. *Houseman*, 93 U.S. 130, 136, 137 (1876), followed in *Second Employers' Liability Cases*, 223 U.S. 1, 55–59 (1912).

[19] 40 Stat. 76 (1917).

[20] J. Clark, *The Rise of a New Federalism* (New York: 1938), 91.

[21] Hart, "Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement," 13 Va. L. Rev. 86 (1926).

[22] J. Clark, *The Rise of a New Federalism* (New York: 1938), 91; E. Corwin, *Court Over Constitution* (Princeton: 1938), 148–168.

# ARTICLE VII

## RATIFICATION

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

### In General

In *Owings* v. *Speed* [1] the question at issue was whether the Constitution of the United States operated upon an act of Virginia passed in 1788. The Court held it did not, stating in part:

"The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'

"Both Governments could not be understood to exist at the same time. The New Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day proceeding that on which the Members of the new Congress were directed to assemble.

"The resolution of the Convention might originally have suggested a doubt, whether the Government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789 . . ."

[1] 5 Wheat. (18 U.S.) 420, 422–423 (1820).

# AMENDMENTS TO THE CONSTITUTION
## FIRST THROUGH TENTH AMENDMENTS

# BILL OF RIGHTS

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# AMENDMENTS TO THE CONSTITUTION

## FIRST THROUGH TENTH AMENDMENTS

### Bill of Rights

On September 12, five days before the Convention adjourned, Mason and Gerry raised the question of adding a bill of rights to the Constitution. Said Mason: "It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours." But the motion of Gerry and Mason to appoint a committee for the purpose of drafting a bill of rights was rejected.[1] Again, on September 14, Pinckney and Gerry sought to add a provision "that the liberty of the Press should be inviolably observed—." But after Sherman observed that such a declaration was unnecessary, because "[t]he power of Congress does not extend to the Press," this suggestion too was rejected.[2] It cannot be known accurately why the convention opposed these suggestions. Perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the States, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration would deny, perhaps all these contributed to the rejection.[3]

In any event, the opponents of ratification soon made the absence of a bill of rights a major argument [4] and some friends of the document, such as Jefferson,[5] strongly urged amendment to in-

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[1] 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 587–588.

[2] Id., 617–618.

[3] The argument most used by proponents of the Constitution was that inasmuch as Congress was delegated no power to do those things which a bill of rights would proscribe no bill of rights was necessary and that it might be dangerous because it would contain exceptions to powers not granted and might therefore afford a basis for claiming more than was granted. *The Federalist* No. 84 (Modern Library ed. 1937), 555–567 (Hamilton).

[4] Substantial excerpts from the debate in the country and in the ratifying conventions are set out in 1 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* (New York: 1971), 435–620; 2 id., 627–980. The earlier portions of volume 1 trace the origins of the various guarantees back to the Magna Carta.

[5] In a letter to Madison, Jefferson indicated what he did not like about the proposed Constitution. "First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of the fact triable by the laws of the land and not by the law of Nations. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth,

clude a declaration of rights.[6] Several state conventions ratified while urging on the Congress to be convened the proposing of such amendments, 124 amendments in all being put forward by these States.[7] Although some dispute has occurred with regard to the obligation of the first Congress to propose amendments, Madison at least had no doubts[8] and introduced a series of proposals,[9] which

general or particular, and what no just government should refuse, or rest on inference." 12 *The Papers of Thomas Jefferson*, J. Boyd ed. (Princeton : 1958), 438, 440. In subsequent letters, Jefferson suggested that nine States should ratify and four withhold ratification until amendments adding a bill of rights were adopted. Id., 557, 570, 583. Jefferson still later endorsed the plan put forward by Massachusetts to ratify and propose amendments. 14 id., 649.

[6] Thus, George Washington in letters specifically observed that a ratified Constitution could be amended but that making such amendments conditions for ratification was ill-advised. 11 *The Writings of George Washington*, W. Ford ed. (New York: 1891), 249.

[7] 2 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* (New York: 1971), 627-980. *See also* H. Ames, *The Proposed Amendments to the Constitution* (Washington: 1896), 19.

[8] Madison began as a doubter, writing Jefferson that while "[m]y own opinion has always been in favor of a bill of rights," still "I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment. . . ." 5 *The Writings of James Madison*, G. Hunt ed. (New York : 1904), 269. His reasons were four. (1) The Federal Government was not granted the powers to do what a bill of rights would proscribe. (2) There was reason "to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." (3) A greater security was afforded by the jealousy of the States of the national government. (4) "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. . . . Wherever there is a interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince." Id., 272-273. Jefferson's response acknowledged the potency of Madison's reservations and attempted to answer them, in the course of which he called Madison's attention to an argument in favor not considered by Madison "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." 14 *The Papers of Thomas Jefferson*, J. Boyd ed. (Princeton: 1958), 659. Madison was to assert this point when he introduced his proposals for a bill of rights in the House of Representatives. 1 *Annals of Congress* 439 (June 8, 1789).

In any event, following ratification, Madison in his successful campaign for a seat in the House firmly endorsed the proposal of a bill of rights. "[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c." 5 *The Writings of James Madison*, G. Hunt ed. (New York: 1904), 319.

he had difficulty claiming the interest of the rest of Congress in considering. At length, the House of Representatives adopted 17 proposals; the Senate rejected two and reduced the remainder to twelve, which were accepted by the House and sent on to the States [10] where ten were ratified and the other two never received the requisite number of concurring States.[11]

***Bill of Rights and the States.***—One of the amendments which the Senate refused to accept—declared by Madison to be "the most valuable of the whole list"[12]—read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases shall not be infringed by any State."[13] In spite of this rejection the contention that the Bill of Rights—or at least the first eight—was applicable to the States was repeatedly pressed upon the Supreme Court. By a long series of decisions, beginning with the opinion of Chief Justice Marshall in *Barron* v. *Baltimore* [14] the argument was consistently rejected. Nevertheless, the enduring vitality of natural law concepts encouraged renewed appeals for judicial protection through application of the Bill of Rights.[15]

***The Fourteenth Amendment.***—Following the ratification of the Fourteenth Amendment, litigants disadvantaged by state laws and policies first resorted unsuccessfully to the privileges and immunities clause of § 1 for judicial protection.[16] Then, claimants seized

[9] 1 *Annals of Congress* 424-450 (June 8, 1789). The proposals as introduced are at id., 433-436. The Members of the House were indisposed to moving on the proposals.

[10] Debate in the House began on July 21, 1789, and final passage was had on August 24, 1789. 1 *Annals of Congress* 660-779. The Senate considered the proposals from September 2 to September 9, but no journal was kept. The final version compromised between the House and Senate was adopted September 24 and 25. *See* 2 B. Schwartz, (ed.), *The Bill of Rights: A Documentary History (New York: 1971)*, 983-1167.

[11] The two not ratified dealt with the ratio of population to representatives and with compensation of Members of Congress. H. Ames, *The Proposed Amendments to the Constitution* (Washington: 1896), 184, 185.

[12] 1 *Annals of Congress* 755 (August 17, 1789).

[13] Ibid.

[14] 7 Pet. (32 U.S.) 243 (1833). *See also Livingston's Lessee* v. *Moore*, 7 Pet. (32 U.S.) 469 (1833); *Permoli* v. *First Municipality*, 3 How. (44 U.S.) 589, 609 (1845); *Fox* v. *Ohio*, 5 How. (46 U.S.) 410 (1847); *Smith* v. *Maryland*, 18 How. (59 U.S.) 71 (1855); *Withers* v. *Buckley*, 20 How. (61 U.S.) 84 (1858); *Pervear* v. *Massachusetts*, 5 Wall. (72 U.S.) 475 (1867); *Twitchell* v. *Commonwealth*, 7 Wall. (74 U.S.) 321 (1869).

[15] Thus, Justice Miller for the Court in *Loan Association* v. *Topeka*, 20 Wall. (87 U.S.) 655, 662, 663 (1875): "It must be conceded that there are . . . rights in every free government beyond the control of the State . . . There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

[16] *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873).

upon the due process clause of the Fourteenth Amendment as guaranteeing certain fundamental and essential safeguards, without pressing the point of the applicability of the Bill of Rights.[17] It was not until 1887 that a litigant contended that, although the Bill of Rights had not limited the States, yet so far as they secured and recognized the fundamental rights of man they were privileges and immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment.[18] This case the Court decided on other grounds, but in a series of subsequent cases it confronted the argument and rejected it,[19] though over the dissent of the elder Justice Harlan who argued that the Fourteenth Amendment in effect incorporated the Bill of Rights and made them effective restraints on the States.[20] Until 1947, this dissent made no headway,[21] but in *Adamson* v. *California*,[22] a mi-

[17] *Walker* v. *Sauvinet*, 92 U.S. 90 (1876); *United States* v. *Cruikshank*, 92 U.S. 542 (1876); *Hurtado* v. *California*, 110 U.S. 516 (1884); *Presser* v. *Illinois*, 116 U.S. 252 (1886). In *Hurtado*, in which the Court held that indictment by information rather than by grand jury did not offend due process, the elder Justice Harlan entered a long dissent arguing that due process preserved the fundamental rules of procedural justice as they had existed in the past, but he made no reference to the possibility that the Fourteenth Amendment due process clause embodied the grand jury indictment guarantee of the Fifth Amendment.

[18] *Spies* v. *Illinois*, 123 U.S. 131 (1887).

[19] *In re Kemmler*, 136 U.S. 436 (1890); *McElvaine* v. *Brush*, 142 U.S. 155 (1891); *O'Neil* v. *Vermont*, 144 U.S. 323 (1892).

[20] In *O'Neil* v. *Vermont*, 144 U.S. 323, 370 (1892), Justice Harlan, with Justice Brewer concurring, argued "that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Field took the same position. Id., 337. Thus, he said: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." Id., 363. Justice Harlan reasserted this view in *Maxwell* v. *Dow*, 176 U.S. 581, 605 (1900) (dissenting opinion), and in *Twining* v. *New Jersey*, 211 U.S. 78, 114 (1908) (dissenting opinion). Justice Field was no longer on the Court and Justice Brewer did not in either case join Justice Harlan as he had done in *O'Neil*.

[21] *Cf. Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937), in which Justice Cardozo for the Court, including Justice Black, said: "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule." *See* Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746 (1965). According to Justice Douglas' calculations, ten Justices have felt that the Fourteenth Amendment incorporated the Bill of Rights, but a majority of

nority of four Justices were marshalled behind Justice Black who contended that his researches into the history of the Fourteenth Amendment left him in no doubt "that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." [23] Scholarly research stimulated by Justice Black's view tended to discount the validity of much of the history recited by him and to find in the debates in Congress and in the ratifying conventions no support for his contention.[24] Other scholars, going beyond the immediate debates, found in the pre- and post-Civil War period a substantial body of abolitionist constitutional thought which could be shown to have greatly influenced the principal architects and observed that all three formulations of § 1, privileges and immunities, due process, and equal protection, had long been in use as shorthand descriptions for the principal provisions of the Bill of Rights.[25]

Unresolved perhaps in theory, the controversy in fact has been mostly mooted through the "selective incorporation" of a majority of the provisions of the Bill of Rights.[1] This process seems to have

the Court at any one particular time has never been of that view, *Gideon* v. *Wainwright*, 372 U.S. 355, 345–347 (1963) (concurring opinion). *See also Malloy* v. *Hogan*, 378 U.S. 1, 4 n. 2 (1964). It must be said, however that many of these Justices were not consistent in asserting this view. Justice Goldberg probably should be added to the list. *Pointer* v. *Texas*, 380 U.S. 400, 410–414 (1965) (concurring opinion).

[22] 332 U.S. 46 (1947).

[23] Id., 74, Justice Black's contentions, id., 68–123, were concurred in by Justice Douglas. Justices Murphy and Rutledge also joined this view but went further. "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Id., 124. Justice Black rejected this extension as an invocation of "natural law due process." For examples in which he and Justice Douglas split over the application of nonspecified due process limitations, *see*, e.g., *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *In re Winship*, 397 U.S. 358 (1970).

[24] The leading piece is Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949).

[25] Graham, "Early Antislavery Backgrounds of the Fourteenth Amendment," 1950 Wisc. L. Rev. 479,610; Graham, "Our 'Declaratory' Fourteenth Amendment," 7 Stan. L. Rev. 3 (1954); J. tenBroek, *Equal Under Law* (New York: 1965 enlarged ed.). The argument of these scholars tends to support either a "selective incorporation" theory or a fundamental rights theory, but it emphasized the abolitionist stress on speech and press as well as on jury trials as included in either construction.

[1] *Williams* v. *Florida*, 399 U.S. 78, 130–132 (1970) (Justice Harlan concurring in part and dissenting in part). The language of this process is somewhat abstruse. Justice Frankfurter objected strongly to "incorporation" but accepted other terms. "The

had its beginnings in an 1897 case in which the Court, without mentioning the just compensation clause of the Fifth Amendment, held that the Fourteenth Amendment's due process clause forbade the taking of private property without just compensation.[2] Then, in *Twining* v. *New Jersey*,[3] the Court observed that "it is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . . If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such nature that they are included in the conception of due process of law." And in *Gitlow* v. *New York*,[4] the Court in dictum said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." After quoting the language set out above from *Twining* v. *New Jersey*, the Court in 1932 said that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character." [5] The doctrine of this period was best formulated by Justice Cardozo, who observed that the due process clause of the Fourteenth Amendment might proscribe a certain state procedure, not because the proscription was spelled out in one of the first eight amendments, but because the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," [6] because certain proscrip-

cases say the First [Amendment] is 'made applicable' by the Fourteenth or that it is taken up into the Fourteenth by 'absorption,' but not that the Fourteenth 'incorporates' the First. This is not a quibble. The phrase 'made applicable' is a neutral one. The concept of 'absorption' is a progressive one, i.e., over the course of time something gets absorbed into something else. The sense of the word 'incorporate' implies simultaneity. One writes a document incorporating another by reference at the time of the writing. The Court has used the first two forms of language, but never the third." Frankfurter, "Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746, 747-748 (1965). It remains true that no opinion of the Court has used "incorporation" to describe what it is doing, *cf. Washington* v. *Texas*, 388 U.S. 14, 18 (1967); *Beaton* v. *Maryland*, 395 U.S. 784, 794 (1969), though it has regularly been used by dissenters. E.g., *Pointer* v. *Texas* 380 U.S. 400, 408 (1965) (Justice Harlan); *Williams* v. *Florida*, 399 U.S. 78, 130 (1970) (Justice Harlan); *Williams* v. *Florida*, *supra*, 143 (Justice Stewart).

[2] *Chicago, B. & Q. Railroad* v. *City of Chicago*, 166 U.S. 226 (1897).

[3] 211 U.S. 78, 99 (1908).

[4] 268 U.S. 652, 666 (1925).

[5] *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932).

[6] *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934).

tions were "implicit in the concept of ordered 'liberty.'" [7] As late as 1958, Justice Harlan was able to assert in an opinion of the Court that a certain state practice fell afoul of the Fourteenth Amendment because "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . ." [8]

But this process of "absorption" into due process of rights which happened also to be specifically named in the Bill of Rights came to be supplanted by a doctrine which had for a time coexisted with it, the doctrine of "selective incorporation." This doctrine holds that the due process clause incorporates the text of certain of the provisions of the Bill of Rights. Thus in *Malloy* v. *Hogan*,[9] Justice Brennan was enabled to say: "We have held that the guarantees of the First Amendment, . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment, . . . and the right to counsel guaranteed by the Sixth Amendment, . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." And Justice Clark was enabled to

[7] *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Justice Frankfurter was a strong advocate of this approach to the Fourteenth Amendment's due process clause. E.g., *Rochin* v. *California*, 342 U.S. 165 (1952); *Adamson* v. *California*, 332 U.S. 46, 59 (1947) (concurring opinion). Justice Harlan followed him in this regard. E.g., *Benton* v. *Maryland*, 395 U.S. 784, 801 (1969) (dissenting opinion); *Williams* v. *Florida*, 399 U.S. 78, 117 (1970) (concurring in part and dissenting in part). For early applications of the principles to void state practices, *see Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Rochin* v. *California*, *supra*.

[8] *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

[9] 378 U.S. 1, 10 (1964). In *Washington* v. *Texas*, 388 U.S. 14, 18 (1967), Chief Justice Warren for the Court said that the Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." And in *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969), Justice Marshall for the Court wrote: "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." In this process, the Court has substantially increased the burden of showing that a procedure is fundamentally fair as carried by those who would defend a departure from the requirement of the Bill of Rights. That is, previously the Court has asked whether a civilized system of criminal justice could be imagined that did not accord the particular procedural safeguard. E.g., *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). The present approach is to ascertain whether a particular guarantee is fundamental in the light of the system existent in the United States, which can make a substantial difference. *Duncan* v. *Louisiana*, 391 U.S. 145, 149 n. 14 (1968). *Quaere*, the approach followed in *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972).

say: "First, this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment." [10] Similar language asserting that particular provisions of the Bill of Rights have been applied to the States through the Fourteenth Amendment's due process clause may be found in numerous cases.[11] Most of the provisions have now so been applied.[12]

[10] *Abington School District* v. *Schempp*, 374 U.S. 203, 215 (1963). Similar formulations for the speech and press clauses appeared early. E.g., *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943); *Schneider* v. *Irvington*, 308 U.S. 147, 160 (1939). In *Griffin* v. *California*, 380 U.S. 609, 615 (1965), Justice Douglas stated the holding as "that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids" the state practice at issue.

[11] E.g., *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Baldwin* v. *New York*, 399 U.S. 66 (1970).

[12] The following list does not attempt to distinguish between those Bill of Rights provisions which have been held to have themselves been incorporated or absorbed by the Fourteenth Amendment and those provisions which the Court indicated at the time were applicable against the States because they were fundamental and not merely because they were named in the Bill of Rights. Whichever formulation was originally used, the former is now the one used by the Court. *Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968).

First Amendment—
- Religion—
  - Free exercise: *Hamilton* v. *Regents*, 293 U.S. 245, 262 (1934); *Cantwell* v. *Connecticut*, 310 U.S. 296, 300, 303 (1940).
  - Establishment: *Everson.* v. *Board of Education*, 330 U.S. 1, 3, 7, 8 (1947); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948).
- Speech—*Gitlow* v. *New York*, 268 U.S. 652, 666 (1925); *Fiske* v. *Kansas*, 274 U.S. 380 (1927); *Stromberg* v. *California*, 283 U.S. 359 (1931).
- Press—*Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 701 (1931).
- Assembly—*DeJonge* v. *Oregon*, 299 U.S. 353 (1937).
- Petition—*DeJonge* v. *Oregon*, *supra*, 364, 365; *Hague* v. *CIO*, 307 U.S. 496 (1939); *Bridges* v. *California*, 314 U.S. 252 (1941).

Fourth Amendment—
- Search and seizure—*Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

Fifth Amendment—
- Double jeopardy—*Benton* v. *Maryland*, 395 U.S. 784 (1969); *Ashe* v. *Swenson*, 397 U.S. 436 (1970) (collateral estoppel).
- Self-incrimination—*Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Griffin* v. *California*, 380 U.S. 609 (1965).
- Just compensation—*Chicago, B. & Q Railroad* v. *City of Chicago*, 166 U.S. 226 (1897).

Sixth Amendment—
- Speedy trial—*Klopfer* v. *North Carolina*, 386 U.S. 213 (1967).
- Public trial—*In re Oliver*, 333 U.S. 257 (1948).
- Jury trial—*Duncan* v. *Louisiana*, 391 U.S. 145 (1968).
- Impartial Jury—*Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Turner* v. *Louisiana*, 379 U.S. 466 (1965).

First Through Tenth Amendments

Bill of Rights

Aside from the theoretical and philosophical considerations which enter into the question whether the Bill of Rights are incorporated into the Fourteenth Amendment or whether due process subsumes certain fundamental rights which may be named in the Bill of Rights, the principal relevant controversy is whether once a guarantee or a right set out in the Bill of Rights is held to be a limitation on the States the same standards which restrict the Federal Government restrict the States. The majority of the Court has consistently held that the standards are identical, whether the Federal Government or a State is involved,[13] and "has rejected the notion that the Fourteenth Amendment applies to the State only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" [14] Those who have argued for the application of a dual-standard test of due process as between the Federal Government and the States, most notably Justice Harlan,[15] but includ-

Notice of charges—*In re Oliver*, 333 U.S. 257 (1948).
Confrontation—*Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965).
Compulsory process—*Washington* v. *Texas*, 388 U.S. 14 (1967).
Counsel—*Powell* v. *Alabama*, 287 U.S. 45 (1932); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).
Eighth Amendment—
Cruel and unusual punishment—*Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947); *Robinson* v. *California*, 370 U.S. 660 (1962).
Provisions not applied are:
Second Amendment—
Right to keep and bear arms—*Cf. United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876); *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886).
Third Amendment—
Quartering troops in homes—No cases.
Fifth Amendment—
Grand Jury indictment—*Hurtado* v. *California*, 110 U.S. 516 (1884).
Seventh Amendment—
Jury trial in civil cases in which value of controversy exceeds $20—*Cf. Adamson* v. *California*, 332 U.S. 46, 64–65 (1947) (Justice Frankfurter concurring). *See Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211 (1916).
Eighth Amendment—
Bail—*But see Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971).
Excessive Fines—*But see Tate* v. *Short*, 401 U.S. 395 (1971) (utilizing equal protection to prevent automatic jailing of indigents when others can pay a fine and avoid jail).

[13] *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964); Ker v. *California*, 374 U.S. 23 (1963); *Griffin* v. *California*, 380 U.S. 609 (1965); *Baldwin* v. *New York*, 399 U.S. 66 (1970); *Williams* v. *Florida*, 399 U.S. 78 (1970); *Ballew* v. *Georgia*, 435 U.S. 223 (1978); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 780 n. 16 (1978) (specifically the First Amendment speech and press clauses); *Crist* v. *Bretz*, 437 U.S. 28 (1978); *Burch* v. *Louisiana*, 441 U.S. 131 (1979).

[14] *Williams* v. *Florida*, 399 U.S. 78, 106–107 (1970) (Justice Black concurring in part and dissenting in part), quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964).

[15] Justice Harlan first took this position in *Roth* v. *United States*, 354 U.S. 476, 496 (1957) (concurring in part and dissenting in part). *See also Ker* v. *California*, 374 U.S. 23, 45–46 (1963) (concurring). His various opinions are collected in *Williams* v. *Florida*, 399 U.S. 78, 129–133 (1970) (concurring in part and dissenting in part).

ing Justice Stewart,[16] Justice Fortas,[17] Justice Powell,[18] and Justice Rehnquist,[19] have not only based their contentions on a rejection of actual incorporation but upon the ground as well that if the same standards are to apply the standards previously developed with the Federal Government in mind will have to be diluted in order to give the States more leeway in the operation of their criminal justice systems.[20] The latter result seems to have developed with regard to issues surrounding the interpretation of the jury trial guarantee of the Sixth Amendment.[21]

[16] *Williams* v. *Florida*, 399 U.S. 78, 143–145 (1970) (concurring in part and dissenting in part); *Duncan* v. *Louisiana*, 391 U.S. 145, 173–183 (1968) (Justices Harlan and Stewart dissenting). *But see Apodaca* v. *Oregon*, 406 U.S. 404, 414 (1972) (dissenting). *See also Crist* v. *Bretz*, 437 U.S. 28 (1978) (Justice Stewart writing opinion of the Court).

[17] *Bloom* v. *Illinois*, 391 U.S. 194, 211 (1968) (concurring).

[18] *Johnson* v. *Louisiana*, 406 U.S. 356, 366 (1972) (concurring); *Crist* v. *Bretz*, 437 U.S. 28, 52–53 (1978) (dissenting, joined by Chief Justice Burger and Justice Rehnquist). *But see First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 780 n. 16 (1978) (rejecting theory in First Amendment context in opinion for the Court, joined by Chief Justice Burger).

[19] *Buckley* v. *Valeo*, 424 U.S. 1, 290 (1976) (concurring in part and dissenting in part); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 822 (1978) (dissenting). *See also Crist* v. *Bretz*, 437 U.S. 28, 52–53 (1978) (joining Justice Powell's dissent). Justice Jackson was also apparently of this view. *Beauharnais* v. *Illinois*, 343 U.S. 250, 288 (1952) (dissenting).

[20] E.g., *Williams* v. *Florida*, 399 U.S. 78, 129–138 (1970) (Justice Harlan concurring in part and dissenting in part); *Bloom* v. *Illinois*, 391 U.S. 194, 213–215 (1968) (Justice Fortas concurring). *But see Williams* v. *Florida*, *supra*, 106–108 (Justice Black concurring in part and dissenting in part).

[21] *Williams* v. *Florida*, 399 U.S. 78 (1970); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). *But compare Ballew* v. *Georgia*, 435 U.S. 223 (1978).

# FIRST AMENDMENT

# RELIGION AND EXPRESSION

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# RELIGION AND FREE EXPRESSION

## FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## RELIGION

### An Overview

Madison's original proposal for a bill of rights provision concerning religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed." [1] The language was altered in the House to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." [2] In the Senate, the section adopted read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, . . ." [3] It was in the conference committee of the two bodies, chaired by Madison, that the present language was written with its

[1] 1 *Annals of Congress* 434 (June 8, 1789).

[2] The committee appointed to consider Madison's proposals, and on which Madison served, with Vining as chairman, had rewritten the religion section to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." After some debate during which Madison suggested that the word "national" might be inserted before the word "religion" as "point[ing] the amendment directly to the object it was intended to prevent," the House adopted a substitute reading: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals of Congress* 729-731 (August 15, 1789). On August 20, on motion of Fisher Ames, the language of the clause as quoted in the text was adopted. Id., 766. According to Madison's biographer, "[t]here can be little doubt that this was written by Madison." I. Brant, *James Madison—Father of the Constitution 1787-1800* (Indianapolis: 1950), 271.

[3] This text, taken from the Senate *Journal* of September 9, appears in 2 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* (New York: 1971), 1153. It was at this point that the religion clauses were joined with the freedom of expression clauses.

somewhat more indefinite "respecting" phraseology.[4] Debate in Congress lends little assistance in interpreting the religion clauses; Madison's position, as well as that of Jefferson who influenced him, is fairly clear,[5] but the intent, insofar as there was one, of the others in Congress who voted for the language and those in the States who voted to ratify is subject to speculation.

***Scholarly Commentary.***—The explication of the religion clauses by the scholars has followed a restrained sense of their meaning. Story, who thought that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice,"[6] looked upon the prohibition simply as an exclusion from the Federal Government of all power to act upon the subject. "The situation . . . of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others presbyterians; in others, congregationists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imper-

[4] 1 *Annals of Congress* 913 (September 24, 1789). The Senate concurred the same day. *See* I. Brant, *James Madison—Father of the Constitution 1787–1800* (Indianapolis: 1950), 271–272.

[5] During House debate, Madison told his fellow Members that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any Manner contrary to their conscience." 1 *Annals of Congress* 730 (August 15, 1789). That his conception of "establishment" was quite broad is revealed in his veto as President in 1811 of a bill which in granting land reserved a parcel for a Baptist Church in Salem, Mississippi, because the action "comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment,'" 8 *The Writings of James Madison*, G. Hunt. ed. (New York: 1904), 132–133. Madison's views were no doubt influenced by the fight in the Virginia legislature in 1784–1785 in which he successfully led the opposition to a tax to support teachers of religion in Virginia and in the course of which he drafted his "Memorial and Remonstrance against Religious Assessments" setting forth his thoughts. 2 *Writings, op cit.*, 183–191; I. Brant, *James Madison—The Nationalist 1780–1787* (Indianapolis: 1948), 343–355. Acting on the momentum of this effort, Madison secured passage of Jefferson's "Bill for Religious Liberty". Id., 354; D. Malone, *Jefferson the Virginian* (Boston: 1948), 274–280. The theme of the writings of both was that it was wrong to offer public support of any religion in particular or of religion in general.

[6] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1865.

fect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." [7]

"Probably," Story also wrote, "at the time of the adoption of the constitution and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." [8] The object, then, of the religion clauses was not to prevent general governmental encouragement of religion, of Christianity, but to prevent religious persecution and to prevent a national establishment.[9]

***Court Tests Applied to Legislation Affecting Religion.***—Before considering the development of the two religion clauses by the Supreme Court, one should notice briefly the tests developed by which religion cases are adjudicated by the Court. While later cases rely on a series of rather well-defined, if difficult-to-apply, tests, the language of earlier cases "may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." [10] It is well to recall that "the purpose [of the religion clauses] was to state an objective, not to write a statute." [11]

[7] Id., § 1873.

[8] Id., § 1868.

[9] As late as 1898, Cooley expounded the establishment clause as follows: "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others . . . It was never intended by the Constitution that the government should be prohibited from recognizing religion . . . where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects." T. Cooley, *General Principles of Constitutional Law in the United States* (Boston, 3d ed. 1898), 224-225.

[10] *Walz* v. *Tax Comm. of City of New York*, 397 U.S. 664, 668 (1970).

[11] Ibid.

In 1802, President Jefferson wrote a letter to a group of Baptists in Danbury, Connecticut, in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State." [12] In *Reynolds* v. *United States*,[13] Chief Justice Waite for the Court characterized the phrase as "almost an authoritative declaration of the scope and effect of the amendment." In its first encounters with challenges to state programs on religious grounds, the Court looked to Jefferson's metaphor for substantial guidance.[14] But a metaphor may obscure as well as illuminate and the Court soon began to emphasize neutrality and voluntarism as the standard of restraint on governmental action.[15] The concept of neutrality, though, is a coat of many colors,[16] and three standards which could be stated in objective fashion emerged. The first two standards were part of the same formulation. "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." [17] The third test is whether the gov-

[12] 16 *The Writings of Thomas Jefferson*, A. Libscomb ed. (Washington: Library ed., 1904), 281.

[13] 98 U.S. 145, 164 (1879).

[14] *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211, 212 (1948); *cf. Zorach* v. *Clauson*, 343 U.S. 306, 317 (1952) (Justice Black dissenting). In *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971), Chief Justice Burger remarked that "the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

[15] *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Abington School District* v. *Schempp*, 374 U.S. 203, 305 (1963) (Justice Goldberg concurring); *Walz* v. *Tax Comm. of City of New York*, 397 U.S. 664, 694-697 (1970) (Justice Harlan concurring). In the opinion of the Court in the latter case, Chief Justice Burger wrote: "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id., 669.

[16] *Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968) (Justice Harlan concurring).

[17] *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963).

ernmental program results in "an excessive government entanglement with religion. The test is inescapably one of degree . . . [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." [18]

Although accepted by all the Justices,[19] the tests are not applied by them in the same manner and the fact that the tests and their applications have evolved over time means that the cases do not follow a consistent line of development.[20] Nonetheless, evaluation of the results of each case and line of cases and of the continuing vitality of any particular precedent is somewhat easier with the tests in mind. Finally, the Court has established one distinct difference between establishment cases and free exercise cases: in the latter but not in the former, a challenger must demonstrate the coercive effect of a policy or enactment in order to prevail.[21]

***Government Neutrality in Religious Disputes.***—One value which both clauses of the religion section serve is to enforce governmental neutrality in deciding controversies arising out of religious disputes. It will often be the case that schism will develop within churches or between a local church and the general church, which will result in secession or expulsion of one faction or of the local church. A dispute over which body is to have control of the property of the church will then often be taken into the courts. It is now established that both religion clauses prevent governmental inquiry into religious doctrine in settling such disputes and contrarily require courts to look simply to the decision-making body or

[18] *Walz* v. *Tax Comm. of City of New York*, 397 U.S. 664, 674–675 (1970).

[19] E.g., *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980), and id., 665 (dissenting opinion); *Stone* v. *Graham*, 449 U.S. 39, 40 (1980), and id., 43 (dissenting opinion). At least with respect to public aid to religious schools, Justice Stevens would abandon the tests and simply adopt a "no-aid" position. *Regan*, *supra*, 671.

[20] The tests provide "helpful signposts," *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973), and are at best "guidelines" rather than a "constitutional caliper;" they must be used to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action." Inevitably, "no 'bright line' guidance is afforded." *Tilton* v. *Richardson*, 403 U.S. 672, 677–678 (1971). *See also Com. for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 761 & n. 5, 773 n. 31 (1973); *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 662 (1980), and id., 663 (Justice Blackmun dissenting).

[21] *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). *See also Board of Education* v. *Allen*, 392 U.S. 236, 248–249 (1968); *Tilton* v. *Richardson*, 403 U.S. 672, 689 (1971). *Compare Gillette* v. *United States*, 401 U.S. 437 (1971), with *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Recently, the Court has held that the tripartite test is not applicable when law grants a denominational preference, distinguishes between religions; rather, the distinction is to be subjected to the strict scrutiny of a suspect classification. *Larson* v. *Valente*, 456 U.S. 228, 244–246 (1982).

process in the church and to give effect to whatever decision is officially and properly made

The first such case was *Watson* v. *Jones* [22] which was decided on common-law grounds in a diversity action without explicit reliance on the First Amendment. A constitutionalization of the rule was made in *Kedroff* v. *St. Nicholas Cathedral,* [23] in which the Court held unconstitutional a state statute that recognized the autonomy and authority of those North American branches of the Russian Orthodox Church which had declared their independence from the general church. Recognizing that *Watson* v. *Jones* had been decided on nonconstitutional grounds, the Court thought nonetheless that the opinion radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." [24] The power of civil courts to resolve church property disputes was severely circumscribed, the Court held, because to permit resolution of doctrinal disputes in court was to jeopardize First Amendment values. What a court must do, it was held, is to look at the church rules: if the church is a hierarchical one which reposes determination of ecclesiastical issues in a certain body, the resolution by that body is determinative, while if the church is a congregational one prescribing action by a majority vote, that determination will prevail.[25] The Court did suggest that a court confronted with a church property dispute could apply "neutral principles of law, developed for use in all property disputes," when to do so would not require them to decide doctrinal issues; in other words, deference when the First Amendment would be violated by independent review, application of neutral principles when review was possible of nonecclesiastical grounds of dispute.[1]

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[22] 13 Wall. (80 U.S.) 679 (1872).

[23] 344 U.S. 94 (1952). *Kedroff* was grounded on the free exercise clause. Id., 116. But the subsequent cases used a collective "First Amendment" designation.

[24] Id., 116. On remand, the state court adopted the same ruling on the merits but relied on a common-law rule rather than the statute. This too was struck down. *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190 (1960).

[25] *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 447, 450–451 (1969); *Maryland and Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg,* 396 U.S. 367 (1970). For a similar rule of neutrality in another context, see *United States* v. *Ballard,* 322 U.S. 78 (1944) (denying defendant charged with mail fraud through dissemination of purported religious literature the right to present to the jury evidence of the truthfulness of the religious views he urged).

[1] *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449 (1969); *Maryland and Virginia Eldership of the Churches of God* v. *Church of God of Sharpsburg,* 396 U.S. 367, 368 (1970). *See also* id., 368–370 (Justice Brennan concurring).

However, the Court viewed strictly the limits of the inquiry a court might make, holding that an argument over a matter of internal church government, the power to reorganize the dioceses of a hierarchical church in this country, was "at the core of ecclesiastical affairs" and a court could not interpret the church constitution to make an independent determination of the power but must defer to the interpretation of the body authorized to decide.[2]

In *Jones* v. *Wolf*,[3] however, a divided Court, while formally adhering to these principles, appeared to depart in substance from their application. A schism developed in a local church which was a member of a hierarchical church and the majority voted to withdraw from the general church. The proper authority of the general church determined that the minority constituted the "true congregation" of the local church and awarded them authority over it. The Court approved the approach of the state court in applying neutral principles by examining the deeds to the church property, state statutes, and provisions of the general church's constitution concerning ownership and control of church property in order to determine that no language of trust in favor of the general church was contained in any of them and that the property thus belonged to the local congregation.[4] Further, the Court held, the First Amendment did not prevent the state court from applying a presumption of majority rule to award control to the majority of the local congregation, provided that it permitted defeasance of the presumption upon a showing that the identity of the local church is to be determined by some other means as expressed perhaps in the general church charter.[5] The dissent argued that to permit a court narrowly to view only the church documents relating to property ownership permitted the ignoring of the fact that the dispute was over ecclesiastical matters and that the general church had decided which faction of the congregation was the local church.[6]

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[2] *The Serbian Eastern Orthodox Diocese* v. *Dionisije Milivojevich*, 426 U.S. 697, 720–725 (1976). In *Gonzalez* v. *Archbishop*, 280 U.S. 1 (1929), the Court had permitted limited inquiry into the legality of the actions taken under church rules. The *Serbian Eastern* Court disapproved this inquiry with respect to concepts of "arbitrariness," although it reserved decision on the "fraud" and "collusion" exceptions. *Supra*, 426 U.S., 708–720.

[3] 443 U.S. 595 (1979). In the majority were Justices Blackmun, Brennan, Marshall, Rehnquist, and Stevens. Dissenting were Justices Powell, Stewart, White, and Chief Justice Burger.

[4] Id., 602–606.

[5] Id., 606–610. Because it was unclear whether the state court had applied such a rule and applied it properly, the Court remanded.

[6] Id., 610.

Thus, it is unclear where the Court is on this issue. *Jones* continues to state that it is improper to review an ecclesiastical dispute and that deference is required in those cases, but by approving a neutral principles inquiry which can filter out in effect the doctrinal issues underlying a church dispute the Court seems to have approved at least an indirect limitation of the authority of hierarchical churches.[7]

**Establishment of Religion**

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." [1] However, the Court's reading of the clause has never resulted in the barring of all assistance which aids, however incidentally, a religious institution. Outside this area, the decisions generally have more rigorously prohibited what may be deemed governmental promotion of religious doctrine.

***Financial Assistance to Church-Related Insitutions.***—The first case coming to the Court challenging financial assistance to a religious-connected institution arose in 1899, the assistance being a federal grant for the construction of a hospital owned and operated by a Roman Catholic order. The Court viewed the hospital as a secular institution so chartered by Congress and not as a religious or sectarian body, thus avoiding the constitutional issue.[2] But when the right of local authorities to provide free transportation for children attending parochial schools reached the Court, it adopted very restrictive language. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over an-

[7] The Court indicated that the general church could always expressly provide in its charter or in deeds to property the proper disposition of disputed property. But here the general church had decided which faction was the "true congregation" which would appear to constitute as definitive a rule as the Court's suggestion. Id., 606.

[1] *Walz* v. *Tax Comm. of City of New York*, 397 U.S. 664, 668 (1970). "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools . . . In my opinion both avenues were closed by the Constitution." *Everson* v. *Board of Education*, 330 U.S. 1, 63 (1947) (Justice Rutledge dissenting).

[2] *Bradfield* v. Roberts, 175 U.S. 291 (1899). *Cf. Abington School District* v. *Schempp*, 374 U.S. 203, 246 (1963) (Justice Brennan concurring). In *Cochran* v. *Board of Education*, 281 U.S. 370 (1931), a state program furnishing textbooks to parochial schools was sustained under a due process attack without reference to the First Amendment, *See also Quick Bear* v. *Leupp*, 210 U.S. 50 (1908).

other. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" [3] But the majority sustained the provision of transportation. While recognizing that "it approaches the verge" of the State's constitutional power, still, Justice Black thought, the transportation was a form of "public welfare legislation" which was being extended "to all its citizens without regard to their religious belief." [4] "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." [5] Transportation benefited the child, just as did police protection at crossings, fire protection, connections for sewage disposal, public highways and sidewalks. Thus was born the "child benefit" theory.[6]

State loans of textbooks to parochial school students was next sustained on a "child benefit" theory in 1968.[7] Utilizing the secular purpose and effect tests,[8] the Court determined that the purpose of the loans was the "furtherance of the educational opportunities available to the young," while the effect was hardly less secular. "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to

[3] *Everson* v. *Board of Education*, 330 U.S. 1, 15–16 (1947).
[4] Id., 16.
[5] Id. 17. It was in *Everson* that the Court, without much discussion of the matter, held that the establishment clause applied to the States through the Fourteenth and limited both national and state governments equally. Id., 8, 13, 14–16. The issue is discussed at some length by Justice Brennan in *Abington School District* v. *Schempp*, 374 U.S. 203, 253–258 (1963).
[6] *And see Zorach* v. *Clauson*, 343 U.S. 306, 312–313 (1952).
[7] *Board of Education* v. *Allen*, 392 U.S. 236 (1968).
[8] *Supra*, *pp.* 966–967.

parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for religious institution." [9]

From these beginnings, the case law on the discretion of state and federal governmental assistance to sectarian elementary and secondary schools has multiplied and become as restrictive in fact as the dicta in the early cases suggested, save for the provision of some assistance to children under the "child benefit" theory, although the more recent decisions do evince a judicial attitude to permit some limited public assistance to such schools in contexts in which the religious missions of those schools may be only marginally served. At the same time, the Court's disposition is to allow a greater discretion when colleges affiliated with religious institutions are aided. Moreover, the opinions reveal a deep division among the Justices upon the application of the tripartite test developed to guide resolution of these controversies.[10]

A secular purpose is the first requirement to sustain the validity of legislation touching upon religion and upon this standard the Justices display little disagreement. State desire to preserve a healthy and safe educational environment for all of its school children, state interest in promoting pluralism and diversity among its public and nonpublic schools, and state concern to prevent an overburdening of the public school system that would accompany the financial failure of private schools provide adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools.[11]

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[9] *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968).

[10] Eight of the sitting Justices adhere to the tests, *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980), and id., 665 (dissenting opinion), while dividing with respect to application. Justice Blackmun describes the Court as being comprised of Justices (1) who perceive no barrier under the Constitution to almost any aid a legislature sees fit to provide, (2) who perceive a broad barrier to aid of almost any kind, and (3) who occupy a centrist position barring some aid and validating other kinds. Id., 663–664 (dissenting). While the first and second groups are not wholly united in their internal views, it is the third group which creates the uncertainty with respect to a range of forms of assistance. Justice Stevens, a member of group (2), is the lone Justice who would abandon the tests and adopt a "no aid" position. Id., 671 (dissenting); *Wolman* v. *Walter*, 433 U.S. 229, 264 (1977) (dissenting).

[11] *Com. for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973). *See also* id., 805 (Chief Justice Burger dissenting), 812–813 (Justice Rehnquist dissenting), 813 (Justice White dissenting). *And see Wolman* v. *Walter*, 433 U.S. 229, 240 (1977) (plurality opinion); *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 653–654 (1980), and id., 665 (dissenting opinion).

Upon the tests of secular primary effect [12] and church-state entanglement, however, varied views have been expressed by the Justices. As to the former test, the Court has formulated no hard-and-fast standard permitting easy judgment in all cases. In providing assistance, government must avoid aiding directly or indirectly the religious mission of such schools; thus, funds may not be given to an institution that would, for example, defray the costs of building or maintaining chapels or classrooms in which religion is taught.[13] Even the provision of secular services in religious schools raises the possibility that religious instruction might be introduced into the class and is sufficient to condemn a program.[14] The extent to which the religious mission of the entity is inextricably intertwined with the secular mission and the size of the assistance furnished are factors for the reviewing court to consider.[15] But the fact that public aid to further secular purposes of the school will necessarily "free up" some of the institution's funds which it may apply to its religious mission is not alone sufficient to condemn the program.[16] Rather, it must always be determined whether the religious effects are substantial or whether they are remote and incidental.[17] Upon that determination and upon the guarantees built

[12] Aside from the other arguments, Justice White has argued that the primary effect test requires the Court to make an "ultimate judgment" whether *the* primary effect of a program advances religion. If the primary effect is secular, i.e., keeping the parochial school system alive and providing adequate secular education to substantial numbers of students, then the incidental benefit to religion was only secondary and permissible. *Com. for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 822-824 (1973) (dissenting). The Court responded that "[o]ur cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." Id., 873 n. 39.

[13] Id., 774-780; *Meek* v. *Pittenger*, 421 U.S. 349, 362-366 (1975); *Wolman* v. *Walter*, 433 U.S. 229, 248-251 (1977).

[14] *Compare Meek* v. *Pittenger*, 421 U.S. 349, 367-372 (1975), *with Wolman* v. *Walter*, 433 U.S. 229, 238-248 (1977) *and Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 654-657 (1980).

[15] *Lemon* v. *Kurtzman*, 403 U.S. 602, 616-619 (1971). The existence of what the Court perceived to be massive aid and of religion-pervasive recipients constituted a major backdrop in *Com. for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), and *Meek* v. *Pittenger*, 421 U.S. 349 (1973). When the aid is more selective and its permissible use is cabined sufficiently, the character of the institution assumes less importance. *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 661-662 (1980). When the entity is an institution of higher education, the Court appears less concerned with its religious character but it still evaluates the degree to which it is pervasively sectarian. *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Maryland Public Works Bd.*, 426 U.S. 736 (1976).

[16] *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 658-659 (1980).

[17] The form which the assistance takes may have little to do with the determination. One group of Justices has argued that when the assistance is given to par-

into any program to assure that public aid is used exclusively for secular, neutral, and nonideological purposes rest the issue of the validity of public assistance.

The greater the necessity of policing the entity's use of public funds to ensure secular effect the greater danger of impermissible entanglement of government with religious matters. Any scheme that requires detailed and continuing oversight of the schools and that includes the entity reporting to and justification to public authority has this potential and an aid program may founder on it.[18] However, where the nature of the assistance is such that furthering of the religious mission is unlikely and the public oversight is concomitantly less intrusive, a review may be sustained.[19]

Thus, government aid which is directed toward furthering secular interests in the welfare of the child or the nonreligious functions of the entity will generally be permitted where the entity is not so pervasively religious that secular and sectarian activities may not be separated and the latter denied more than incidental benefit or the requisite policing to ensure no sectarian benefit is not excessively entangling. But no mere statement of rules can adequately survey the cases.

Substantial unanimity, at least in result, has prevailed among the Justices in dealing with direct financial assistance to sectarian schools, as might have been expected from the argument over the primary effect test. State aid to church-connected schools was first found to have gone over the "verge" [20] in *Lemon* v. *Kurtzman.*[21]

ents, the dangers of impermissible primary effect and entanglement are avoided and it should be approved. *Com. for Public Educ. & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 801–805 (1973) (dissenting). The Court denied a controlling significance to delivery of funds to parents rather than schools; government must always ensure a secular use. Id., 780. Another group of Justices has argued that the primary effect test does not permit direct financial support to sectarian schools, *Com. for Public Educ. & Religious Liberty* v. *Regan,* 444 U.S. 646, 665–669 (1980) (dissenting), but the Court held that provision of direct aid with adequate assurances of nonreligious use does not constitute a forbidden primary effect. Id., 661–662.

[18] *Lemon* v. *Kurtzman,* 403 U.S. 602, 619–620, 621–622 (1971); *Meek* v. *Pittenger,* 421 U.S. 349, 367–372 (1975); *Wolman* v. *Walter,* 433 U.S. 229, 254–255 (1977). Another aspect of entanglement identified by the Court is the danger that an aid program would encourage continuing political strife through disputes over annual appropriations and enlargements of programs. *Lemon* v. *Kurtzman, supra,* 622–624; *Com. for Public Educ. & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 794–798 (1973); *Meek* v. *Pittenger, supra,* 372. This concern appears to have lessened somewhat in more recent cases. *Roemer* v. *Maryland Public Works Board,* 426 U.S. 736, 763–766 (1976); *Com. for Public Educ. & Religious Liberty* v. *Regan,* 444 U.S. 646, 661 n. 8 (1980).

[19] Id., 659–661; *Wolman* v. *Walter,* 433 U.S. 229, 240–241, 242–244, 248 (1977).

[20] *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947).

[21] 403 U.S. 602 (1971).

Involved were two state statutes, one which authorized the "purchase" of secular educational services from nonpublic elementary and secondary schools, a form of reimbursement for the cost to religious schools of the teaching of such things as mathematics, modern foreign languages, and physical sciences, and the other which provided salary supplements to nonpublic school teachers who taught courses similar to those found in public schools, used textbooks approved for use in public schools, and agreed not to teach any classes in religion. Accepting the secular purpose attached to both statutes by the legislature, the Court did not pass on the secular effect test, inasmuch as excessive entanglement was found. This entanglement arose because the legislature "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." [22] Because the schools concerned were religious schools, because they were under the control of the church hierarchy, because the primary purpose of the schools was the propagation of the faith, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [on religious utilization of aid] are obeyed and the First Amendment otherwise respected." [23] Moreover, the provision of public aid inevitably will draw religious conflict into the public arena as the contest for adequate funding goes on. Thus, the Court held, both programs were unconstitutional because the state supervision necessary to ensure a secular purpose and a secular effect inevitably involved the state authorities too deeply in the religious affairs of the institutions aided.[24]

Two programs of assistance through provision of equipment and services to private, including sectarian, schools were invalidated in *Meek* v. *Pittenger*.[25] First, the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools was voided as an impermissible extension of assistance of religion. This conclusion was reached on the basis that 75 percent of the qualifying schools were church-related or religiously affiliated educational institutions and the assistance was available

[22] Id., 619.

[23] Ibid.

[24] Only Justice White dissented. Id., 661. In *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), the Court held that the State could reimburse schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. *But see New York* v. *Cathedral Academy*, 434 U.S. 125 (1977).

[25] 421 U.S. 349 (1975). Chief Justice Burger and Justices Rehnquist and White dissented. Id., 385, 387.

without regard to the degree of religious activity of the schools. The materials and equipment loaned were religiously neutral, but the substantial assistance necessarily constituted aid to the sectarian school enterprise as a whole and thus had a primary effect of advancing religion.[1] Second, the provision of auxiliary services—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—by public employees on nonpublic school premises was invalidated because the Court thought the program had to be policed closely to ensure religious neutrality and it saw no way that could be done without impermissible entanglement. The fact that the teachers would, under this program and unlike one of the programs condemned in *Lemon* v. *Kurtzman*, be public employees rather than employees of the religious schools and possibly under religious discipline was insufficient to permit the State to fail to make certain that religion was not inculcated by subsidized teachers.[2]

A state program to reimburse nonpublic schools for a variety of services mandated by state law was voided because the statute did not distinguish between services, some secular and some potentially religious, the costs of which would be reimbursed.[3] Similarly, a program of direct money grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because "within the context of these religion-oriented institutions" the Court could not see how such restrictions could effectively be imposed.[4] But a plan of direct

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[1] Id., 362-366. *See also Wolman* v. *Walter*, 433 U.S. 229, 248-251 (1977). The Court in *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 661-662 (1980), held that *Meek* did not forbid all aid that benefited religiously pervasive schools to some extent, so long as it was conferred in such a way as to prevent any appreciable risk of being used to transmit or teach religious views. *See also Wolman* v. *Walter, supra*, 262 (Justice Powell concurring in part and dissenting in part).

[2] *Meek* v. *Pittenger*, 421 U.S. 349, 367-372 (1975). *But see Wolman* v. *Walter*, 433 U.S. 229, 238-248 (1977).

[3] *Levitt* v. *Com. for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973). Justice White dissented, Id., 482. Among the services reimbursed was the cost of preparing and grading examinations in the nonpublic schools by the teachers there. In *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), the Court struck down a new statutory program entitling private schools to obtain reimbursement for expenses incurred during the school year in which the prior program was voided in *Levitt*.

[4] *Com. for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 774-780 (1973). Chief Justice Burger and Justice Rehnquist concurred, Id., 798, and Justice White dissented. Id., 820.

monetary grants to nonpublic schools to reimburse them for the costs of state-mandated record-keeping and of administering and grading state-prepared tests and which contained safeguards against religious utilization of the tests was sustained even though the Court recognized the incidental benefit to the schools.[5]

The "child benefit" theory, under which it is permissible for government to render assistance and services to pupils in sectarian schools without being deemed to be aiding the religious mission of the schools so long as the service and assistance are themselves ideologically neutral, has not proved easy of application. In *Wolman* v. *Walter*,[6] the Court approved a program in which the State supplied standardized tests and scoring services used in the public schools, with nonpublic school personnel not involved in the test drafting or scoring, speech, hearing, and psychological diagnostic services provided in the private schools by public employees, and therapeutic, guidance, and remedial services for students provided off the premises of the private schools. In all these, the Court thought the program contained adequate built-in protections against religious utilization. But while the Court adhered to its ruling permitting the States to loan secular textbooks used in the public schools to pupils attending religious schools,[7] it declined to

[5] *Com. for Public Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980). Justices Blackmun, Brennan, Marshall, and Stevens dissented. Id., 662, 671. The dissenters thought the case different from precedents in its authorization of direct reimbursement grants whereas previously approved plans had merely relieved the private schools of the costs of preparing and grading state-prepared tests. *See Wolman* v. *Walter*, 433 U.S. 229, 238–241 (1977).

[6] 433 U.S. 229 (1977). The Court deemed the situation in which these services were performed and the nature of the services to occasion little danger of aiding religious functions and thus requiring little supervision that would give rise to entanglement. All the services fell "within that class of general welfare services for children that may be provided by the States regardless of the incidental benefit that accrues to church-related schools." Id., 243, quoting *Meek* v. *Pittenger*, 421 U.S. 349, 371 n. 21 (1975). Justice Brennan would have voided all the programs because, considered as a whole, the amount of assistance was so large as to constitute assistance to the religious mission of the schools. Id., 433 U.S., 255. Justice Marshall would have approved only the diagnostic services, id., 256, while Justice Stevens would generally approve closely administered public health services. Id., 264.

[7] *Meek* v. *Pittenger*, 421 U.S. 349, 359–372 (1975); *Wolman* v. *Walter*, 433 U.S. 229, 236–238 (1977). *Allen* was explained as resting on "the unique presumption" that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." Id., 251 n. 18. There was "a tension" between *Nyquist, Meek, and Wolman*, on the one hand, and *Allen* on the other, and *Allen* was to be followed "as a matter of *stare decisis*" but the "presumption of neutrality" embodied in *Allen* would not be extended to other similar assistance, ibid., as Chief Justice Burger and Justices White and Rehnquist were prepared to do. Id., 255. Justices Brennan, Marshall, and Stevens would overrule *Allen* and void textbook programs. Id., 255, 256, 264.

extend the precedent to permit the loan to pupils or their parents of instructional materials and equipment, such as projectors, tape recorders, maps, globes and science kits, although they were identical to those used in the public schools.[8] Nor was a State permitted to expend funds to pay the costs to religious schools of field trip transportation such as was provided to public school students.[9]

In terms of aid to parents of religious school children, substantially similar tuition reimbursement programs from New York and Pennsylvania were struck down. New York's program provided out of general tax revenues reimbursements for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid. Pennsylvania provided fixed-sum reimbursement for parents who send their children to nonpublic elementary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance to sectarian institutions with no attempt to segregate the benefits so that religious activities did not receive any.[10]

New York had also enacted a program of tax relief for those parents sending their children to nonpublic schools; relief was available to parents not qualifying for the tuition reimbursements so long as they made less than $25,000 per year and the relief was in the form of fixed sums bearing no relationship to the amounts of tuition paid. "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both

[8] Id., 248-251. *See also* id., 263-264 (Justice Powell concurring in part and dissenting in part).

[9] Id., 252-255. Justice Powell joined the other three dissenters who would have approved this expenditure. Id., 264.

[10] *Com. for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 789-798 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973). The Court distinguished *Everson* and *Allen* from the present programs on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. Id., 781-782. Chief Justice Burger thought that *Everson* and *Allen* were controlling. Id., 798.

instances the money involved represents a charge made upon the state for the purpose of religious education.'" [11] Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in *Walz*.[12]

Two subsidiary arguments were rejected by the Court in these cases. First, it had been argued that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that "tension inevitably exists between the Free Exercise and the Establishment Clauses," but government is required to neither advance nor inhibit religion and the tuition program inescapably advanced religion and must fall.[13] In the Pennsylvania case, it was argued that because the program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones the portion respecting the former parents was valid and "parents of children who attended sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious. . . . The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution." [14]

With respect to institutions of higher learning, however, the Court, although closely divided, has approved quite extensive public assistance. On the same day that it first struck down an assistance program for elementary and secondary private schools, the Court sustained construction grants to church-related colleges and universities.[15] The specific grants in question were for construction

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[11] *Com. for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 789–794 (1973). The quoted paragraph is id. 790–791.

[12] Id., 791–794. Principally, *Walz* was said to be different because of the age of exemption there dealt with, the fact that it was granted in the spirit of neutrality while the tax credit under consideration was not, and the fact that the *Walz* exemption promoted less entanglement while the credit would promote more.

[13] Id., 788–789.

[14] *Sloan* v. *Lemon*, 413 U.S. 825, 833–835 (1973). In any event, the Court sustained the District Court's refusal to sever the program and save that portion as to children attending non-sectarian schools on the basis that since so large a portion of the children benefitted attended religious schools it could not be assumed the legislature would have itself enacted such a limited program.

In *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), the Court held that States receiving federal educational funds were required by federal law to provide "comparable" but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.

[15] *Tilton* v. *Richardson*, 403 U.S. 672 (1971). The plurality opinion was by Chief Justice Burger and was joined by Justices Harlan, Stewart, and Blackmun. Justice White concurred, having disagreed with the Court in *Lemon* v. *Kurtzman*. Justices Black, Douglas, Brennan, and Marshall dissented. Id., 642, 689.

of two library buildings, a science building, a music, drama, and arts building, and a language laboratory. The law prohibited the financing of any facility for, or the use of any federally-financed building for, religious purposes, although the restriction on use ran for only twenty years.[16] The Court found that the purpose and effect of the grants were secular and that, unlike elementary and secondary schools, religious colleges were not so permeated with religious inculcations.[17] The supervision required to ensure conformance with the non-religious-use requirement was found not to constitute "excessive entanglement," inasmuch as a building is nonideological in character, unlike teachers, and inasmuch as the construction grants were onetime things and did not continue as did the state programs.

Also sustained was a South Carolina program under which institutions of higher education could enter into contracts with a state authority by which the authority would issue revenue bonds for construction of projects on an institution's campus, thus affording a college a better arrangement in terms of interest costs than it could make otherwise, and the authority would hold formal title to the project. The principal of and the interest on the bonds as well as the expenses of the authority would be paid by the college. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited nor was there any impermissible public entanglement. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[18] The colleges involved, though they were affiliated with religious institutions, were not shown to be so permeated with religion as to fall under the former clause—no religious test existed for faculty or student body, a substantial part of the student body was

[16] Because such buildings would still have substantial value after twenty years, a religious use then would be an unconstitutional aid to religion and the period of limitation was struck down, Id., 682–684.

[17] It was no doubt true, Chief Justice Burger conceded, that construction grants to religious-related colleges did in some measure benefit religion, since the grants freed money that the colleges would be required to spend on the facilities for which the grants were made. Bus transportation, textbooks, and tax exemptions similarly benefited religion and had been upheld. "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." Id., 679.

[18] *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973).

not of the religion of the affiliation—and state law precluded the use of any project financed under it for religious activities.[19]

The kind of assistance permitted by *Tilton* and by *Hunt* v. *McNair* seems to have been broadened when the Court sustained a Maryland program of annual subsidies to qualifying private institutions of higher education; the grants were noncategorical but could not be used for sectarian purposes, a limitation to be policed by the administering agency.[20] The plurality opinion found a secular purpose, it found that the religious affiliated institutions were not so pervasively sectarian that secular activities could not be separated from sectarian ones and therefore the limitation of funding to secular activities was meaningful,[21] and it thought the character of the institutions aided as not pervasively sectarian reduced the degree of public surveillance required to police the use of the funds to such an extent that excessive entanglement was improbable. The annual nature of the subsidy was a problem but the plurality thought that the generally secular character of the institutions, again, permitted the relationship between the public agency and the recipient institution occasioned by annual grants and that there was much less likelihood of political divisiveness in controversies over annual funding because the student body was not local but diverse, because large numbers of non-religious affiliated institutions received aid, and because the affiliated colleges were not closely tied to their respective churches.[22]

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[19] Id., 739–740, 741–745. Justices Brennan, Douglas and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id., 749.

[20] *Roemer* v. *Maryland Public Works Bd.*, 426 U.S. 736 (1976). The opinion of the Court by Justice Blackmun was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist concurred on the basis of secular purpose and no primary religious benefit, rejecting entanglement. Id., 767. Justices Brennan and Marshall dissented and Justices Stewart and Stevens separately dissented. Id., 770, 773, 775.

[21] Id. 755. In some of the schools mandatory religion courses were taught, the significant factor in Justice Stewart's view, id., 773, but overweighed by other factors in the plurality's view.

[22] Id., 765–766. A still further broadening of governmental power to extend aid affecting religious institutions of higher education may be discerned in the Court's summary affirmance of two lower-court decisions upholding programs of assistance—scholarships and tuitions grants—to students at college and university as well as vocational programs in both public and private—including religious—institutions; one of the programs contained no secular use restriction at all and in the other one the restriction seemed somewhat *pro forma*. *Smith* v. *Bd. of Govrs. of Univ. of North Carolina*, 434 U.S. 803 (1977), *aff'g* 429 F. Supp. 871 (D.C.W.D.N.C. 1977); *Americans United* v. *Blanton*, 434 U.S. 803 (1977), *aff'g* 433 F. Supp. 97 (D.C.M.D. Tenn. 1977).

***Governmental Encouragement of Religion in Public Schools: Released Time.***—The second of Justice Rutledge's "great drives" [23] in the area of education has also occasioned a substantial amount of litigation in the Court. In its first two encounters, the Court voided one program and upheld another, in which the similarities were at least as significant as the differences. Both cases involved "released time" programs, the establishing of a period during which pupils in public schools were to be allowed, upon parental request, to receive religious instruction. In the first, the religious classes were conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval or supervision of the superintendent of schools. Attendance reports were kept and reported to the school authorities in the same way as for other classes, and pupils not attending the religious instruction classes were required to continue their regular studies. "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ." [24] The case was also noteworthy because of the Court's express rejection of the contention "that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." [25]

Four years later, another released-time case came before the Court. In this one, schools released pupils during school hours, on written requests of their parents, so that they might leave the school building and go to religious centers for religious instruction or devotional exercises. The churches reported to the schools the names of children released from the public schools who did not report for religious instruction; children not released remained in the classrooms for regular studies. The Court ruled that the differences between the two programs—the fact that regligious instruction was off school property without the authority made obvious by the use of classroom to which students were ordinarily compelled

[23] *Everson* v. *Board of Education*, 330 U.S. 1 63 (1947) (Justice Rutledge dissenting), quoted *supra*, *p.* 970 n. 1.

[24] *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 209–210 (1948).

[25] Id., 211.

to attend—were constitutionally significant to the point of sustaining the program.[1] "We are a religious people whose institutions presuppose a Supreme Being," Justice Douglas wrote for the Court. ". . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." [2]

***Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading.***—Upon recommendation of the state governing board, a local New York school caused to be read aloud by each class in the presence of a teacher at the beginning of each school day the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country." Said the Court: "We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York had adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. . . . [W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." [3] "Neither the fact that the prayer may be nondenominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause. . . . The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether

[1] *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Justices Black, Frankfurter, and Jackson dissented. Id., 315, 320, 323.

[2] Id., 313–314. The formulation of the three-fold test for religious litigation—secular purpose, secular effect, and entanglement—leaves unclear the constitutional status of released-time programs today. The degree of official and church cooperation may well not rise to a problem of excessive entanglement, but *quaere.*, what is the secular purpose and secular effect of such programs? *But see Abington School District* v. *Schempp*, 374 U.S. 203 261–263 (1963) (Justice Brennan concurring).

[3] *Engel* v. *Vitale*, 370 U.S. 421, 424, 425 (1962).

those laws operate directly to coerce nonobserving individuals or not." [4]

Following the prayer decision came two cases in which parents and their school age children challenged the validity under the establishment clause of requirements that each school day begin with readings of selections from the Bible. Scripture reading, like prayers, the Court found, was a religious exercise. "Given that finding the exercises and the law requiring them are in violation of the Establishment Clause." [5] Rejected were contentions by the State that the object of the programs was the promotion of secular purposes, such as the expounding of moral values, the contradition of the materialistic trends of the times, the perpetuation of traditional institutions, and the teaching of literature [6] and that to forbid the particular exercises was to choose a "religion of secularism" in their place.[7] Though the "place of religion in our society is an exalted one," the establishment clause, the Court continued, prescribed that in "the relationship between man and religion," the State must be "firmly committed to a position of neutrality." [8]

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[4] Id., 430. Justice Black for the Court rejected the idea that the prohibition of religious services in public schools evidenced "a hostility toward religion or toward prayer." Id., 434. Rather, such an application of the First Amendment protected religion from the coercive hand of government and government from control by a religious sect. Justice Douglas's concurrence presented a lengthy itemization of federal, state, and local financing and support of religious exercises, ranging from chaplains in Congress and the armed forces to the recognition of a "Supreme Being" in the Pledge of Allegiance and the use of the motto "In God We Trust." Id., 437. Dissenting alone, Justice Stewart could not "see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Id., 444, 445.

[5] *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). "Applying the Establishment Clause principles to the cases at bar we find the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach* v. *Clauson*." Ibid.

[6] Id., 223–224. The Court thought the exercises were clearly religious.

[7] Id., 225. "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' *Zorach* v. *Clauson*, *supra*, at 314. We do not agree, however, that this decision in any sense has that effect."

[8] Id. 226. Justice Brennan contributed a lengthy concurrence in which he attempted to rationalize the decisions of the Court on the religion clauses and to delineate the principles applicable. He concluded that what the establishment clause foreclosed "are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially reli-

***Governmental Encouragement of Religion in Public Schools: Curriculum Restriction.***—In *Epperson* v. *Arkansas,*[9] the Court struck down a state statute which made it unlawful for any teacher in any state-supported educational institution "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Agreeing that control of the curriculum of the public schools was largely in the control of local officials, the Court nonetheless held that the motivation of the statute was a fundamentalist belief in the literal reading of the Book of Genesis and that this motivation and result required the voiding of the law. "The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First . . . Amendment to the Constitution." [10]

***Access of Religious Groups to School Property.***—Although government may not promote religion through its educational facilities, it may not, in pursuit of neutrality, bar groups of students seeking voluntarily to meet to engage in religious activities from doing so on school property, at least in institutions of higher learning.[11] So long as the government permits nonreligious groups to meet on a nondiscriminatory basis, to allow religious groups access to the same facilities would not constitute an impermissible benefit to religion, the purpose in allowing access would be secular, and little hazard of entanglement was likely.[12]

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gious means to serve governmental ends, where secular means would suffice." Id., 230, 295. Justice Stewart again dissented alone, feeling that the claims presented were essentially free exercise contentions which were not supported by proof of coercion or of punitive official action for nonparticipation.

While numerous efforts were made over the years to overturn these cases, through constitutional amendment and through limitations on the Court's jurisdiction, the Supreme Court itself has had no occasion to review the area again. *But see Stone* v. *Graham,* 449 U.S. 39 (1980) (summarily reversing state court and invalidating statute requiring the posting of the Ten Commandments, purchased with private contributions, on the wall of each public classroom).

[9] 393 U.S. 97 (1968).

[10] Id., 109.

[11] *Widmar* v. *Vincent,* 454 U.S. 263 (1981).

[12] Id., 270–275. Whether the case would apply similarly to secondary and perhaps elementary schools is unclear. The Court noted that university students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." Id., 274 n. 14. In a case decided before *Widmar,* but in which the Supreme Court denied *certiorari* afterward, one court held that a school board refusal to permit a student religious group to meet on school property before the beginning of the school day was proper, inasmuch as permission would violate the establishment clause. *Brandon* v. *Board of Education,* 635 F.2d 971 (C.A. 2, 1980), *cert. den.,* 454 U.S. 1123 (1981).

While the greater number of establishment cases have involved educational facilities, in other areas as well there have been contentions that legislative policies have been laws "respecting" the establishment of religion.

***Tax Exemptions of Religious Property.***—Every State and the District of Columbia afford provision for tax exemptions for religious institutions and the history of such exemptions goes back to the time of our establishment as a polity. The only expression by a Supreme Court Justice prior to 1970 was by Justice Brennan, who deemed tax exemptions constitutional because the benefit conferred was incidental to the religious character of the institutions concerned.[13] Then, in 1970, a nearly unanimous Court sustained a state exemption from real or personal property taxation of "property used exclusively for religious, educational or charitable purposes" owned by a corporation or association which was conducted exclusively for one or more of these purposes and did not operate for profit.[14] The first prong of a two-prong argument saw the Court adopting Justice Brennan's rationale. Using the secular purpose and effect test, Chief Justice Burger noted that the purpose of the exemption was not to single out churches for special favor, but it rather designated a broad category of associations having many common features and all dedicated to social betterment as deserving and worthy of special treatment because they function to serve a public need. Thus, churches in association with museums, hospitals, libraries, charitable organizations, professional associations, and the like, all non-profit, all having a beneficial and stabilizing influence in community life which was desirable and deserving of furthering, all were to be encouraged by being treated specially in the tax laws. The primary effect of the exemptions was not to aid religion; the primary effect was secular and any assistance to religion was merely incidental.[15]

For the second prong, the Court created a new test, the entanglement test,[16] by which to judge the program. There was some en-

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[13] "If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups." *Abington School District* v. *Schempp*, 374 U.S. 203, 301 (1963) (concurring opinion).

[14] *Walz* v. *Tax Comm. of City of New York*, 397 U.S. 664 (1970). Justice Douglas dissented.

[15] Id., 672–674.

[16] *Supra, pp.* 966–967.

tanglement whether there were exemptions or not, Chief Justice Burger continued, but with exemptions there was minimal involvement. But termination of exemptions would deeply involve government in the internal affairs of religious bodies, because evaluation of religious properties for tax purposes would be required and there would be tax liens and foreclosures and litigation concerning such matters.[17]

While the general issue is now settled, it is to be expected that variations of the exemption upheld in *Walz* will present the Court with an opportunity to elaborate the field still further.[18]

***Sunday Closing Laws.***—The history of Sunday Closing Laws goes back into United States colonial history and far back into English history.[19] Commonly, they require the observance of the Christian Sabbath as a day of rest, although in recent years they have tended to become honeycombed with exceptions. The Supreme Court's primary encounter with such laws as a challenged establishment violation occurred in *McGowan* v. *Maryland*.[20] There, the Court acknowledged that historically the laws had a religious motivation and were designed to effectuate concepts of Christian theology. However, "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion. . . ." [21] That is, the Court determined that more recent history bespoke a secular state interest in the promotion of the health, safety, recreation, and general well-being of its citizens, which was effectuated by many types of laws, including the requirement of a day of rest. "[T]he fact that this day is Sunday, a day of particular significance

[17] 397 U.S., 674-676.

[18] For example, the Court subsequently accepted for review a case concerning property tax exemption for church property used as a commercial parking lot, but state law was changed, denying exemption for purely commercial property and requiring a *pro rata* exemption for mixed use, and the Court remanded so that the change in the law could be considered. *Differderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972).

[19] The history is recited at length in the opinion of the Court in *McGowan* v. *Maryland*, 366 U.S. 420, 431-440 (1961), and in Justice Frankfurter's concurrence. Id., 459, 470-551 and appendix.

[20] 366 U.S. 420 (1961). Decision on the establishment question in this case also controlled the similar decision on that question in *Two Guys from Harrison-Allentown* v. *McGinley*, 366 U.S. 582 (1961), *Braunfeld* v. *Brown*, 366 U.S. 599 (1961, and *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617 (1961). On free exercise in the two latter cases, *see infra, pp.* 995-998.

[21] *McGowan* v. *Maryland*, 366 U.S. 420, 444 (1961).

for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." [22] The choice of Sunday as the day of rest, while originally religious, now reflected simple legislative inertia or recognition that Sunday was a traditional day for the choice.[23] Valid secular reasons existed for not simply requiring one day of rest and leaving to each individual to choose the day, reasons of ease of enforcement and of assuring a common day in the community for rest and leisure.[24]

***Conscientious Objection.***—Historically, Congress has provided for alternative service for men who had religious scruples against participating in either combat activities or in military activities altogether; the fact the Congress chose to draw the line of exemption on the basis of religious belief confronted the Court with a difficult constitutional question, which, however, the Court chose to avoid by a somewhat disingenuous interpretation of the statute.[25] In *Gillette* v. *United States,*[1] a further constitutional problem arose in which the Court did squarely confront and validate the congressional choice. Congress had restricted conscientious objection status to those who objected to "war in any form" and the Court conceded that there were religious or conscientious objectors who were not opposed to all wars but only to particular wars based upon evaluation of a number of factors by which the "justness" of any particular war could be judged; "properly construed," the Court said, the statute did draw a line relieving from military service some reli-

[22] Id., 445.

[23] Id., 449–452.

[24] Ibid. Justice Frankfurter, with whom Justice Harlan concurred, arrived at the same conclusions by a route which did not require approval of *Everson* v. *Board of Education* from which he had dissented.

[25] In *United States* v. *Seeger,* 380 U.S. 163 (1965), a unanimous Court construed the language of the exemption limiting the status to those who by "religious training and belief," that is, those who believed in a "Supreme Being," to mean that a person must have some belief which occupies in his life the place or role which the traditional concept of God occupies in the orthodox believer. After the "Supreme Being" clause was deleted, a plurality in *Welsh* v. *United States,* 398 U.S. 333 (1970), construed the religion requirement as inclusive of moral, ethical, or religious grounds. Justice Harlan concurred on constitutional grounds, believing that the statute was clear that Congress had intended to restrict conscientious objection status to those persons who could demonstrate a traditional religious foundation for their beliefs and that this was impermissible under the establishment clause. Id., 344. The dissent by Justices White and Stewart and Chief Justice Burger rejected both the constitutional and the statutory basis. Id., 367.

[1] 401 U.S. 437 (1971).

gious objectors while not relieving others.[2] Purporting to apply the secular purpose and effect test, the Court looked almost exclusively to purpose and hardly at all to effect. Although it is not clear, the Court seemed to require that a classification must be religiously based "on its face" [3] or to lack any "neutral, secular basis for the lines government has drawn" [4] in order that it be held to violate the establishment clause. The classification here was not religiously based "on its face" and there was underlaying it "a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions." [5] These purposes involved the maintenance of a fair and efficient selective service system and protection of the integrity of democratic decisionmaking both of which arose out of the difficulty of administering any system that attempted to separate sincere conscientious objectors to particular wars from others with fraudulent claims.[6]

***Regulation of Religious Solicitation.***—Although the solicitation cases have generally been decided under the free exercise or free speech clauses,[7] in one instance the Court, intertwining establishment and free exercise principles, voided a provision in a state charitable solicitations law that required only those religious organizations that received less than half their total contributions from members or affiliated organizations to comply with the registration and reporting sections of the law.[8] Applying strict scrutiny equal protection principles, the Court held that by distinguishing between older, well-established churches that had strong membership financial support and newer bodies lacking a contributing constituency or that may favor public solicitation over general reliance on financial support from the members, the statute granted denominational preference forbidden by the establishment clause.[9]

**Free Exercise of Religion**

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free

[2] Id., 449.
[3] Id., 450.
[4] Id., 452.
[5] Ibid.
[6] Id., 452–460.
[7] *Infra, pp.* 1138–1139.
[8] *Larson* v. *Valente,* 456 U.S. 228 (1982). Two Justices dissented on the merits, id., 258 (Justices White and Rehnquist), while two other Justices dissented on a standing issue. Id., 264 (Chief Justice Burger and Justice O'Connor).
[9] Id., 246–251. *Compare Heffron* v. *ISKCON,* 452 U.S. 640, 652–653 (1981), and id., 659 n. 3 (Justice Brennan, concurring in part and dissenting in part) (dealing with a facially neutral solicitation rule distinguishing between religious groups that have a religious tenet requiring peripatetic solicitation and those who do not).

exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority." [1] It bars "governmental regulation of religious *beliefs* as such," [2] prohibiting misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect." [3] "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." [4] Freedom of conscience is the basis of the free exercise clause, and government may not penalize or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs.[5] Yet, the free exercise clause does not prevent government from either requiring the doing of some act or forbidding the doing of some act merely because religious beliefs underlie the conduct in question.[6]

***Court Standards: The Belief-Conduct Distinction.***—Generally, the Court in evaluating a free exercise challenge to legislation or governmental policy will look to the same tests applied in establishment cases; that is, secular purpose and effect will be sought, and, presumably, entanglement will be considered.[7] But necessarily there are some differences. Government may enact legislation which impermissibly "respects" an establishment of religion without coercing persons in their beliefs or practices, but the effect of a law or a governmental action upon an individual's belief or conduct is the gravamen of a free exercise complaint.[8] In this connection,

[1] *Abington School District* v. *Schempp*, 374 U.S. 203, 222–223 (1963).

[2] *Sherbert* v. *Verner*, 374 U.S 398, 402 (1963) (emphasis in original).

[3] *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961).

[4] *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972).

[5] *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

[6] E.g., *Reynolds* v. *United States*, 98 U.S. 145 (1879); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *United States* v. *Lee*, 455 U.S. 252 (1982).

[7] *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); *Sherbert* v. *Verner*, 374 U.S. 398, 408–409 (1963); *Braunfeld* v. *Brown*, 366 U.S. 599, 603–608 (1961).

[8] "The impact of the compulsory attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. . . . Nor is the impact of the compulsory attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion which the First Amendment was designed to prevent." *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972).

there is the familiar distinction between belief and conduct which has varied in precision over the years. As the Court has noted, the free exercise clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be." [9] In its first free exercise case involving the power of government to prohibit polygamy, the Court invoked a hard distinction between the two, saying that although laws "cannot interfere with mere religious beliefs and opinions, they may with practices." [10] The rule thus propounded protected only belief, inasmuch as religiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other motives. And although the rule was applied in a number of cases,[11] more recent cases establish that religiously grounded conduct is not always outside the protection of the free exercise clause.[12] Rather, the Court will balance the secular interest asserted by the government against the claim of religious liberty asserted by the person affected and only if the governmental interest is compelling and if no alternative forms of regulation would serve that interest is the claimant to be required to yield.[13] Thus, it is still true that freedom to act is not absolute but the freedom is more substantially protected than it was.

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[9] *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940).

[10] *Reynolds* v. *United States*, 98 U.S. 145, 166 (1878). "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.' " *Davis* v. *Beason*, 133 U.S. 333, 345 (1890). In another context, Justice Sutherland in *United States* v. *Macintosh*, 283 U.S. 605, 625 (1931), suggested a plenary governmental power to regulate action in denying that recognition of conscientious objection to military service was of a constitutional magnitude, saying that "unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

[11] *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Prince* v. *Massachussets* 321 U.S. 158 (1944) (child labor); *Cleveland* v. *United States*, 329 U.S. 14 (1946) (polygamy). In *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963), Justice Brennan asserted that the "conduct or activities so regulated [in the cited cases] have invariably posed some substantial threat to public safety, peace or order."

[12] *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *cf. Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961): [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

[13] *Sherbert* v. *Verner*, 374 U.S. 398, 403, 406–409 (1963). In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court did not use the "compelling state interest" language, but it did emphasize the insubstantial disagreement between what the State was seeking to promote and what the Amish were seeking to avoid. Thus, while the State's provision of public schools "ranks at the very apex of the function of a State", it was not really this interest but a lesser one which was balanced against the liberty of the Amish. *And see Gillette* v. *United States*, 401 U.S. 437 (1971), in which the governmental interest overrode the religious claim.

***The Mormon Cases.***—The Court's first encounter with free exercise claims occurred in a series of cases in which the Federal Government and the territories moved against the Mormons because of their practice of polygamy. Actual prosecutions and convictions for bigamy presented little problem for the Court, inasmuch as it could distinguish between beliefs and acts.[14] But the presence of large numbers of Mormons in some of the territories made convictions of bigamy difficult to obtain and in 1882 Congress enacted a statute which barred "bigamists," "polygamists," and "any person cohabiting with more than one woman" from voting or serving on juries and the Court sustained it, even as to persons entering into the state prior to enactment of the original law prohibiting bigamy and persons as to whom the statute of limitations had run.[15] Subsequently, an act of a territorial legislature which required a prospective voter not only to swear that he was not a bigamist or polygamist but as well that "I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy . . . or which practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, . . ." was upheld in an opinion devoted to the condemnation of plural marriage and its advocacy as equal evils.[16] And, finally, the Court sustained the revocation of the charter of the Mormon Church and confiscation of all church property not actually used for religious worship or for burial.[17]

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[14] *Reynolds* v. *United States*, 98 U.S. 145 (1879); *cf. Cleveland* v. *United States*, 329 U.S. 14 (1946).

[15] *Murphy* v. *Ramsey*, 114 U.S. 15 (1885).

[16] *Davis* v. *Beason*, 133 U.S. 333 (1890). "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." Id., 341–342.

[17] *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1 (1890). "[T]he property of the said corporation . . . [is to be used to promote] the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. . . . The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity had produced in the Western world." Id., 48–49.

***The Jehovah's Witnesses Cases.***—In contrast to the Mormons, the sect known as Jehovah's Witnesses, in many ways as unsettling to the conventional as the Mormons were,[18] provoked from the Court a lengthy series of decisions [19] expanding the rights of religious proselytizers and other advocates to utilize the streets and parks to broadcast their ideas, though the decisions may be based more squarely on the speech clause than on the free exercise clause. The leading case is *Cantwell* v. *Connecticut.*[20] Three Jehovah's Witnesses were convicted under a statute which forbade the unlicensed soliciting of funds on the representation that they were for religious or charitable purposes and also a general charge of breach of the peace, which arose when they accosted in a strongly Catholic neighborhood two communicants of that faith and played to them a phonograph record which grossly insulted the Christian religion in general and the Catholic Church in particular. The solicitation statute count was voided as an infringement on religion because the issuing officer was authorized to inquire whether the requester did have a religious cause and to decline a license if in his view the cause was not religious. Such power amounted to a previous restraint upon the exercise of religion and was invalid, the Court held.[21] The breach of the peace count was voided because on an application of a clear-and-present danger test the Court did not find that the interest sought to be upheld by the State justified the suppression of religious views that simply annoyed listeners.[22]

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[18] As Professor Chafee described them, they are "a sect distinguished by great religious zeal and astonishing powers of annoyance." Z. Chafee, *Free Speech in the United States* (Cambridge: 1941), 399. For recent cases dealing with religious groups discomfiting to the mainstream, *see Heffron* v. *ISKCON,* 452 U.S. 640 (1981) (Hare Krishnas); *Larson* v. *Valente,* 456 U.S. 228 (1982) (Unification Church).

[19] Most of the cases are collected and categorized by Justice Frankfurter in *Niemotko* v. *Maryland,* 340 U.S. 268, 273 (1951) (concurring opinion).

[20] 310 U.S. 296 (1940).

[21] Id., 303–307. "The freedom to act must have appropriate definition to preserve the enforcement of that protection [of society]. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . [A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Id., 304.

[22] Id., 307–311. "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Id., 310.

There followed a series of sometimes conflicting decisions. At first, the Court sustained the application to vendors of religious books and pamphlets of a non-discriminatory license fee,[23] but eleven months later it vacated its former decision and struck down such fees.[24] A city ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was held in violation of the First Amendment when applied to distributors of leaflets advertising a religious meeting.[25] But a state child labor law was held to be validly applied to punish the guardian of a nine-year old child who permitted her to engage in "preaching work" and the sale of religious publications after hours.[1] The Court decided a number of cases involving meetings and rallies in public parks and other public places by upholding licensing and permit requirements which were premised on nondiscriminatory "times, places, and manners" terms and which did not seek to regulate the content of the religious message to be communicated.[2]

***Free Exercise Exemption From General Governmental Requirements.***—No single line of decisions governs the determination when a uniform, nondiscriminatory requirement by government mandating action or nonaction by citizens must yield in the case of citizens with a sincere religious conviction against the required action or nonaction. Thus, the Court sustained the power of a State to exclude from its schools children who because of their religious beliefs would not participate in the salute to the flag,[3] only within a short time to reverse itself and condemn such exclusions but on speech grounds rather than religious grounds.[4] Also, the Court seemed to be clearly of the view that government could compel those persons religiously opposed to bearing arms to take an oath to do so or to receive training to do so,[5] only in more recent cases

[23] *Jones* v. *Opelika*, 316 U.S. 584 (1942).

[24] *Jones* v. *Opelika*, 319 U.S. 103 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

[25] *Martin* v. *City of Struthers*, 319 U.S. 141 (1943). *Compare Breard* v. *City of Alexandria*, 341 U.S. 622 (1951) (similar ordinance sustained in commercial solicitation context).

[1] *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

[2] E.g., *Niemetko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). *See also Larson* v. *Valente*, 456 U.S. 228 (1982) (solicitation on state fair ground by Unification Church members).

[3] *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940).

[4] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). On the same day, the Court held that a State may not forbid the distribution of literature urging and advising on religious grounds that citizens refrain from saluting the flag. *Taylor* v. *Mississippi*, 319 U.S. 583 (1943).

[5] *See United States* v. *Macintosh*, 283 U.S. 605 (1931) (denying naturalization to a conscientious objector who would not swear to bear arms in defense of the coun-

by its statutory resolution to cast doubt on this resolution,[6] and still more recently leave the whole matter in some doubt.[7]

*Braunfield* v. *Brown* [8] held that the free exercise clause did not mandate an exemption from Sunday Closing Laws for an Orthodox Jewish merchant who observed Saturday as the Sabbath and was thereby required to be closed two days of the week rather than one. Emphasizing that legislation which directly penalizes a religious practice, while subject to close scrutiny, is not *per se* violative of the free exercise clause, the Court compared the present situation in which the challenged law "does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even those are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated . . . may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful." [9] The rule, said the Court, was that "if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." [10]

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try, a conscientious objector exemption to military service being solely by grace of Congress), overruled by *Girouard* v. *United States*, 328 U.S. 61 (1946) (holding that Congress had not intended to bar naturalization on this ground, a strictly statutory interpretation). *See also Hamilton* v. *Board of Regents*, 293 U.S. 245 (1934) (upholding expulsion from state university for a religiously based refusal to take a required course in military training); *In re Summers*, 325 U.S. 561 (1945) (upholding refusal to admit applicant to bar because as conscientious objector he could not take required oath).

[6] *United States* v. *Seeger*, 380 U.S. 163 (1965); *see* id., 188 (Justice Douglas concurring); *Welsh* v. *United States*, 398 U.S. 333 (1970); and *see* id., 344 (Justice Harlan concurring).

[7] *Gillette* v. *United States*, 401 U.S. 437 (1971) (holding that secular considerations overbalanced free exercise infringement of religious beliefs of objectors to particular wars).

[8] 366 U.S. 599 (1961). On Sunday Closing Laws and the establishment clause, *see supra*, *pp.* 987–988.

[9] Id., 605–606.

[10] Id., 607. The passages quoted are from the plurality opinion of the Court. The concurrence balanced the economic disadvantage suffered by the Sabbatarians

Within two years *Sherbert* v. *Verner* [11] cast substantial doubt upon the continued vitality of *Braunfeld* but as importantly extended the line of analysis to require a religious exemption from a secular, regulatory piece of economic legislation. Sherbert was disqualified from receiving unemployment compensation, because as a Seventh Day Adventist she would not accept work on Saturday which kept her from finding other similar work and which, according to state officials, meant she was not complying with the statutory requirement to stand ready to accept suitable employment. The denial of unemployment compensation in those circumstances, the Court said, in order to withstand constitutional challenge, "must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religions may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .' " [12] First, the disqualification was held to impose a burden on the free exercise of Sherbert's religion; it was an indirect burden and it did not impose a criminal sanction on a religious practice, but the disqualification derived solely from her practice of her religion and constituted a compulsion upon her to forgo that practice.[13] Second, there was no compelling interest demonstrated by the State. The only interest asserted was the prevention of the possibility of fraudulent claims, but that was merely a bare assertion and even if there was a showing of demonstrable danger, "it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." [14]

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against the important interest of the State in securing its day of rest regulation. *McGowan* v. *Maryland*, 366 U.S. 420, 459, 512–522 (1961). Three Justices dissented. Id., 561 (Justice Douglas); *Braunfeld* v. *Brown*, 366 U.S. 599, 610, 616 (Justices Brennan and Stewart).

[11] 374 U.S. 398 (1963). Three Justices thought that *Sherbert* overruled *Braunfeld*. Id., 413, 417 (Justice Stewart concurring), 418 (Justice Harlan and White dissenting). *See also McDaniel* v. *Paty*, 435 U.S. 618, 633 n. 6 (1978) (concurring opinion), in which Justice Brennan stated that "[c]andor compels the acknowledgment that to the extent that *Braunfeld* conflicts with *Sherbert* in this regard, it was overruled." Yet, *Braunfeld* remains a seemingly viable if constricted precedent.

[12] Id., 374 U.S. 403, quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

[13] Id., 403–406.

[14] Id., 407. *Braunfeld* was distinguished because of "a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers." That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. Id., 408–409.

*Sherbert* was reaffirmed and applied in a subsequent case involving a Jehovah's Witness who quit his job when his employer transferred him from a department making items for industrial use to a department making parts for military equipment; he asserted he refused to work on war materials because of his religious beliefs, although he conceded that at least some other Jehovah's Witnesses did not concur in those principles. Holding that courts may not inquire into the validity of beliefs asserted to be religious so long as the claims were made in good faith (and the beliefs were at least arguably religious), the Court held it to deny the Witness' free exercise rights to refuse him unemployment compensation on the basis that he was not unemployed for "good cause." [15]

Application of the balancing test in this area is clarified in two other cases in which neutral state regulation had an adverse impact upon individuals or groups because of religious beliefs. *Wisconsin* v. *Yoder* [16] held that a state compulsory attendance law as applied to require Amish children to attend ninth and tenth grades of public schools in contravention of Amish religious beliefs violated the free exercise clause. Finding that the beliefs of the Amish were indeed religiously based and of great antiquity,[17] the Court went on then to determine whether the governmental interests were sufficiently important to override the free exercise claims and then only if those interests could not be achieved without inflicting the burden upon religious beliefs.[18] The governmental interest was not simply the provision of education, inasmuch as the State and the Amish were in agreement on education through the first eight grades and since the Amish provided additional education of a primarily vocational nature to their children after the eighth grade. The State's interest was really that of providing two additional years of public schooling. Nothing in the record, felt the Court, showed that this interest outweighed the great harm which it would do to traditional Amish religious beliefs to impose the compulsory ninth and tenth grade attendance.[19]

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[15] *Thomas* v. *Review Board*, 450 U.S. 707 (1981). Justice Rehnquist dissented, arguing, *inter alia*, that the decisions in *Sherbert* and *Thomas* created unacceptable tensions between the establishment and free exercise clauses, that requiring the States to accommodate persons like *Sherbert* and *Thomas* because of their religious beliefs ran the risk of "establishing" religion, and that neutral application of governmental interests in such cases did not deny free exercise. Id., 720. The Court has expressly held that a judicial mandate of such accommodation does not violate the establishment clause. Id., 719–720; *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

[16] 406 U.S. 205 (1972).

[17] Id., 215–219. Why the Court felt impelled to make these points is unclear, since it is settled that it is improper for courts to inquire into the interpretation of religious belief. E.g., *United States* v. *Lee*, 455 U.S. 252, 257 (1982).

[18] Id., 406 U.S., 215.

[19] Id., 221–229.

On the other hand, in *United States* v. *Lee*,[20] the Court denied the Amish exemption from compulsory participation in the Social Security system. The objection was that payment of taxes by Amish employers and employees and the receipt of public financial assistance were forbidden by the religious beliefs of the Amish. Accepting that this was true, the Court nonetheless held that the governmental interest was compelling and therefore sufficient to justify the burdening of religious beliefs. Compulsory payment of taxes was necessary for the vitality of the system; either voluntary participation or a pattern of exceptions would undermine its soundness and make the program difficult of administration.[21]

It may be assumed that this area of free exercise jurisprudence will remain fruitful of litigation. Especially is this likely to be true in the context of the discretion of governments, in the absence of judicial compulsion, to grant exemptions from facially neutral regulations on the basis that across-the-board application would violate some individual's or some group's free exercise rights.[22] It may be assumed that exceptions are permissible in some circumstances without the necessity of resort first to the courts.

***Religious Test Oaths.***—However the Court has been divided in dealing with religiously-based conduct and governmental compulsion of action or nonaction, it was unanimous in voiding a state constitutional provision which required a notary public, as a condition of perfecting his appointment, to declare his belief in the existence of God. The First Amendment, considered with the religious oath provision of Article VI, makes it impossible "for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting

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[20] 455 U.S. 252 (1982).

[21] *See also Heffron* v. *ISKCON*, 452 U.S. 640 (1981). Requiring Krishnas to solicit at fixed booth sites on county fair grounds is a valid time, place, and manner regulation, although, as the Court acknowledged, id., 652, peripatetic solicitation was an element of Krishna religious rites.

[22] For example, federal law prohibits discrimination on the basis of religion in employment, 42 U.S.C. § 2000e–2(a), but it also excepts the employment practices of a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to carry out work connected with the activities of the employer. 42 U.S.C. § 2000e–1. The law also obligates an employer to reasonably accommodate an employee's religious observance or practice if he may do so without undue hardship on the conduct of business. 42 U.S.C. § 2000e(j). *See Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977). Other constitutional questions arise in the context of possible coverage of religious institutions under laws providing for collective bargaining by employees, e.g., *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (construing NLRA to find religious schools exempted), or for unemployment compensation taxes. E.g., *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (construing statutes to exempt church schools).

public offices to persons who have, or perhaps more properly, profess to have a belief in some particular kind of religious concept." [23]

***Religious Disqualification.***—Unanimously, but with great differences of approach, the Court declared invalid a Tennessee statute, once common in the States but now restricted to this one State, barring ministers and priests from service in a specially called state constitutional convention and inferentially indicated the invalidity of the state constitutional provision barring ministers and priests from service as legislators.[24]

## FREEDOM OF EXPRESSION—SPEECH AND PRESS

### Adoption and the Common Law Background

Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." [1] The special committee rewrote the language to some extent, adding other provisions from Madison's draft, to make it read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." [2] In this form it went to the Senate, which rewrote it to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances." [3] Subsequently, the religion

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[23] *Torcaso* v. *Watkins*, 367 U.S. 488, 494 (1961).

[24] *McDaniel* v. *Paty*, 435 U.S. 618 (1978). The plurality opinion by Chief Justice Burger, joined by Justices Powell, Rehnquist, and Stevens, found the case governed by *Sherbert* v. *Verner* as requiring strict scrutiny of governmental restrictions upon the free exercise of one's religion. The State had failed to show that its view of the dangers of clergy participation in the political process had any validity; *Torcaso* v. *Watkins* was distinguished because the State was acting on the status of being a clergyman rather than on one's beliefs. Justice Brennan, joined by Justice Marshall, found *Torcaso* controlling because imposing a restriction upon one's status as a religious person did penalize his religious belief, his freedom to profess or practice that belief. Id., 629. Justice Stewart also found *Torcaso* dispositive, id., 642, and Justice White found an equal protection violation because of the restraint upon seeking political office. Ibid.

[1] 1 *Annals of Congress* 434 (1789). Madison had also proposed language limiting the power of the States in a number of respects, including a guarantee of freedom of the press, Id., 435. Although passed by the House, the amendment was defeated by the Senate, *Supra*, p. 952.

[2] Id., 731 (August 15, 1789).

[3] B. Schwartz (ed.), *The Bill of Rights: A Documentary History* (New York: 1971), 1148–1149.

clauses and these clauses were combined by the Senate.[4] The final language was agreed upon in conference.

Debate in the House is unenlightening with regard to the meaning the Members ascribed to the speech and press clause and there is no record of debate in the Senate.[5] In the course of debate, Madison warned against the dangers which would arise "from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty." [6] That the "simple, acknowledged principles" embodied in the First Amendment have occasioned controversy without end both in the courts and out should alert one to the difficulties latent in such spare language. Insofar as there is likely to have been a consensus, it was no doubt the common law view as expressed by Blackstone. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievious, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad

[4] Id., 1153.

[5] The House debate insofar as it touched upon this amendment was concerned almost exclusively with a motion to strike the right to assemble and an amendment to add a right of the people to instruct their Representatives. 1 *Annals of Congress* 731-749 (August 15, 1789). There are no records of debates in the States on ratification.

[6] Id., 738.

sentiments, destructive to the ends of society, is the crime which society corrects." [7]

Whatever the general unanimity on this proposition at the time of the proposal of and ratification of the First Amendment,[8] it appears that there emerged in the course of the Jeffersonian counterattack on the Sedition Act [9] and the use by the Adams Administration of the Act to prosecute its political opponents [10] something of a libertarian theory of freedom of speech and press,[11] which,

[7] 4 W. Blackstone's *Commentaries on the Laws of England*, T. Cooley ed. (Chicago; 2d rev. ed. 1872), 151–152. *See* 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 1874–1886. The most comprehensive effort to assess theory and practice in the period prior to and immediately following adoption of the Amendment is L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: 1960), which generally concluded that the Blackstonian view was the prevailing one at the time and probably the understanding of those who drafted, voted for, and ratified the Amendment.

[8] It would appear that Madison held to advance libertarian views earlier than his Jeffersonian compatriots as witness his leadership of a move to refuse officially to concur in Washington's condemnation of "[c]ertain self-created societies," by which the President meant political clubs supporting the French Revolution, and his success in deflecting the Federalist intention to censure such societies. I. Brant, *James Madison—Father of the Constitution 1787–1800* (Indianapolis: 1950), 416–420. "If we advert to the nature of republican government," Madison told the House, "we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 *Annals of Congress* 934 (1794). On the other hand, the early Madison, while a member of his county's committee on public safety, had enthusiastically promoted prosecution of Loyalist speakers and the burning of their pamphlets during the Revolutionary period. 1 *Papers of James Madison*, W. Hutchinson & W. Rachal eds. (Chicago: 1962), 147, 161–162, 190–192. There seems little doubt that Jefferson held to the Blackstonian view. Writing to Madison in 1788, he said: "A declaration that the federal government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed." 13 *Papers of Thomas Jefferson*, J. Boyd ed. (Princeton: 1955), 442. Commenting a year later to Madison on his proposed amendment, Jefferson suggested that the free speech-free press clause might read something like: "The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations." 15 *Papers, op. cit.* 367.

[9] The Act, 1 Stat. 596 (1798), punished anyone who would "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; . . . ." On the Act, *see* J. Smith, *Freedom's Fetters—The Alien and Sedition Laws and American Civil Liberties* (Ithaca: 1956).

[10] Id., 159 *et seq.*

[11] L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: 1960), ch. 6; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273–276 (1964).

however much the Jeffersonians may have departed from it upon assuming power,[12] was to blossom into the theory undergirding Supreme Court First Amendment jurisprudence in modern times. Full acceptance of the theory that the Amendment operates not only to bar most prior restraints of expression but subsequent punishment of all but a narrow range of expression, in political discourse and indeed in all fields of expression dates from a quite recent period, although the Court's movement toward that position began in its consideration of limitations on speech and press in the period following World War I.[13] Thus, in 1907, Justice Holmes could observe that even if the Fourteenth Amendment embodied prohibitions similar to the First Amendment, "still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare . . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of crimi-

[12] L. Levy, *Jefferson and Civil Liberties—The Darker Side* (Cambridge: 1963). Thus President Jefferson wrote to Governor McKean of Pennsylvania in 1803: "The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one." *9 Works of Thomas Jefferson*, P. Ford, ed. (New York: 1905), 449.

[13] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), provides the principal doctrinal justification for the development, although the results had long since been fully applied by the Court. In *Times*, Justice Brennan discerned in the controversies over the Sedition Act a crystallization of "a national awareness of the central meaning of the First Amendment," id., 273, which is that the "right of free public discussion of the stewardship of public officials . . . [is] a fundamental principle of the American form of government." Id., 275. This "central meaning" proscribes either civil or criminal punishment for any but the most maliciously, knowingly false criticism of government. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [The historical record] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." Id., 276. Madison's Virginia Resolutions of 1798 and his *Report* in support of them brought together and expressed the theories being developed by the Jeffersonians and represent a solid doctrinal foundation for the point of view that the First Amendment superseded the common law on speech and press, that a free, popular government cannot be libeled, and that the First Amendment absolutely protects speech and press. 6 *Writings of James Madison*, G. Hunt, ed. (New York: 1908), 341–406.

nal libel apart from statute in most cases, if not in all." [14] But as Justice Holmes also observed, "[t]here is not constitutional right to have all general propositions of law once adopted remain unchanged." [15]

But in *Schenck* v. *United States*,[16] the first of the post-World War I cases to reach the Court, Justice Holmes, in the opinion of the Court, while upholding convictions for violating the Espionage Act by attempting to cause insubordination in the military service by circulation of leaflets, suggested First Amendment restraints on subsequent punishment as well as prior restraint. "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic . . . . The question in every case is whether the words used are used in such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Justice Holmes along with Justice Brandeis soon went into dissent in their views that the majority of the Court was misapplying the legal standards thus expressed to uphold suppression of speech which offered no threat of danger to organized institutions.[17] But it was with the Court's assumption

[14] *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907). *And see* Justice Frankfurter in 1951: "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. . . . 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years." *Dennis* v. *United States*, 341 U.S. 494, 521–522, 524 (1951) (concurring opinion). The internal quotation is from *Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897).

[15] *Patterson* v. *Colorado*, 205 U.S. 454, 461 (1907).

[16] 249 U.S. 47, 51–52 (1919).

[17] *Debs* v. *United States*, 249 U.S. 211 (1919); *Abrams* v. *United States*, 250 U.S. 616 (1919); *Schaefer* v. *United States*, 251 U.S. 466 (1920); *Pierce* v. *United States*, 252 U.S. 239 (1920); *United States ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U.S. 407 (1921). A state statute similar to the federal one was upheld in *Gilbert* v. *Minnesota*, 254 U.S. 325 (1920).

that the Fourteenth Amendment restrained the power of the States to suppress speech and press that the doctrines developed.[18] At first, Holmes and Brandeis remained in dissent, but in *Fiske* v. *Kansas*,[19] the Court sustained a First Amendment type of claim in a state case, and in *Stromberg* v. *California*,[20] a state law was voided on grounds of its interference with free speech.[21] Development over the years since has been uneven, but by 1964 the Court could say with unanimity: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." [22] And in 1969, it was said that the cases "have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [23] This development and its myriad applications are elaborated in the following sections.

**Freedom of Expression: The Philosophical Basis**

Probably no other provision of the Constitution has given rise to so many different views with respect to its underlying philosophical foundations, and hence proper interpretive framework, as has the guarantee of freedom of expression—the free speech and free press clauses.[1] The argument has been fought out among the com-

[18] *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Whitney* v. *California*, 274 U.S. 357 (1927). The Brandeis and Holmes dissents in both cases were important formulations of speech and press principles.

[19] 274 U.S. 380 (1927).

[20] 283 U.S. 359 (1931). By contrast, it was not until 1965 that a federal statute was held unconstitutional under the First Amendment. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). *See also United States* v. *Robel*, 389 U.S. 258 (1967).

[21] *And see Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Herndon* v. *Lowry*, 301 U.S. 242 (1937); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

[22] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

[23] *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969).

[1] While "expression" is not found in the text of the First Amendment, it is used herein, first, as a shorthand term for the freedoms of speech, press, assembly, petition, association, and the like, which are comprehended by the Amendment, and, second, as a recognition of the fact that judicial interpretation of the clauses of the First Amendment has greatly enlarged the definition commonly associated with "speech," as the following discussion will reveal. The term seems well settled, e.g., T. Emerson, *The System of Freedom of Expression* (New York: 1970), although it has been criticized. F. Schauer, *Free Speech: A Philosophical Inquiry* (New York: 1982), 50–52. The term also, as used here, conflates the speech and press clauses, explicitly

mentators. "The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases." [2] Some of the commentators argue in behalf of a complex of values, none of which by itself is sufficient to support a broad-based protection of freedom of expression.[3] Others would limit the basis of the First Amendment to one only among a constellation of possible values and would therefore limit coverage or degree of protection of the speech and press clauses.[4] For example, one school of thought believes that political speech is exclusively within the protected area, because of the constitutional commitment to free self-government,[4] although some commentators tend to define more broadly the concept of "political" than one might suppose from the word alone. Others recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary to the eventual ascertainment of the truth, through conflict of ideas in the marketplace, a view skeptical of our ability to ever know the truth.[5] A broader-

assuming they are governed by the same standards of interpretation and that, in fact, the press clause itself adds nothing significant to the speech clause as interpreted, an assumption briefly defended *infra*, *pp.* 1006–1008.

[2] T. Emerson, *The System of Freedom of Expression* (New York: 1970), 15. The practice in the Court is largely to itemize all the possible values the First Amendment has been said to protect. E.g., *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530, 534–535 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776–777 (1978).

[3] T. Emerson, *The System of Freedom of Expression* (New York: 1970), 6–7. For Emerson, the four values are (1) assuring individuals self-fulfillment, (2) promoting discovery of truth, (3) providing for participation in decisionmaking by all members of society, and (4) promoting social stability through discussion and compromise of differences. For a persuasive argument in favor of an "eclectic" approach, see Shrifrin, "The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment," 78 Nw. U. L. Rev. 1212 (1983). A compressive discussion of all the theories may be found in F. Schauer, *Free Speech: A Philosophical Inquiry* (New York: 1982).

[4] E.g., A. Meiklejohn, *Political Freedom* (New York: 1960); Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L. J. 1 (1971); BeVier, "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle," 30 Stan. L. Rev. 299 (1978). The contention does not reflect the Supreme Court's view. "It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection." *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 231 (1977).

[5] The "marketplace of ideas" metaphor is attributable to Justice Holmes' opinion in *Abrams* v. *United States*, 250 U.S. 616, 630 (1919). See Scanlon, "Freedom of Expression and Categories of Expression," 40 U. Pitt. L. Rev. 519 (1979). The theory has been the dominant one in scholarly and judicial writings. Baker, "Scope of the First Amendment Freedom of Speech," 25 UCLA L. Rev. 964, 967–974 (1978).

grounded view is variously expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment, such as the concept that when speech is freely chosen by the speaker to persuade others it defines and expresses the "self," promotes his liberty,[6] or the concept of "self-realization," the belief that free speech enables the individual to develop his powers and abilities and to make and influence decisions regarding his destiny.[7] The literature is enormous and no doubt the Justices as well as the larger society are influenced by it, and yet the decisions, because, in large part no doubt, they are the collective determination of nine individuals, seldom clearly reflect a principled and consistent acceptance of any philosophy.

**Freedom of Expression: Is There a Difference Between Speech and Press**

Utilization of the single word "expression" to reach speech, press, petition, association, and the like, raises the central question of whether the free speech clause and the free press clause are coextensive; does one perhaps reach where the other does not? It has been much debated, for example, whether the "institutional press" may assert or be entitled to greater freedom from governmental regulations or restrictions than are non-press individuals, groups, or associations. Justice Stewart has argued: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively." [1] But as Chief Justice Burger wrote: "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." [2]

Several Court holdings do firmly point to the conclusion that the press clause does not confer on the press the power to compel government to furnish information or to give the press access to in-

[6] E.g., Baker "Process of Change and the Liberty Theory of the First Amendment," 55 S. Cal. L. Rev. 293 (1982); Baker, "Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech," 130 U. Pa. L. Rev. 646 (1982).

[7] Redish, "The Value of Free Speech," 130 U. Pa. L. Rev. 591 (1982).

[1] *Houchins* v. *KQED*, 438 U.S. 1, 17 (1978) (concurring opinion). Justice Stewart initiated the debate in a speech, subsequently reprinted as Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975). Other articles are cited in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 795 (1978) (Chief Justice Burger concurring).

[2] Id., 798, the Chief Justice's conclusion was that the institutional press had no special privilege as the press.

formation that the public generally does not have.[3] Nor in many respects is the press entitled to treatment different in kind than the treatment any other member of the public may be subjected to.[4] Yet, it does seem clear that to some extent the press, because of the role it plays in keeping the public informed and in the dissemination of news and information, is entitled to particular if not special deference that others are not similarly entitled to, that its role constitutionally entitles it to governmental "sensitivity," to use Justice Stewart's word.[5] To what degree of difference in the decision of controversies such a recognized "sensitivity" might contribute is difficult to say.

The most interesting possibility lies in the area of First Amendment protection of good faith defamation.[6] Justice Stewart argued that the *Sullivan* privilege is exclusively a free press right, denying that the "constitutional theory of free speech gives an individual any immunity from liability for libel or slander." [7] To be sure, in all the cases to date that the Supreme Court has resolved, the defendant has been, in some manner, of the press,[8] but the Court's decision that corporations are entitled to assert First Amendment speech guarantees against federal and, through the Fourteenth Amendment, state regulations causes the evaporation of the supposed "conflict" between speech clause protection of individuals only and of press clause protection of press corporations as

[3] *Houchins* v. *KQED*, 438 U.S. 1 (1978), and id., 16 (Justice Stewart concurring); *Saxbe* v. *Washington Post*, 417 U.S. 843 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Nixon* v. *Warner Communications*, 435 U.S. 589 (1978). The trial access cases, whatever they may precisely turn out to mean, recognize a right of access of both public and press to trials. *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982).

[4] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978); *Herbert* v. *Lando*, 441 U.S. 153 (1979).

[5] E.g., *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Landmark Communications* v. *Virginia*, 435 U.S. 829 (1978). *See also Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563-567 (1978), and id., 568 (Justice Powell concurring); *Branzburg* v. *Hayes*, 408 U.S. 665, 709 (1972) (Justice Powell concurring). Several concurring opinions in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), imply recognition of some right of the press to gather information that apparently may not be wholly inhibited by nondiscriminatory constraints. Id., 582-584 (Justice Stevens), 586 n. 2 (Justice Brennan), 599 n. 2 (Justice Stewart). On the other hand, the Court has also suggested that the press is protected in order to promote and to protect the exercise of free speech in the society, including the receipt of information by the people. E.g., *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *CBS* v. *FCC*, 453 U.S. 367, 394-395 (1981).

[6] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *See infra*, pp. 1101-1108.

[7] Stewart, "Or of the Press," 26 Hastings, L. J. 631, 633-635 (1975).

[8] In *Hutchinson* v. *Proxmire*, 443 U.S. 111 133 n. 16 (1979), the Court noted that it has never decided whether the *Times* standard applies to an individual defendant. Some think they discern in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), intimations of such leanings by the Court.

well as of press individuals.[9] The issue, the Court wrote, was not what constitutional rights corporations have but whether the speech which is being restricted is expression that the First Amendment protects because of its societal significance. Because the speech concerned the enunciation of views on the conduct of governmental affairs, it was protected regardless of its source; while the First Amendment protects and fosters individual self-expression as a worthy goal, it also and as important affords the public access to discussion, debate, and the dissemination of information and ideas. Despite *Bellotti's* emphasis upon the nature of the speech there being political, it is clear that the same principle, the right of the public to receive information, governs nonpolitical, corporate speech.[10]

With some qualifications, therefore, it is submitted that the speech and press clauses may be analyzed under an umbrella "expression" standard, with little, if any, hazard of missing significant doctrinal differences.

**The Doctrine of Prior Restraint**

"[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." [1] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." [2] Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." [3] Under the English licens-

[9] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). The decision, addressing a question not theretofore confronted, was 5-to-4. Justice Rehnquist would have recognized no protected First Amendment rights of corporations on the basis that as creatures entirely the creation of state law they were not to be accorded rights enjoyed by natural persons. Id., 822. Justices White, Brennan, and Marshall thought the First Amendment implicated but not dispositive because of the state interests asserted. Id., 802. Previous decisions recognizing corporate free speech had either involved press corporations, id., 781-783; and see id., 795 (Chief Justice Burger concurring), or concerned corporations organized especially to promote the ideological and associational interests of their members. E.g., *NAACP* v. *Button*, 371 U.S. 415 (1963).

[10] Commercial speech when engaged in by a corporation is subject to the same standards of protection as when natural persons engage in it. *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530, 533-535 (1980). Nor does the status of a corporation as a government regulated monopoly alter the treatment. Id., 534 n. 1; *Central Hudson Gas & Electric Co.* v. *PSC*, 447 U.S. 557, 566-568 (1980).

[1] *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

[2] *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963).

[3] *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971).

ing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license that which for a long time could be published only with a license.[4]

The United States Supreme Court's first encounter with a law imposing a prior restraint came in *Near* v. *Minnesota ex rel. Olson*,[5] in which a five-to-four majority voided a law authorizing the permanent enjoining of future violations by any newspaper or periodical once found to have published or circulated an "obscene lewd and lascivious" or a "malicious, scandalous and defamatory" issue. An injunction had been issued after the newspaper in question had printed a series of articles tying local officials to gangsters. While the dissenters maintained that the injunction constituted no prior restraint, inasmuch as that doctrine applied to prohibitions of publication without advance approval of an executive official,[6] the majority deemed the difference of no consequence, since in order to avoid a contempt citation the newspaper would have to clear future publications in advance with the judge.[7] Liberty of the press to scrutinize closely the conduct of public affairs was essential, said Chief Justice Hughes for the Court. "[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." [8] The Court did not undertake to explore the kinds of restrictions to which the term "prior restraint" would apply nor to do more than assert that only in "exceptional circumstances" would prior restraint be permissible.[9]

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[4] *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713–714 (1931); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (1938).

[5] 283 U.S. 697 (1931).

[6] Id., 723, 733–736 (Justice Butler dissenting).

[7] Id., 712–713.

[8] Id., 719–720.

[9] Id., 715–716.

Nor did subsequent cases substantially illuminate the murky interior of the doctrine. The doctrine of prior restraint was called upon by the Court as it struck down a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them, and as it voided other restrictions on First Amendment rights.[10] The doctrine that generally emerged was that permit systems—prior licensing, if you will—were constitutionally valid so long as the discretion of the issuing official was limited to questions of times, places, and manners.[11] The most recent Court encounter with the doctrine in the national security area occurred when the Government attempted to enjoin press publication of classified documents pertaining to the Vietnam War[12] and, although the Court rejected the effort, at least five and perhaps six Justices concurred on principle that in some circumstances prior restraint of publication would be constitutional.[13] But no cohesive doctrine relating to the subject, its applications, and its exceptions has yet emerged.

[10] E.g., *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958). For other applications, see *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Follett* v. *McCormick*, 321 U.S. 573 (1944).

[11] *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). In *Carroll* v. *President & Comrs. of Princess Anne*, 393 U.S. 175 (1968), the Court held invalid the issuance of an *ex parte* injunction to restrain the holding of a protest meeting, holding that usually notice must be given the parties to be restrained and an opportunity for them to rebut the contentions presented to justify the sought-for restraint. In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the Court held an invalid prior restraint an injunction preventing the petitioners from distributing in a city of 18,000 pamphlets attacking respondent's alleged "blockbusting" real estate activities; he was held not to have borne the "heavy burden" of justifying the restraint. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." Id., 419–420.

The necessity of immediate appellate review of orders restraining the exercise of First Amendment rights was strongly emphasized in *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43 (1977), and seems to explain the Court's action in *Philadelphia Newspapers* v. *Jerome*, 434 U.S. 241 (1978). *But see Moreland* v. *Sprecher*, 443 U.S. 709 (1979) (party can relinquish right to expedited review through failure to properly request it).

[12] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). The vote was six to three, with Justices Black, Douglas, Brennan, Stewart, White, and Marshall in the majority and Chief Justice Burger and Justices Harlan and Blackmun in the minority. Each Justice issued an opinion.

[13] The three dissenters thought such restraint appropriate in this case. Id., 748, 752, 759. Justice Stewart thought restraint would be proper if disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people," id.,

***Injunctions and the Press in Fair Trial Cases.***—Confronting a claimed conflict between free press and fair trial guarantees, the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[14] Though agreed on result, the Justices were divided with respect to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The opinion of the Court utilized the Learned Hand formulation of the "clear and present danger" test [15] and considered as factors in any decision on the imposition of a restraint upon press reporters (a) the nature and extent of pretrial news coverage, (b) whether other measures were likely to mitigate the harm, and (c) how effectively a restraining order would operate to prevent the threatened danger.[16] One seeking a restraining order would have a heavy burden to meet to justify such an action, a burden that could be satisfied only on a showing that without a prior restraint a fair trial would be denied, but the Chief Justice refused to rule out the possibility of showing the kind of threat that would possess the degree of certainty to justify restraints.[17] Justice Brennan's major

730, while Justice White did not endorse any specific phrasing of a standard. Id., 730–733. Justice Brennan would preclude even interim restraint except upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." Id., 712–713.

The same issues were raised in *United States* v. *Progressive*, 467 F. Supp. 990 (D.C.W.D.Wis. 1979), in which the United States obtained an injunction prohibiting publication of an article it claimed would reveal information about nuclear weapons, thus increasing the dangers of nuclear proliferation. The injunction was lifted when the same information was published elsewhere and thus no appellate review was had of the order.

With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, *see Snepp* v. *United States*, 444 U.S. 507 (1980); *Alfred A. Knopf* v. *Colby*, 509 F.2d 1362 (C.A. 4), *cert. den.*, 421 U.S. 992 (1975); *United States* v. *Marchetti*, 446 F.2d 1309 (C.A. 4), *cert. den.*, 409 U.S. 1063 (1972).

[14] *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976).

[15] Id., 562, quoting *Dennis* v. *United States*, 183 F.2d 201, 212 (C.A. 2, 1950), *aff'd.*, 341 U.S. 494, 510 (1951).

[16] *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562 (1976). Opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell. Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. Id. 562–567.

[17] The Court differentiated between two kinds of information, however: (1) reporting on judicial proceedings held in public which has "special" protection and requires a much higher justification than (2) reporting of information gained from other sources as to which the burden of justifying restraint is still high. Id., 567–568, 570. *See also Oklahoma Pub. Co.* v. *District Court*, 430 U.S. 308 (1977) (setting aside

concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would hold, and secrecy can do so much harm "that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained." [18] The extremely narrow exceptions under which prior restraints might be permissible relate to probable national harm resulting from publication, the Justice continued; because the trial court could adequately protect a defendant's right to a fair trial through other means even if there were conflict of constitutional rights the possibility of damage to the fair trail right would be so speculative that the burden of justification could not be met.[19] While the result does not foreclose the possibility of future "gag orders," it does lessen the number to be expected and shifts the focus to other alternatives for protecting trial rights.[20]

***Obscenity and Prior Restraint.***—Only in the obscenity area has there emerged a substantial consideration of the doctrine of prior restraint and the doctrine's use there may be based upon the proposition that obscenity is not a protected form of expression.[21] In *Kingsley Books* v. *Brown,*[22] the Court upheld a state statute which, while it embodied some features of prior restraint, was seen as having little more restraining effect than an ordinary criminal statute; that is, the law's penalties applied only after publication. But in *Times Film Corp.* v. *City of Chicago,*[23] a divided Court spe-

injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); *Smith* v. *Daily Mail Pub. Co.*, 433 U.S. 97 (1979).

[18] Id., 427 U.S., 572, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with Justice Brennan there also. Id., 617. Justice White, while joining the opinion of the Court, noted that he had grave doubts that "gag orders" could ever be justified but he would refrain from so declaring in the Court's first case on the issue. Id., 570.

[19] Id., 588–595.

[20] One such alternative is the banning of communication on trial issues by prosecution and defense attorneys, police officials, and court officers with the press. This, of course, also raises First Amendment issues, E.g., *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242 (C.A. 7, 1975), *cert. den.*, 427 U.S. 912 (1976).

[21] *Infra, pp.* 1111–1121.

[22] 354 U.S. 436 (1957). *See also Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963).

[23] 365 U.S. 43 (1961). *See also Young* v. *American Mini Theatres*, 427 U.S. 50 (1976) (zoning ordinance prescribing distances adult theaters may be located from residential areas and other theaters is not an impermissible prior restraint).

cifically affirmed that, at least in the case of motion pictures, the First Amendment did not proscribe a licensing system under which a board of censors could refuse to license for public exhibition films which it found to be obscene. Books and periodicals may as well be subjected to some forms of prior restraint,[24] but the thrust of the Court's opinions in this area with regard to all forms of communication has been to establish strict standards of procedural protections to ensure that the censoring agency bears the burden of proof on obscenity, that only a judicial order can restrain exhibition, and that a prompt final judicial decision is assured.[25]

**Subsequent Punishment: Clear and Present Danger and Other Tests**

Granted that the context of the controversy over freedom of expression at the time of the ratification of the First Amendment was almost exclusively limited to the problem of prior restraint, still the words speak of laws "abridging" freedom of speech and press and the modern adjudicatory disputes have been largely fought out over subsequent punishment. "The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications . . . .

"[The purpose of the speech-press clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent

[24] *Cf. Kingsley Books* v. *Brown*, 354 U.S. 436 (1957).

[25] *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968); *Interstate Circuit* v. *City of Dallas*, 390 U.S. 676 (1968); *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 367-375 (1971); *Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (1975); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

exercise of their rights as citizens." [1] A rule of law permitting criminal or civil liability to be imposed upon those who speak or write on public issues and their superintendence would lead to "self-censorship" by all which would not be relieved by permitting a defense of truth. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . . The rule thus dampens the vigor and limits the variety of public debate." [2]

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." [3] "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a

[1] 2 T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union* (Boston: 8th ed 1927), 885–886.

[2] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964), *See also Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *Smith* v. *California*, 361 U.S. 147, 153–154 (1959); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967).

[3] *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." [4]

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." [5] The fixing of a standard is necessary, by which it can be determined what degree of evil is sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection and how clear and imminent and likely the danger is.[6] That standard has fluctuated over a period of some fifty years now and it cannot be asserted with a great degree of confidence that the Court has yet settled on any firm standard or any set of standards for differing forms of expression.[7] The cases are instructive of the difficulty.

***Clear and Present Danger.***—Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action may either counsel the commission of criminal conduct or itself constitute criminal conduct. Leaving aside for the moment the problem of "speech-plus" communication, it becomes necessary to determine when expression which may be a nexus to criminal conduct is subject to punishment and restraint. At first, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, the advocacy of or promotion of the conduct could be made criminal.[8] Then, in *Schenck* v. *United States*,[9] in

[4] *Whitney* v. *California*, 274 U.S. 357, 375–376 (1927) (Justice Brandeis concurring).

[5] Id., 373.

[6] Id., 374.

[7] On the great range of expressive communications, *see infra*.

[8] *Davis* v. *Beason*, 133 U.S. 333 (1890); *Fox* v. *Washington*, 236 U.S. 273 (1915).

[9] 249 U.S. 47 (1919).

which defendants had been convicted of seeking to disrupt recruitment of military personnel by dissemination of certain leaflets, Justice Holmes formulated the "clear and present danger" test which has ever since been the starting point of argument. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." [10] The convictions were unanimously affirmed. One week later, the Court again unanimously affirmed convictions under the same Act with Justice Holmes speaking. "[W]e think it necessary to add to what has been said in *Schenck* v. *United States* . . . only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." [11] And in *Debs* v. *United States*,[12] Justice Holmes was found referring to "the natural and intended effect" and "probable effect" of the condemned speech in common-law tones.

But in *Abrams* v. *United States*,[13] Justice Holmes and Brandeis dissented upon affirmance of the convictions of several alien anarchists who had printed up leaflets seeking to encourage discontent with United States participation in the War. The majority simply referred to *Schenck* and *Frohwerk* to rebut the First Amendment argument, but the dissenters urged that the Government had made no showing of a clear and present danger. Another affirmance by the Court of a conviction, the majority simply saying that "[t]he tendency of the articles and their efficacy were enough for the offense," drew a similar dissent.[14] Moreover, in *Gitlow* v. *New York*,[15] in which defendant was convicted under a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the

[10] Id., 52.
[11] *Frohwerk* v. *United States*, 249 U.S., 204, 206 (1919).
[12] 249 U.S. 211, 215–216 (1919).
[13] 250 U.S. 616 (1919).
[14] *Schaefer* v. *United States*, 251 U.S. 466, 479 (1920). *See also Pierce* v. *United States*, 252 U.S. 239 (1920).
[15] 268 U.S. 652 (1925).

effect of the circulation of the manifesto for which he was convicted and in the absence of any contention that it created any immediate threat to the security of the State. In so doing, it discarded Holmes' test. "It is clear that the question in such cases [as this] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. . . . In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. . . . [T]he general statement in the *Schenck Case* . . . was manifestly intended . . . to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character." [16] Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive on the Court.[17] It is not clear what test, if any, the majority would have utilized, although the "bad tendency" test has usually been associated with the case. In *Whitney* v. *California*,[18] the Court affirmed a conviction under a criminal syndicalism statute based on defendant's association with and membership in an organization which advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "such danger to the public peace and the security of the State" was entitled to almost conclusive weight.

[16] Id., 670–671.

[17] Id., 668. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they would be given their chance and have their way." Id., 673 (Justice Holmes dissenting).

[18] 274 U.S. 357, 371–372 (1927).

In a technical concurrence which was in fact a dissent from the opinion of the Court, Justice Brandeis restated the "clear and present danger" test. "[E]ven advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy fails short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." [19]

***The Adoption of Clear and Present Danger.***—The Court did not invariably affirm convictions during this period in cases like those under consideration. In *Fiske* v. *Kansas*,[20] it held that a criminal syndicalism law had been invalidly applied to convict one against whom the only evidence was the "class struggle" language of the constitution of the organization to which he belonged. A conviction for violating a "red flag" law was voided as the statute was found unconstitutionally vague.[21] Neither case mentioned clear and present danger. An "incitement" test seemed to have underlaid the opinion in *De Jonge* v. *Oregon*,[22] upsetting a conviction of a defendant who had been held to have violated a criminal syndicalism statute by attending a meeting held under the auspices of an organization which was said to advocate violence as a political method, although the meeting was orderly and no violence was advocated during it. In *Herndon* v. *Lowry*,[23] the Court narrowly rejected the contention that the standard of guilt could be made the "dangerous tendency" of one's words and indicated that the power of a State to abridge speech "even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."

Finally, in *Thornhill* v. *Alabama*,[24] a state anti-picketing law was invalidated because "no clear and present danger of destruc-

[19] Id., 376.

[20] 274 U.S. 380 (1927).

[21] *Stromberg* v. *California*, 283 U.S. 359 (1931).

[22] 299 U.S. 353 (1937). *See* id., 364–365.

[23] 301 U.S. 242, 258 (1937). At another point, clear and present danger was alluded to without any definite indication it was the standard. Id., 261.

[24] 310 U.S. 88, 105 (1940). The Court admitted that the picketing did result in economic injury to the employer but found such injury "neither so serious nor so imminent" as to justify restriction. The role of clear and present danger was not to play a future role in the labor picketing cases.

tion of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." During the same term, the Court reversed the breach of peace conviction of a Jehovah's Witness who had played an inflammatory phonograph record to persons on the street because the Court could discern no clear and present danger of disorder.[25]

Application of clear and present danger to the stormiest fact situation faced by the Court occurred in *Terminiello* v. *City of Chicago*,[1] in which a five-to-four majority struck down a conviction obtained after the judge instructed the jury that a breach of the peace could be committed by speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." "A function of free speech under our system of government," wrote Justice Douglas for the majority, "is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." [2] The dissenters focused on the disorders which had actually occurred as a result of Terminiello's speech, Justice Jackson saying: "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish . . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate." [3] The Jackson position was soon adopted in *Feiner* v. *New York*,[4] in which Chief Justice Vinson said that "[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

[25] *Cantwell* v. *Connecticut*, 310 U.S. 296, 308 (1940).
[1] 337 U.S. 1 (1949).
[2] Id., 4–5.
[3] Id., 25–26.
[4] 340 U.S. 315, 321 (1951).

***Contempt of Court and Clear and Present Danger.***—The period during which clear and present danger was the standard by which to determine the constiutionality of governmental suppression of or punishment for expression was a brief one, extending roughly from *Thornhill* to *Dennis*.[5] But in one area it was vigorously, though not without dispute, applied to enlarge freedom of utterance and it is in this area that it remains viable. In early contempt-of-court cases in which criticism of courts had been punished as contempt, the Court generally took the position that even if freedom of speech and press was protected against governmental abridgment, a publication tending to obstruct the administration of justice was punishable, irrespective of its truth.[6] But in *Bridges* v. *California*,[7] in which contempt citations had been brought against a newspaper and a labor leader for statements made about pending judicial proceedings, Justice Black for a five-to-four Court majority began with application of clear and present danger, which he interpreted to require that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." [8] He noted that the "substantive evil here sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice." The likelihood that the court will suffer damage to its reputation or standing in the community was not, Justice Black continued, a "substantive evil" which would justify punishment of expression.[9] The other evil, "disorderly and unfair administration of justice," "is more plausibly associated with restricting publications which touch upon pending litigation." But the "degree of likelihood" of the evil being accomplished was not "sufficient to justify summary punishment." [10] In dissent, Justice Frankfurter accepted the application of clear and present danger, but he interpreted it as meaning no more than a "resonable tendency" test. "Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. . . . A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It

[5] *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Dennis* v. *United States*, 341 U.S. 494 (1951).

[6] *Patterson* v. *Colorado*, 205 U.S. 454 (1907); *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402 (1918).

[7] 314 U.S. 252 (1941).

[8] Id., 263.

[9] Id., 270–271.

[10] Id., 271–278.

must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed." [11]

A unanimous Court next struck down the contempt conviction arising out of newpaper criticism of judicial action already taken, although one case was pending after a second indictment. Specifically alluding to clear and present danger, while seeming to regard it as stringent a test as Justice Black had in the prior case, Justice Reed wrote that the danger sought to be averted, a "threat to the impartial and orderly administration of justice," "has not the clearness and immediacy necessary to close the door of permissible public comment." [12] Divided again, the Court a year later set aside contempt convictions based on publication, while a motion for a new trial was pending, of inaccurate and unfair accounts and an editorial concerning the trial of a civil case. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, and not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." [13]

In *Wood* v. *Georgia*,[14] the Court again divided, applying clear and present danger to upset the contempt conviction of a sheriff who had been cited for criticizing the recommendation of a county court that a grand jury look into Negro bloc voting, vote buying, and other alleged election irregularities. No showing had been made, said Chief Justice Warren, of "a substantive evil actually designed to impede the course of justice." The case presented no situation in which someone was on trial, there was no judicial proceeding pending that might be prejudiced, and the dispute was more po-

[11] Id., 291. Joining Justice Frankfurter in dissent were Chief Justice Stone and Justices Roberts and Byrnes.

[12] *Pennekamp* v. *Florida*, 328 U.S. 331, 336, 350 (1946). To Justice Frankfurter, the decisive consideration is whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Id., 369.

[13] *Craig* v. *Harney*, 331 U.S. 367, 376 (1947). Dissenting with Chief Justice Vinson, Justice Frankfurter said: "We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another." Id., 390. Justice Jackson also dissented. Id., 394. *See also Landmark Communications* v. *Virginia*, 435 U.S. 829, 844 (1978); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562–563 (1976).

[14] 370 U.S. 375 (1962).

litical than judicial.[15] A unanimous Court recently seems to have applied the standard to set aside a contempt conviction of a defendant who, arguing his own case, alleged before the jury that the trial judge by his bias had prejudiced his trial and that he was a political prisoner. Though the defendant's remarks may have been disrespectful of the court, the Supreme Court noted that "[t]here is no indication . . . . that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding" and quoted its previous language about the imminence of the threat necessary to constitute contempt.[16]

***Clear and Present Danger Revised: Dennis.***—In *Dennis* v. *United States,*[17] the Court sustained the constitutionality of the Smith Act,[18] which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld convictions under it. *Dennis'* importance here is in the rewriting of the clear and present danger test. For a plurality of four, Chief Justice Vinson acknowledged that the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that "shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." It was a relative concept. Many of the cases in which it had been used to reverse convictions had turned "on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech." [19] Here, in contrast, "[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech." [20] And in combating that threat, the Government need not wait to act until the *putsch* is about to be executed and the plans are set for action. "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by

[15] Id., 383-385, 386-390. Dissenting, Justices Harlan and Clark thought that the charges made by defendant could well have influenced the grand jurors in their deliberations and that the fact that laymen rather than judicial officers were subject to influence should call forth a less stringent test than when the latter were the object of comment. Id., 395.

[16] *In re Little,* 404 U.S. 553, 555 (1972). The language from *Craig* v. *Harney,* 331 U.S. 367, 376 (1947), is quoted *supra,* text accompanying n. 13.

[17] 341 U.S. 494 (1951).

[18] 54 Stat. 670 (1940), 18 U.S.C. § 2385.

[19] *Dennis* v. *United States,* 341 U.S. 494, 508 (1951).

[20] Id., 509.

the Government is required." [21] Therefore, what does the phrase "clear and present danger" import for judgment? "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words." [22] The "gravity of the evil, discounted by its improbability" was found to justify the convictions.[23]

***Balancing.***—Clear and present danger as a test, it seems clear, was a pallid restriction on governmental power after *Dennis* and it virtually disappeared from the Court's language over the next twenty years.[24] Its replacement for part of this period was the much disputed "balancing" test which made its appearance in the year prior to *Dennis* in *American Communications Assn.* v. *Douds.*[25] There the Court sustained a law barring from access to

[21] Id., 508, 509.

[22] Id., 510. Justice Frankfurter, concurring, adopted a balancing test, id., 517, discussed *infra, pp.* 1023-1028. Justice Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. Id., 561. Justices Black and Douglas dissented, reasserting clear and present danger as the standard. Id., 579, 581. Note the recurrence to the Learned Hand formulation in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.

[23] In *Yates* v. *United States*, 354 U.S. 298 (1957), the Court substantially limited both the Smith Act and the *Dennis* case by interpreting the Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine and by finding the evidence lacking to prove the former. Of *Dennis*, Justice Harlan wrote: "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' id., at 511-512, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." Id., 321.

[24] *Cf.* Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1, 8 (1965). *See Garner* v. *Louisiana*, 368 U.S. 157, 185-207 (1961) (Justice Harlan concurring).

[25] 339 U.S. 382 (1950). *See also Osman* v. *Douds*, 339 U.S. 846 (1950). Balancing language was used by Justice Black in his opinion for the Court in *Martin* v. *City of Struthers*, 319 U.S. 141,143 (1943), but it seems not to have influenced the decision. Similarly, in *Schneider* v. *Irvington*, 308 U.S. 147, 161-162 (1939), Justice Roberts used balancing language which he apparently did not apply.

the NLRB any labor union if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government.[1] For the Court, Chief Justice Vinson rejected reliance on the clear and present danger test. "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes . . . are the present or impending products of advocacy of the doctrines of Communism or the expression of belief in overthrow of the Government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so *without* advocacy." [2]

The test, rather, must be one of balancing of interests, "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." [3] Inasmuch as the interest in the restriction, the government's right to prevent political strikes and the disruption of commerce, is much more substantial than the limited interest on the other side in view of the relative handful of persons affected in only a partial manner, the Court perceived no difficulty upholding the statute.[4]

Justice Frankfurter in *Dennis* [5] rejected the applicability of clear and present danger and adopted a balancing test. "The de-

[1] The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person "who is or has been a member of the Communist Party" during the preceding five years to serve as an officer or employee of any union, § 504, 73 Stat. 536 (1959), 29 U.S.C. § 504. It was held unconstitutional in *United States* v. *Brown*, 381 U.S. 437 (1965).

[2] *American Communications Assn.* v. *Douds*, 339 U.S. 382, 396 (1950).

[3] Id., 399.

[4] Id., 400–406.

[5] *Dennis* v. *United States*, 341 U.S. 494, 517 (1951) (concurring opinion).

mands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interest, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved." [6] But the "careful weighing of conflicting interests" [7] not only placed in the scale the disparately-weighed interest of government in self-preservation and the interest of defendants in advocating illegal action, which alone would have determined the balance, it also involved the Justice's philosophy of the "confines of the judicial process" within which the role of courts, in First Amendment litigation as in other, is severely limited. Thus, "[f]ull responsibility" may not be placed in the courts "to balance the relevant factors and ascertain which interest in the circumstances [is] to prevail." "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." Rather, "[p]rimary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress." [8] Therefore, after considering at some length the factors to be balanced, Justice Frankfurter concluded: "It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends." [9] Only if the balance struck by the legislature is "outside the pale of fair judgment" [10] could the Court hold that Congress was deprived by the Constitution of the power it had exercised.[11]

Thereafter, during the 1950's and the early 1960's, the Court utilized the balancing test in a series of decisions in which the issues were not, as they were not in *Douds* and *Dennis*, matters of expression or advocacy as a threat but rather were governmental inquiries into associations and beliefs of persons or governmental regulation of associations of persons, based on the idea that beliefs and assocations provided adequate standards for predicting future or intended conduct which it was within the power of government to regulate or to prohibit. Thus, in the leading case on balancing,

[6] Id., 524–525.
[7] Id., 542.
[8] Id., 525.
[9] Id., 550–551.
[10] Id., 540.
[11] Id., 551.

*Konigsberg* v. *State Bar of California*,[12] the Court upheld the refusal of the State to certify an applicant for admission to the bar. Required to satisfy the Committee of Bar Examiners that he was of "good moral character," Konigsberg testified that he did not believe in the violent overthrow of the government and that he had never knowingly been a member of any organization which advocated such action, but he declined to answer any question pertaining to membership in the Communist Party.

For the Court, Justice Harlan began by asserting that freedom of speech and association were not absolutes but were subject to various limitations. Among the limitations, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." [13] The governmental interest involved was the assurance that those admitted to the practice of law were committed to lawful change in society and it was proper for the State to believe that one possessed of "a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form" of government did not meet the standard of fitness.[14] On the other hand, the First Amendment interest was limited because there was "minimal effect upon free association occasioned by compulsory disclosure" under the circumstances. "There is here no likelihood that deterrence of association may result from foreseeable private action . . . for bar committee interrogations such as this are conducted in private. . . . Nor is there the possibility that the State may be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association . . . for a bar applicant's exclusion by reason of Communist Party membership is subject to judicial review, including ultimate review by this Court, should it appear that such exclusion has rested on substantive or procedural factors that do not comport with the Federal Constitution." [15]

[12] 366 U.S. 36 (1961).

[13] Id., 50–51.

[14] Id., 51–52.

[15] Id., 52–53. *See also In re Anastaplo*, 366 U.S. 82 (1961). The status of these two cases is in doubt after *Baird* v. *State Bar*, 401 U.S. 1 (1971), and *In re Stolar*, 401 U.S. 23 (1971), in which neither the plurality nor the concurring Justice making up the majority used a balancing test.

Balancing was used to sustain congressional and state inquiries into the associations and activities of individuals in connection with allegations of subversion [16] and to sustain proceedings against the Communist Party and its members.[17] In certain other cases, involving state attempts to compel the production of membership lists of the National Association for the Advancement of Colored People and to investigate that organization, use of the balancing test resulted in a finding that speech and associational rights outweighed the governmental interest claimed.[18] The Court used a balancing test in the late 1960's to protect the speech rights of a public employee who had criticized his employers.[19] On the other hand, balancing was not used when the Court struck down restrictions on receipt of materials mailed from Communist countries,[20] and it was similarly not used in cases involving picketing, pamphleteering, and demonstrating in public places.[21] But the only case in which it was specifically rejected involved a statutory regulation like those which had given rise to the test in the first place. *United States* v. *Robel* [22] held invalid under the First Amendment a statute which made it unlawful for any member of an organization which the Subversive Activities Control Board had ordered to register to work in a defense establishment.[23] Although Chief Justice Warren for the Court asserted that the vice of the law was that its proscription operated *per se* "without any need to establish that an individual's association poses the threat feared by the Government in proscribing it," [24] the rationale of the decision was not clear and present danger but the existence of less restrictive means by which the governmental interest could be accomplished.[25] In a concluding

[16] *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *Uphaus* v. *Wyman*, 360 U.S. 72 (1959); *Wilkinson* v. *United States*, 365 U.S. 399 (1961); *Braden* v. *United States*, 365 U.S. 431 (1961).

[17] *Communist Party* v. *SACB*, 367 U.S. 1 (1961); *Scales* v. *United States*, 367 U.S. 203 (1961).

[18] *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Gibson* v. *Florida Legislative Investigating Committee*, 372 U.S. 539 (1963).

[19] *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

[20] *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).

[21] E.g., *Cox* v. *Louisiana* (2 cases), 379 U.S. 536 and 559 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Brown* v. *Louisiana*, 383 U.S. 131 (1966). *But see Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), where it reappears and in which other considerations overbalance the First Amendment claims.

[22] 389 U.S. 258 (1967).

[23] § 5(a)(1)(D), Subversive Activities Control Act of 1950, 64 Stat. 992, 50 U.S.C. § 784(a)(1)(D).

[24] *United States* v. *Robel*, 389 U.S. 258, 265 (1967).

[25] Id., 265–268.

footnote, the Court said: "It has been suggested that this case should be decided by 'balancing' the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict." [1]

***The "Absolutist" View of the First Amendment, With a Note on "Preferred Position".***—During much of this period, the opposition to the balancing test was led by Justices Black and Douglas who espoused what may be called an "absolutist" position, denying the government any power to abridge speech. But the beginnings of such a philosophy may be gleaned in much earlier cases in which a rule of decision based on a preference for First Amendment liberties was prescribed. Thus, Chief Justice Stone in his famous 1938 "footnote 4" suggested that the ordinary presumption of constitutionality which prevailed when economic regulation was in issue might very well be reversed when legislation which restricted "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" is called into question.[2] Then in *Murdock* v. *Pennsylvania*,[3] in striking down a license tax on religious colporteurs, the Court remarked that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Two years later the Court indicated that its decision with regard to the constitutionality of legislation regulating individuals is "delicate . . . [especially] where the usual presumption supporting legislation is balanced by the preferred place given in our

[1] Id., 268 n. 20.

[2] *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

[3] 319 U.S. 105, 115 (1943). *See also West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943).

scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." [4] The "preferred-position" language was sharply attacked by Justice Frankfurter in *Kovacs* v. *Cooper* [5] and it dropped from the opinions, although its philosophy did not.

Justice Black expressed his position in many cases but his *Konigsberg* dissent contains one of the lengthiest and clearest expositions of it.[6] That a particular governmental regulation abridged speech or deterred it was to him "sufficient to render the action of the State unconstitutional" because he did not subscribe "to the doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a State might have an interest sufficient to justify abridgment of those freedoms . . . I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." [7] As he elsewhere wrote: "First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government." [8] But the "First and Fourteenth Amendments . . . take away from government, state and federal, all power to restrict freedom of speech, press and assembly *where people have a right to be for such purpose.* This does not mean however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling whether on publicly owned streets or on privately owned property." [9] Thus, in his

[4] *Thomas* v. *Collins*, 323 U.S. 516, 529–530 (1945).

[5] 336 U.S. 77, 89 (1949) (collecting cases with critical analysis).

[6] *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 56 (1961) (dissenting opinion). *See also Braden* v. *United States*, 365 U.S. 431, 441 (1961) (dissenting); *Wilkinson* v. *United States*, 365 U.S. 399, 422 (1961) (dissenting); *Uphaus* v. *Wyman*, 364 U.S. 388, 392 (1960) (dissenting); *Barenblatt* v. *United States*, 360 U.S. 109, 140 (1959) (dissenting); *American Communications Assn.* v. *Douds*, 339 U.S. 382, 445 (1950); *Communist Party* v. *SACB*, 367 U.S. 1, 137 (1961) (dissenting); *Beauharnais* v. *Illinois*, 343 U.S. 250, 267 (1952) (dissenting); *New York Co.* v. *Sullivan*, 376 U.S. 254, 293 (1964) (concurring); *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1961) (concurring). On Justice Douglas, *see New York Times Co.* v. *United States*, *supra*, 720 (concurring); *Roth* v. *United States*, 354 U.S. 476, 508 (1957) (dissenting); *Brandenburg* v. *Ohio*, 395 U.S. 444, 450 (1969) (concurring).

[7] *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 60–61 (1961).

[8] *Bates* v. *City of Little Rock*, 361 U.S. 516, 528 (1960) (concurring).

[9] *Cox* v. *Louisiana*, 379 U.S. 559, 578, 581 (1965) (dissenting).

last years on the Court, the Justice, while maintaining an "absolutist" position, increasingly drew a line between "speech" and "conduct which involved communication." [10]

***Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, and Others.***—In addition to the foregoing tests, the Court has developed certain standards that are exclusively or primarily applicable in First Amendment litigation. Some of these, such as the doctrines prevalent in the libel and obscenity areas, are very specialized,[11] but others are not. Vagueness is a due process vice which can be brought into play with regard to any criminal and many civil statutes,[12] but as applied in areas respecting expression it also encompasses concern that protected conduct will be deterred out of fear that the statute is capable of application to it. Vagueness has been the basis for voiding numerous such laws, especially in the fields of loyalty oaths,[13] obscenity,[14] and restrictions on public demonstrations.[15] It is usually combined with the overbreadth doctrine which focuses on the need for precision in drafting a statute which may affect First Amendment rights; [16] an overbroad statute which sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct.[17]

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[10] These cases involving important First Amendment issues are dealt with *infra, pp.* 1123–1142. *See Brown* v. *Louisiana,* 383 U.S. 131 (1966); *Adderley* v. *Florida,* 385 U.S. 39 (1966).

[11] *Infra, pp.* 1101–1108, 1111–1121.

[12] The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. E.g., *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926); *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939); *Colautti* v. *Franklin,* 439 U.S. 379 (1979); *Village of Hoffman Estates* v. *Flipside,* 455 U.S. 489 (1982).

[13] E.g., *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967).

[14] E.g., *Winters* v. *New York,* 333 U.S. 507 (1948); *Burstyn* v. *Wilson,* 343 U.S. 495 (1952); *Interstate Circuit* v. *City of Dallas,* 390 U.S. 676 (1968).

[15] E.g., *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971). *See also Smith* v. *Goguen,* 415 U.S. 566 (1974) (flag desecration law); *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974) (punishment of opprobrious words); *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976) (door-to-door canvassing). For an evident narrowing of standing to assert vagueness, see *Young* v. *American Mini Theatres,* 427 U.S. 50, 60 (1976).

[16] *NAACP* v. *Button,* 371 U.S. 415, 432–433 (1963).

[17] E.g., *Kunz* v. *New York, 340* U.S. 290 (1951); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *United States* v. *Robel,* 389 U.S. 258 (1967); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974). However, the Court dissatisfaction with the reach of the doctrine, *see* e.g., *Younger* v. *Harris,* 401 U.S. 37 (1971), resulted in a curbing of it in *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), a 5-to-4 decision, in which the Court emphasized "that facial overbreadth ad-

Similarly, and closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to the given end, it must choose the measure which least interferes with rights of expression.[18] Also, the Court has insisted that regulatory measures which bear on expression must relate to the achievement of the purpose asserted as its justification.[19] The prevalence of these standards and tests in this area would appear to indicate that while "preferred position" may have disappeared from the Court's language it has not disappeared from its philosophy.

***Is There a Present Test?***—Complexities inherent in the myriad varieties of types of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any single standard. With respect to certain forms of expression for which protection is claimed, it may be that the Court, at the beginning, may engage in "definitional balancing" to determine that some of those forms are outside the range of protection.[20] Balancing is in evidence to enable the Court to determine whether certain covered speech is entitled to protection in the particular context in which the question arises.[21] Utilization of vagueness, overbreadth

judication is an exception to our traditional overbreadth adjudication," and held that where conduct and not merely speech is concerned "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," Id., 615. The opinion of the Court and Justice Brennan's dissent, id., 621, contain extensive discussion of the doctrine. Other restrictive decisions are *Arnett* v. *Kennedy*, 416 U.S. 134, 158–164 (1974); *Parker* v. *Levy*, 417 U.S. 733, 757–761 (1974); *New York* v. *Ferber*, 458 U.S. 747, 766–774 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. *Bigelow* v. *Virginia*, 421 U.S. 809, 815–818 (1975); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Doran* v. *Salem Inn*, 422 U.S. 922, 932–934 (1975); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 633–639 (1980).

[18] *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *United States* v. *Robel*, 389 U.S. 258 (1967); *Schneider* v. *Smith*, 390 U.S. 17 (1968); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas & Electric Co.* v. *PSC*, 447 U.S. 557, 564, 565, 569–571 (1980).

[19] *Bates* v. *City of Little Rock*, 361 U.S. 516, 525 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961). *See also Central Hudson Gas & Electric Co.* v. *PSC*, 447 U.S. 557, 564, 565, 569 (1980).

[20] Thus, obscenity, by definition, is outside the coverage of the First Amendment, *Roth* v. *United States*, 354 U.S. 476 (1957); *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 (1973), as is malicious defamation, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and "fighting words." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). The Court must, of course, decide in each instance whether the questioned expression definitionally falls within one of these or another category. *See*, e.g., *Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

[21] E.g., the multifaceted test for determining when commercial speech is protected, *Central Hudson Gas & Electric Co.* v. *PSC*, 447 U.S. 557, 566 (1980), the standard for determining when expressive conduct is protected, *United States* v. *O'Brien*,

and less intrusive means may very well operate to reduce the occasions when questions of protection must be answered squarely on the merits. What is observable, however, is the re-emergence, at least in a tentative fashion, of something like the clear and present danger standard in advocacy cases, which is the context in which it was first developed. Thus, in *Brandenburg* v. *Ohio*,[22] a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terroristic means to achieve political change was reversed. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such action was not protected association, regardless of the probability of success.[23] In *Brandenburg*, however, the Court reformulated these and other rulings to "have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [24] Whether this case presages a resurgence of clear and present danger, whether the doctrine would be applied in a variety of fact situations, and whether the Court is working toward an overall standard are questions to be answered in the future.

**Freedom of Belief**

The First Amendment does not expressly speak in terms of liberty to hold such beliefs as one chooses, but in both the religion and the expression clauses, it is clear, liberty of belief is the foundation of the liberty to practice what religion one chooses and to such expression as one chooses.[1] "If there is any fixed star in our

391 U.S. 367, 377 (1968), the elements going into decision with respect to access at trials, *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606-610 (1982), and the test for reviewing press "gag orders" in criminal trials, *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562-567 (1976), are but a small series of examples.

[22] 395 U.S. 444 (1969).

[23] *Yates* v. *United States*, 354 U.S. 298 (1957); *Scales* v. *United States* 367 U.S. 203 (1961); *Noto* v. *United States*, 367 U.S. 290 (1961). *And see Bond* v. Floyd, 385 U.S. 116 (1966); *Watts* v. *United States*, 394 U.S. 705 (1969).

[24] *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). Subsequent cases relying on *Brandenburg* indicate the standard has considerable bite but do not elaborate sufficiently enough to begin filling in the outlines of the test. *Hess* v. *Indiana*, 414 U.S. 105 (1973); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). *But see Haig* v. *Agee*, 453 U.S. 280, 308-309 (1981).

[1] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940); *United States* v. *Ballard*, 322 U.S. 78 (1944); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *American Communications*

constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [2] Speaking in the context of religious freedom, the Court at one point said that while the freedom to act on one's beliefs could be limited, the freedom to believe what one will "is absolute." [3] But matters are not so simple.

***Flag Salute Cases.***—That government generally may not compel from one an affirmation of belief in something is the principle of the second *Flag Salute Case.*[4] In *Minersville School District* v. *Gobitis,*[5] the Court upheld the power of the State to expel from its schools certain children, Jehovah's Witnesses, who refused upon religious grounds to join in a flag salute ceremony and recitation of the pledge of allegiance. "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." [6] But three years later, a six-to-three majority of the Court reversed itself.[7] Justice Jackson for the Court chose to ignore the religious argument and to ground the decision upon freedom of speech. The state policy, he said, constituted "a compulsion of students to declare a belief. . . . It requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks." [8] But the power of a State to follow a policy that "requires affirmation of a belief and an attitude of mind" is limited by the First Amendment, which, under the standard then prevailing, required the State to prove that the act of the students in remaining passive during the ritual

*Assn.* v. *Douds,* 339 U.S. 382, 408 (1950); *Bond* v. *Floyd,* 385 U.S. 116, 132 (1966); *Speiser* v. *Randall,* 357 U.S. 513 (1958); *Baird* v. *State Bar of Arizona,* 401 U.S. 1, 5–6 (1971), and id., 9–10 (Justice Stewart concurring).

[2] *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

[3] *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940).

[4] *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943).

[5] 310 U.S. 586 (1940).

[6] Id., 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of "these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." Id., 601.

[7] *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). Justice Roberts and Reed simply noted their continued adherence to *Gobitis.* Id., 642. Justice Frankfurter dissented at some length, denying that the First Amendment authorized the Court "to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen." Id., 646, 647.

[8] Id., 631, 633.

"creates a clear and present danger that would justify an effort even to muffle expression." [9]

However, the principle of *Barnette* does not extend so far as to bar government from requiring of its employees or of persons seeking professional licensing or other benefits from it an oath generally but not precisely based on the oath required of federal officers, which is set out in the Constitution, that the taker of the oath will uphold and defend the Constitution.[10] It is not at all clear, however, to what degree the government is limited in probing into the sincerity of the person taking the oath.[11]

***Imposition of Consequences for Holding Certain Beliefs.***—Despite the *Cantwell* dictum that freedom of belief is absolute,[12] government has been permitted to inquire into the holding of certain beliefs and to impose consequences on the believers, primarily with regard to its own employees and to licensing certain professions. It is not clear what precise limitations the Court has placed on these practices.

In its disposition of one of the first cases concerning the federal loyalty security program, the Court of Appeals for the District of Columbia asserted broadly that "so far as the Constitution is concerned there is no prohibition against dismissal of Government employees because of their political beliefs, activities or affiliations." [13] On appeal, this decision was affirmed by an equally di-

[9] Id., 633–634. *Barnette* was the focus of the Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), voiding the compulsion under state law of motorists displaying on their auto license plates the motto "Live Free or Die." Acting on the complaint of a Jehovah's Witness, the Court held that one may not be compelled to display on his private property a message making an ideological statement. *Compare PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85–88 (1980), and id., 96 (Justice Powell concurring).

[10] *Cole* v. *Richardson*, 405 U.S. 676 (1972); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); *Bond* v. *Floyd*, 385 U.S. 116 (1966); *Knight* v. *Board of Regents*, 269 F. Supp. 339 (D.C.S.D.N.Y. 1967) (three-judge court), *aff'd.*, 390 U.S. 36 (1968); *Hosack* v. *Smiley*, 276 F. Supp. 876 (D.C.D. Colo. 1967) (three-judge court), *aff'd.*, 390 U.S. 744 (1968); *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (D.C.D. Colo. 1969) (three-judge court), *aff'd.*, 397 U.S. 317 (1970); *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154, 161 (1971); *Fields* v. *Askew*, 279 So. 2d 822 (Fla. 1973), *aff'd. per curiam*, 414 U.S. 1148 (1974).

[11] *Compare Bond* v. *Floyd*, 385 U.S. 116 (1966), *with Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154 (1971).

[12] *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

[13] *Bailey* v. *Richardson*, 182 F. 2d 46, 59 (C.A.D.C. 1950). The premise of the decision by the Court of Appeals was that government employment is a privilege rather than a right and that access thereto may be conditioned as the Government pleases. But this basis, as the Court has said, "has been thoroughly undermined in the ensuing years." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 n. 9 (1972). For the vitiation of the right-privilege distinction, *see infra, pp.* 1062–1064.

vided Court, it being impossible to determine whether this issue was one treated by the Justices.[14] Thereafter, the Court dealt with the loyalty-security program in several narrow decisions and did not confront the issue of denial of or termination of employment because of beliefs or beliefs plus. But the same issue was also before the Court in related fields. In *American Communications Assn.* v. *Douds*,[15] the Court was again evenly divided with regard to a requirement that in order for a union to have access to the NLRB its officers must file affidavits, *inter alia*, that each did not believe in nor was he a member of an organization that believed in the overthrow of government by force or by illegal means. Chief Justice Vinson thought the requirement reasonable inasmuch as it did not prevent anyone from believing what he chose but only prevented certain people from being officers of unions and inasmuch as Congress could believe that a person with such beliefs was likely to engage in political strikes and other conduct which Congress could prevent;[16] dissenting, Justice Frankfurter thought the provision too vague, Justice Jackson thought that Congress could impose no disqualification upon anyone for an opinion or belief which had not manifested itself in any overt act, and Justice Black thought that government had no power to penalize beliefs in any way.[17] Finally, in *Konigsberg* v. *State Bar of California*,[18] a majority of the Court was found supporting dictum in Justice Harlan's opinion in which he justified some inquiry into beliefs, saying that "[i]t would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."

[14] *Bailey* v. *Richardson*, 341 U.S. 918 (1951). *See also Washington* v. *McGrath*, 341 U.S. 923 (1951), *aff'g by an equally divided Court*, 182 F. 2d 375 (C.A.D.C. 1950). While no opinions were written in these cases, several Justices expressed themselves on the issues in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951), decided the same day.

[15] 339 U.S. 382 (1950). In a later case raising the same point, the Court was again equally divided. *Osman* v. *Douds*, 339 U.S. 846 (1950).

[16] 339 U.S., 408–409, 412.

[17] Id., 436, 437, 442, 444, 446, 448, 452.

[18] 336 U.S. 36, 51–52 (1961). *See also In re Anastaplo*, 336 U.S. 82, 89 (1961). Justice Black, joined by Justice Douglas and Chief Justice Warren, dissented on the ground that the refusal to admit the two to the state bars was impermissibly based upon their beliefs. Id., 56, 97.

When the same issue returned to the Court years later, three five-to-four decisions left the principles involved unclear.[19] Four Justices endorsed the view that beliefs could not be inquired into as a basis for determining qualifications for admission to the bar;[20] four Justices endorsed the view that while mere beliefs might not be sufficient grounds to debar one from admission, the States were not precluded from inquiring into them for purposes of determining whether one was prepared to advocate violent overthrow of the government and to act on his beliefs.[21] The decisive vote in each case was cast by a single Justice who would not permit denial of admission based on beliefs alone but would permit inquiry into those beliefs to an unspecified extent for purposes of determining that the required oath to uphold and defend the Constitution could be taken in good faith.[22] Changes in Court personnel following this decision would seem to leave the questions presented open to further litigation.

**Right of Association**

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . .Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." [1] It would appear from the Court's opinions that the right of association is derivative from the First Amendment guarantees of speech, assembly, and petition,[2] although it has at times seemingly been referred

[19] *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154 (1971).

[20] Id., 5-8; id., 28-29 (plurality opinions of Justices Black, Douglas, Brennan, and Marshall); id., 174-176, 178-180 (Justices Black and Douglas dissenting), 186-190 (Justices Marshall and Brennan dissenting).

[21] Id., 17-19, 21-22 (Justices Blackmun, Harlan, and White, and Chief Justice Burger dissenting).

[22] Id., 9-10; id., 31 (concurring). How far Justice Stewart would permit government to go is not made clear by his majority opinion in *Wadmond*. Id., 161-164, 165-166.

[1] *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-461 (1958).

[2] Ibid; *Bates* v. *City of Little Rock*, 361 U.S. 516, 522-523 (1960); *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 578-579 (1971); *Healy* v. *James*, 408 U.S. 169, 181 (1972).

to as a separate, independent freedom protected by the First Amendment.[3] The doctrine is a fairly recent construction, the problems associated with it having previously arisen primarily in the context of loyalty-security investigations of the Communist Party and individual memberships therein and in other organizations and these having been resolved without giving rise to any separate theory of association.[4]

Freedom of association as a concept thus grew out of a series of cases in the 1950's and 1960's in which certain States were attempting to curb the activities of the National Association for the Advancement of Colored People. In the first case, the Court unanimously set aside a contempt citation imposed after the organization refused to comply with a court order to produce a list of its members within the State. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." [5] "[T]hese indispensable liberties, whether of speech, press, or association," [6] may be abridged by governmental action either directly or indirectly, wrote Justice Harlan, and the State had failed to demonstrate a need for the lists which would outweigh the harm to associational rights which disclosure would produce.

Applying the concept in subsequent cases, the Court again held in *Bates* v. *City of Little Rock*,[7] that the disclosure of membership lists, because of the harm to be caused to "the right of association," could only be compelled upon a showing of a subordinating interest, ruled in *Shelton* v. *Tucker*,[8] that while a State had a broad interest to inquire into the fitness of its school teachers that interest did not justify a regulation requiring all teachers to list all organizations to which they had belonged within the previous five years, again struck down an effort to compel membership lists from the NAACP,[9] and overturned a state court order barring the NAACP

[3] *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 461, 463 (1958); *NAACP* v. *Button*, 371 U.S. 415, 429–430 (1963); *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975); *In re Primus*, 436 U.S. 412, 426 (1978); *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 121 (1981).

[4] *Infra*, *pp.* 1044–1057.

[5] *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

[6] Id., 461.

[7] 361 U.S. 516 (1960).

[8] 364 U.S. 479 (1960).

[9] *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961).

from doing any business within the State because of alleged improprieties.[10] Certain of the activities condemned in the latter case, the Court said, were protected by the First Amendment and, while other actions might not have been, the State could not so infringe on the "right of association" by ousting the organization altogether.[11]

A state order prohibiting the NAACP from urging persons to seek legal redress for alleged wrongs and from assisting and representing such persons in litigation opened up new avenues when the Court struck the order down as violating the First Amendment.[12] "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . .

"We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity." [13] This decision was

[10] *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964).

[11] Id., 308, 309.

[12] *NAACP* v. *Button*, 371 U.S. 415 (1963).

[13] Id., 429–430. *Button* was applied in *In re Primus*, 436 U.S. 412 (1978), in which the Court found foreclosed by the First and Fourteenth Amendments the discipline visited upon a volunteer lawyer for the American Civil Liberties Union who had solicited someone to utilize the ACLU to bring suit to contest the sterilization of Medicaid recipients. Both the NAACP and the ACLU were organizations that engaged in extensive litigation as well as in lobbying and educational activities, in which all the efforts were means of political expression. "[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." Id., 431 "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Id., 426. However, ordinary law practice for commercial ends is not given special protection. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 459 (1978). *See Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376 n. 32 (1977).

followed in three subsequent cases in which the Court held that labor unions enjoyed First Amendment protection in assisting their members in pursuing their legal remedies to recover for injuries and other actions. In the first case, the union advised members to seek legal advice before settling injury claims and recommended particular attorneys; [14] in the second the union retained attorneys on a salary basis to represent members; [15] in the third, the union maintained a legal counsel department which recommended certain attorneys who would charge a limited portion of the recovery and which defrayed the cost of getting clients together with attorneys and of investigation of accidents.[16] Wrote Justice Black: "[T]he First Amendment guarantees of free speech, petition, and assembly give railroad workers the rights to cooperate in helping and advising one another in asserting their rights. . . ." [17]

Thus, a right to associate together to further political and social views is protected against unreasonable burdening,[18] but the evolution of this right in recent years has passed far beyond the relatively narrow contexts in which it was given birth.

***Political Association.***—The major expansion of the right of association has occurred in the area of political rights. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." [19] Usually in combination with an equal protection analysis, the Court since *Williams* v. *Rhodes* [20] has passed on numerous state restrictions that have an impact upon the ability of individuals or groups to join one or the other of the major parties or to form and join an independent political party to further political, social and economic goals.[21] Of course, the right is not absolute. The Court

[14] *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964).

[15] *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967).

[16] *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971).

[17] Id., 578–579.

[18] E.g., *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907–915 (1982) (concerted activities of group protesting racial bias); *Healy* v. *James*, 408 U.S. 169 (1972) (denial of official recognition to student organization by public college without justification abridged right of association). The right does not, however, protect the decision of entities not truly private to exclude minorities. *Runyon* v. *McCrary*, 427 U.S. 160, 175–176 (1976); *Norwood* v. *Harrison*, 413 U.S. 455, 469–470 (1973); *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 93–94 (1945).

[19] *Kusper* v. *Pontikes*, 414 U.S. 51, 56–57 (1973).

[20] 393 U.S. 23 (1968).

[21] E.g., *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973) (time deadline for enrollment in party in order to vote in next primary); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973)

has recognized that there must be substantial state regulation of the election process which necessarily will work a diminution of the individual's right to vote and to join with others for political purposes. The validity of governmental regulation must be determined by assessing the degree of infringement of the right of association against the legitimacy, strength, and necessity of the governmental interests and the means of implementing those interests.[22] Many restrictions upon political association have survived this sometimes exacting standard of review, in large measure upon the basis of some of the governmental interests found compelling.[23]

A significant extension of First Amendment association rights in the political context occurred when the Court curtailed the already limited political patronage system. At first holding that a nonpolicy-making, nonconfidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs or affiliations,[24] the Court subsequently held that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." [25] The

(barring voter from party primary if he voted in another party's primary within preceding 23 months); *American Party of Texas* v. *White*, 415 U.S. 767 (1974) (ballot access restriction); *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979) (number of signatures to get party on ballot); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1982) (limit on contributions to associations formed to support or oppose referendum measure); *Clements* v. *Fashing*, 457 U.S. 957 (1982) (resign to run law).

[22] *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968); *Bullock* v. *Carter*, 405 U.S. 134, 142–143 (1972); *Storer* v. *Brown*, 415 U.S. 724, 730 (1974); *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979).

[23] Thus, in *Storer* v. *Brown*, 415 U.S. 724, 736 (1974), the Court found "compelling" the state interest in achieving stability through promotion of the two-party system and upheld a bar on any independent candidate who had been affiliated with any other party within one year. *Compare Williams* v. *Rhodes*, 393 U.S. 23, 31–32 (1968) (casting doubt on state interest in promoting Republican and Democratic voters). The state interest in protecting the integrity of political parties was held to justify requiring enrollment of a person in the party up to eleven months before a primary election, *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973), but not to justify requiring one to forgo one election before changing parties. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). *See also Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) (efficient operation of government justifies limits on employee political activity); *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1 (1982) (permitting political party to designate replacement in office vacated by elected incumbent of that party serves valid governmental interests).

[24] *Elrod* v. *Burns*, 427 U.S. 347 (1976). The limited concurrence of Justices Stewart and Blackmun provided the qualification for an otherwise expansive plurality opinion. Id., 374.

[25] *Branti* v. *Finkel*, 445 U.S. 507, 518 (1980). On the same page, the Court refers to a position in which "party membership was *essential* to a discharge of the employee's governmental responsibilities." Ibid (emphasis supplied). A great gulf separates "appropriate" from "essential" descriptively, so that much depends on the

concept of policymaking, confidential positions was abandoned, the Court noting that some such positions would nonetheless be protected whereas some people filling positions not reached by the description would not be.[1] The opinion of the Court makes difficult an evaluation of the ramifications of the decision, but it seems clear that a majority of the Justices adhere to a doctrine of broad associational political freedom that will have substantial implications for governmental employment.

The protected right of association extends as well to coverage of party principles, enabling a political party to assert against some state regulation an overriding interest sufficient to overcome the legitimate interests of the governing body. Thus, a Wisconsin law that mandated an open primary election, with party delegates bound to support at the national convention the wishes of the voters expressed in that primary election, while legitimate and valid in and of itself, had to yield to a national party rule providing for the acceptance of delegates chosen only in an election limited to those voters who affiliated with the party.[2]

Provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by political organizations, including the maintenance by such organizations of records of everyone contributing more than $10 and the reporting by individuals and groups that are not candidates or political committees who contribute or expend more than $100 a year for the purpose of advocating the election or defeat of an identified candidate, were sustained,[3] "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . We long have recognized the significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . We have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental in-

question whether the Court was using the two words as interchangeables or whether the stronger word was meant to characterize the position noted and not to particularize the standard.

[1] Justice Powell's dissents in both cases contain lengthy treatments of and defenses of the patronage system as a glue strengthening necessary political parties. Id., 520.

[2] *Democratic Party* v. *Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). *See also Cousins* v. *Wigoda*, 419 U.S. 477 (1975) (party rules, not state law, governed which delegation from State would be seated at national convention; national party had protected associational right to sit delegates it chose).

[3] *Buckley* v. *Valeo*, 424 U.S. 1, 60–84 (1976).

terest and the information required to be disclosed." [4] The governmental interests effectuated by these requirements were found to be of sufficient magnitude to be validated even though they might incidentally deter some persons from contributing.[5] A claim that contributions to minor parties and independents should have a blanket exemption from disclosure was rejected inasmuch as an injury was highly speculative; but any such party making a showing of a reasonable probability that compelled disclosure of contributors' names would subject them to threats or reprisals could obtain an exemption from the courts.[6]

***Conflict Between Organization and Members.***—It is to be expected that there will arise disputes between an organization, either a majority of the members or a dominant faction, and some of its members, disputes which may well implicate First Amendment principles. Of course, unless there is some governmental connection, there will be no federal constitutional application to any such controversy.[7] But at least in some instances, when government compels membership in an organization or in some manner lends its authority to such compulsion, there may well be constitutional limitations. Opportunity for presentation of disputes raising such limitations is present in connection with union shop labor agreements permissible under the National Labor Relations Act and under the Railway Labor Act.[8]

In an action by several union members, who had been compelled to join a union pursuant to agreement as permitted by the Railway Labor Act, they argued that the union was spending their dues money for political and other causes with which they disagreed. Construing the statute so as to avoid the constitutional questions, which were of "the utmost gravity," a majority of the

[4] Id., 64 (footnote citations omitted).

[5] The governmental interests are set out in id., 66–68.

[6] Id., 68–74. The Court narrowly construed the requirement of reporting independent contributions and expenditures in order to avoid constitutional problems. Id., 74–84.

[7] The Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S.C. §§ 411–413, enacted a bill of rights for union members, designed to protect, *inter alia*, freedom of speech and assembly and the right to participate in union meetings on political and economic subjects.

[8] § 8(a)(3) of the Labor-Management Relations Act of 1947, 61 Stat. 140, 29 U.S.C. § 158(a)(3), permits the negotiation of union shop but not closed shop agreements, which, however, may be outlawed by contrary state laws. § 14(b), 61 Stat. 151, 29 U.S.C. § 164(b). *See Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *AFL* v. *American Sash & Door Co.*, 335 U.S. 538 (1949). In industries covered by the Railway Labor Act, union shop agreements may be negotiated regardless of contrary state laws. 64 Stat. 1238, 45 U.S.C. § 152, Eleventh; *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225 (1956).

Court determined that Congress had intended that dues money obtained through union shop agreements should be used only to support collective bargaining and not in support of other causes.[9] Justices Black and Douglas, in separate opinions, would have held that Congress could not constitutionally provide for compulsory membership in an organization which could exact from members money which the organization would then spend on causes which the members opposed; Justices Frankfurter and Harlan, also reaching the constitutional issue, would have held that the First Amendment was not violated when government did not compel membership but merely permitted private parties to enter into such agreements and that in any event so long as members were free to espouse their own political views the use by a union of dues money to support political causes which some members opposed did not violate the First Amendment.[10]

In *Abood* v. *Detroit Bd. of Education*,[11] the Court dealt in a public employment context with the issues raised by *Hanson* and *Street*, the permissibility under the First Amendment of a system of compelled support of unions by employees and the permissibility of union expenditures of funds so collected for political and social purposes not directly related to collective bargaining. Recognizing that employee associational rights were clearly restricted by any system of compelled support, because the employees had a right not to associate, not to support, the Court nonetheless found the governmental interest served by the agency shop provision—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact upon employee freedom.[12] But a different balance was drawn when

[9] *International Assn. of Machinists* v. *Street*, 367 U.S. 740 (1961). The quoted phrase is at id., 749.

[10] Id., 775 (Justice Douglas concurring), 780 (Justice Black dissenting), 797 (Justices Frankfurter and Harlan dissenting). On the same day, a majority of the Court declined, in *Lathrop* v. *Donohue*, 367 U.S. 820 (1961), to reach the constitutional issues presented by roughly the same fact situation in a suit by lawyers compelled to join an "integrated bar." Four Justices did, however, reach the constitutional issue and divided evenly. Id., 848 (Justices Harlan and Frankfurter concurring), 865 (Justice Black dissenting), 877 (Justice Douglas dissenting). Surprisingly, the Court has not again faced the issue in the context of the organized bar.

[11] 431 U.S. 209 (1977). That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of *Hanson* and *Street*, id., 226–232, but Justice Powell found the distinction between public and private employment crucial. Id. 244.

[12] Id., 217–223. The compelled support was through the agency shop device. Id., 211, 217 n. 10. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, would have held that compelled support by public employees of unions violated their First Amendment rights. Id., 244. For an argument over the issue of corporate political contributions and shareholder rights, see *First National Bank* v. *Bellotti*, 435 U.S. 765, 792–795 (1978), and id., 802, 812–821 (Justice White dissenting).

the Court considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union's duties as collective-bargaining representative. To compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as much as if government prohibited him from acting to further his own beliefs.[13] However, the remedy was not to restrain the union from making non-collective bargaining related expenditures but to require that those funds come only from employees who do not object. Therefore, the lower courts were directed to oversee development of a system whereby employees could object generally to such use of union funds and could obtain either a proportionate refund or reduction of future exactions.[14]

On a related matter, the Court held that a labor relations body could not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.[15]

**Maintenance of National Security and the First Amendment**

Preservation of the security of the Nation from its enemies, foreign and domestic, is the obligation of government and one of the foremost reasons for government to exist. Pursuit of this goal may lead government officials at times to trespass in areas protected by the guarantees of speech and press and may at other times require the balancing away of rights which might be preserved inviolate at other times. The drawing of the line is committed, not exclusively but finally, to the Supreme Court. In this section, we consider a number of areas in which the necessity to draw lines has arisen.

***Punishment of Advocacy.***—Criminal punishment for the advocacy of illegal or of merely unpopular goals and of ideas did not originate in the United States in the post-World War II concern with Communism. Enactment of and prosecutions under the Sedition Act of 1798 [1] and prosecutions under the federal espionage

[13] Id., 431 U.S., 232-237.

[14] Id., 237-242. Justice Stevens suggested that remedies might have to be stronger, id., 244, and Justice Powell did not think the remedy adequate to redress even the violation found by the Court. Id., 263-264.

[15] *Madison School Dist.* v. *WERC*, 429 U.S. 167 (1977).

[1] *Supra*, p. 1001.

laws [2] and state sedition and criminal syndicalism laws [3] in the 1920's and early 1930's have been alluded to earlier.[4] But it was in the 1950's and the 1960's that both majorities and dissenters on the Supreme Court confronted First Amendment concepts fully in determining the degree to which government could proceed against persons and organizations which it believed were plotting and conspiring both to advocate the overthrow of government and to accomplish the goal.

The Smith Act of 1940 [5] made it a criminal offense for anyone to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States or of any State by force or violence or for anyone to organize any association which teaches, advises, or encourages such an overthrow or for anyone to become a member of or to affiliate with any such association. No case involving prosecution under this law was reviewed by the Supreme Court until in *Dennis* v. *United States* [6] it considered the convictions of eleven Communist Party leaders on charges of conspiracy to violate the advocacy and organizing sections of the statute. Chief Justice Vinson's plurality opinion for the Court applied a revised clear and present danger test [7] and concluded that the evil sought to be pre-

[2] *Supra, pp.* 1002–1004, 1016–1018. The cases included *Schenck* v. *United States*, 249 U.S. 47 (1919) (conviction for attempting to disrupt conscription by circulation of leaflets bitterly condemning the draft); *Debs* v. *United States*, 249 U.S. 211 (1919) (conviction for attempting to create insubordination in armed forces based on one speech generally on socialism and opposition to war, which included passages praising resistance to the draft); *Abrams* v. *United States*, 250 U.S. 616 (1919) (convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers).

[3] *Supra, p.* 1018. The cases included *Gitlow* v. *New York*, 268 U.S. 652 (1925) (conviction based on publication of "manifesto" calling for the furthering of the "class struggle" through mass strikes and other mass action); *Whitney* v. *California*, 274 U.S. 357 (1927) (conviction based upon adherence to party which had platform rejecting parliamentary methods and urging a "revolutionary class struggle," the adoption of which defendant had opposed).

[4] *See also Taylor* v. *Mississippi*, 319 U.S. 583 (1943), setting aside convictions of three Jehovah's Witnesses under a statute which prohibited teaching or advocacy intended to encourage violence, sabotage, or disloyalty to the government after the defendants had said that it was wrong for the President "to send our boys across in uniform to fight our enemies" and that boys were being killed "for no purpose at all." The Court found no evil or sinister purpose, no advocacy of or incitement to subversive action, and no threat of clear and present danger to government.

[5] 54 Stat. 670, 18 U.S.C. §2385.

[6] 341 U.S. 494 (1951).

[7] Id., 510, quoted *supra, p.* 1023.

vented was serious enough to justify suppression of speech. "If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." [8] With regard to the question whether the requisite danger existed, that is when the gravity of the evil is discounted by its improbability is the use of the criminal process justified, the Chief Justice did not attempt to assess from the evidence. "The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score." [9]

Justice Frankfurter in concurrence developed a balancing test, which, however, he deferred to the congressional judgment in applying, concluding that "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security." [10] Justice Jackson's concurrence was based on his reading of the case involving "a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy." Here the Government was dealing with "permanently organized, well-financed, semi-secret, and highly disciplined organizations" plotting to overthrow the Government and under the First Amendment "it is not forbidden to put down force and violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for

[8] Id., 509.
[9] Id., 510–511.
[10] Id., 517, 542

the purpose." [11] Justices Black and Douglas dissented separately, the former viewing the Smith Act as an invalid prior restraint and calling for reversal of the convictions for lack of a clear and present danger while the latter apply the Holmes-Brandeis formula of clear and present danger to the evidence to conclude that "[t]o believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible." [12]

In *Yates* v. *United States*,[13] the convictions of several second-string Communist Party leaders were set aside, a number ordered acquitted, and others remanded for retrial, in a decision which was based upon construction of the statute and appraisal of the evidence rather than on First Amendment claims, although each prong of the ruling seems to have been informed with First Amendment considerations. Thus, Justice Harlan for the Court wrote that the trial judge had given faulty instructions to the jury in advising that all advocacy and teaching of forcible overthrow was punishable, whether it was language of incitement or not, so long as it was done with an intent to accomplish that purpose. But the statute, the Justice continued, prohibited "advocacy of action," not merely "advocacy in the realm of ideas." "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something." [14] Second, the Court found the evidence insufficient to establish that the Communist Party had engaged in the required advocacy of action, requiring the Government to prove such advocacy in each instance rather than presenting evidence generally about the Party. Additionally, the Court found with regard to five of the defendants that no evidence linking each of them to advocacy of action had been presented but that with regard to the other nine a properly instructed jury might so construe the evidence to convict.[15]

***Compelled Registration of Communist Party.***—The Internal Security Act of 1950 provided for a comprehensive regulatory scheme by which "Communist-action organizations" and "Communist-front organizations" could be curbed.[16] Organizations found to fall

[11] Id., 561, 572, 575.

[12] Id., 579 (Justice Black dissenting), 581, 589 (Justice Douglas dissenting).

[13] 354 U.S. 298 (1957).

[14] Id., 314, 315–316, 320, 324–325.

[15] id., 330–331, 332, Justices Black and Douglas would have held the Smith Act unconstitutional. Id., 339, Justice Harlan's formulation of the standard by which certain advocacy could be punished was noticeably stiffened in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

[16] 64 Stat. 987, 50 U.S.C. § 786.

within one or the other of these designations were required to register and to provide for public inspection membership lists, accountings of all money received and expended, and listings of all printing presses and duplicating machines; members of organizations which failed to register were required to register and members were subject to comprehensive restrictions and criminal sanctions. After a lengthy series of proceedings, a challenge to the registration provisions reached the Supreme Court, which sustained the constitutionality of the section under the First Amendment, only Justice Black dissenting on this ground.[17] Employing the balancing test, Justice Frankfurter for himself and four other Justices concluded that the threat to national security posed by the Communist conspiracy outweighed considerations of individual liberty, the impact of the registration provision in this area in any event being limited to whatever "public opprobrium and obloquy" might attach.[18] Three Justices based their conclusion on the premise that the Communist Party was an anti-democratic, secret organization, subservient to a foreign power, utilizing speech-plus in attempting to achieve its ends and therefore subject to extensive governmental regulation.[19]

***Punishment for Membership in an Organization Which Engages in Proscribed Advocacy.***—It was noted above that the Smith Act also contained a provision making it a crime to organize or become a member of an organization which teaches, advocates, or encourages the overthrow of government by force or violence.[20] Just as the Government proceeded against the Communist Party, it proceeded against members of it under this clause. In *Scales* v. *United States,*[21] the Court affirmed a conviction under this section and held it constitutional against First Amendment attack. Advocacy such as the Communist Party engaged in, Justice Harlan wrote, was not protected, citing *Dennis,* and he could see no reason why

[17] *Communist Party* v. *SACB,* 367 U.S. 1 (1961). The Court reserved decision on the self-incrimination claims raised by the Party. The registration provisions ultimately floundered on this claim. *Albertson* v. *SACB,* 382 U.S. 70 (1965), *infra, p.* 1119.

[18] Id., 88–105. The quoted phrase is id., 102.

[19] Id. 169, 170–175 (Justice Douglas dissenting on other grounds), 191 (Justice Brennan and Chief Justice Warren dissenting on other grounds). Justice Black's dissent on First Amendment grounds argued that "Congress has [no] power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country." Id., 137, 147.

[20] *Supra, p.* 1045.

[21] 367 U.S. 203 (1961). Justices Black and Douglas dissented on First Amendment grounds, id., 259, 262. while Justice Brennan and Chief Justice Warren dissented on statutory grounds. Id., 278

membership which constituted a purposeful form of complicity in a group engaging in such advocacy should be a protected form of association. Of course, "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but . . . [t]he clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy." Only one who is an "active" member of the Party, not a "nominal, passive, inactive or purely technical" member, who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization was to be punished, the Court said, and the First Amendment was thus not violated.[22]

***Disabilities Attaching to Membership in Proscribed Organizations.***—The consequences of being or becoming a member of a proscribed organization can be severe. Aliens are subject to deportation for such membership.[23] Congress made it unlawful for any member of an organization required to register as a "Communist-action" or a "Communist-front" organization to apply for a passport or to use a passport.[24] A now repealed statute required as a

[22] Id. 228–230. In *Noto* v. *United States*, 367 U.S. 290 (1961), the Court reversed a conviction under the membership clause because the evidence was insufficient to prove that the Party had engaged in unlawful advocacy. "[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." Id., 297–298.

[23] *Supra, pp.* 310–311. *See* 66 Stat. 163 (1952), 8 U.S.C. §§ 1101–1503. "Innocent" membership in an organization which advocates violent overthrow of the government is apparently insufficient to save an alien from deportation. *Galvan* v. *Press*, 347 U.S. 522 (1954). More recent cases, however, seem to impose a high standard of proof on the Government to show a "meaningful association," as a matter of statutory interpretation. *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957); *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469 (1963).

[24] § 6, Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 785. The section was declared unconstitutional in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), as an infringment of the right to travel, a liberty protected by the due process clause of the Fifth Amendment. But the Court considered the case as well in terms of its restrictions on "freedom of association," emphasizing that the statute reached membership whether it was with knowledge of the organization's illegal aims or not, whether it was active or not, and whether the member intended to further the organization's illegal aims. Id., 507–514. *But see Zemel* v. *Rusk*, 381 U.S. 1, 16–17 (1965), in which the Court denied that State Department area restrictions in its passport policies violated the First Amendment, because the policy inhibited action rather than expression, a distinction the Court continued in *Haig* v. *Agee*, 453 U.S. 280, 304–310 (1981).

condition of access to NLRB processes by any union that each of its officers must file affidavits that he was not a member of the Communist Party or affiliated with it.[25] The Court has sustained state bar associations in their efforts to probe into applicants' membership in the Communist Party in order to determine whether there was knowing membership on the part of one sharing a specific intent to further the illegal goals of the organization.[1] A section of the Communist Control Act of 1954 was designed to keep the Communist Party off the ballot in all elections.[2] The most recent interpretation of this type of disability is *United States* v. *Robel*,[3] in which the Court held unconstitutional under the First Amendment a section of the Internal Security Act which made it unlawful for any member of an organization compelled to register as a "Communist-action" or "Communist-front" organization to work thereafter in any defense facility. For the Court, Chief Justice Warren wrote that a statute which so infringed upon freedom of association must be much more narrowly drawn to take precise account of the evils at which it permissibly could be aimed. One could be disqualified from holding sensitive positions on the basis of active, knowing membership with a specific intent to further the unlawful goals of an organization, but that membership which was passive or inactive, or by a person unaware of the organization's unlawful aims, or by one who disagreed with those aims, could not be grounds for disqualification, certainly not for a non-sensitive position.[4]

A somewhat different matter is disqualifying a person for public benefits of some sort because of membership in a proscribed organization or because of some other basis ascribable to doubts about his loyalty. The First Amendment was raised only in dissent

[25] This part of the oath was sustained in *American Communications Assn.* v. *Douds*, 339 U.S. 382 (1950), and *Osman* v. *Douds*, 339 U.S. 846 (1950). With regard to another part of the required oath, *see supra, p.* 1035.

[1] *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154 (1971). Membership alone, however, appears to be an inadequate basis on which to deny admission. Id., 165–166; *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

[2] 68 Stat. 775, 50 U.S.C. § 842. The section was in issue but was left undecided in *Mitchell* v. *Donovan*, 290 F. Supp. 642 (D.C.D. Minn. 1968) (ordering names of Communist Party candidates put on ballot but not reaching a decision on merits); id., 300 F. Supp. 1145 (D.C.D. Minn. 1969) (dismissing action as moot); id., 398 U.S. 427 (1970) (dismissing appeal for lack of jurisdiction).

[3] 389 U.S. 258 (1967). Joining the Chief Justice were Justices Black, Douglas, Stewart, and Fortas. Justice Brennan concurred on other grounds, id., 269, while Justices White and Harlan dissented, arguing that on balance the Government's interest in security should outweigh the limited restriction on association imposed by the statute. Id., 282.

[4] Id., 265–266. *See also Schneider* v. *Smith*, 390 U.S. 17 (1968).

when in *Flemming* v. *Nestor* [5] the Court sustained a statute which required the termination of old age benefits under Social Security to an alien who was deported on grounds of membership in the Communist Party. Proceeding on the basis that no one was "entitled" to Social Security benefits, Justice Harlan for the Court concluded that a rational justification for the law might be the deportee's inability to aid the domestic economy by spending the benefits locally, although a passage in the opinion could be read to suggest that termination was permissible because alien Communists are undeserving of benefits.[6] Of considerable significance in First Amendment jurisprudence is *Speiser* v. *Randall*,[7] in which the Court struck down a state scheme for denying property tax exemptions for veterans to "disloyal" persons. The system, as interpreted by the state courts, would deny the exemption only to persons who engaged in speech which could be criminally punished consistent with the First Amendment, but the Court found the vice of the provision to be that after each claimant had executed an oath disclaiming his engagement in unlawful speech, the tax assessor could disbelieve the oath taker and deny the exemption, thus placing on the claimant the burden of proof of showing that he was loyal upon judicial review of the denial. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." [8]

[5] 363 U.S. 603 (1960). Justice Black argued the applicability of the First Amendment. Id., 628 (dissenting). Chief Justice Warren and Justices Douglas and Brennan also dissented. Id., 628, 634.

[6] Id., 612. The suggestive passage reads: "Nor . . . can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute." Ibid. *But see Sherbert* v. *Verner*, 374 U.S. 398, 404-405, 409 n. 9 (1963). While the right-privilege distinction is all but moribund, *Flemming* has been strongly reaffirmed in recent cases by emphasis on the noncontractual nature of such benefits. *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174 (1980).

[7] 357 U.S. 513 (1958).

[8] Id., 526. For a possible limiting application of the principle, *see Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154, 162-164 (1971), and id.,

*Employment Restrictions and Loyalty Oaths.*—An area in which significant First Amendment issues are often raised is the establishment of loyalty-security standards for government employees. Such programs generally take one of two forms or may combine the two. First, government may establish a system by which employees or prospective employees are investigated under standards prescribed which relate to presumed loyalty. Second, government may require its employees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization which stands for or advocates, unlawful or disloyal action. The Federal Government security program constituting the first form has been tested numerous times and First Amendment issues raised, but the Supreme Court has never squarely confronted the substantive constitutional issues nor has it dealt with the loyalty oath features of the federal program.[9] With regard to state programs which function primarily in reliance on loyalty oaths of the negative variety, however, the Court has had a long running encounter with them, which is probably not ended.[10]

First encountered[11] was a loyalty oath for candidates for public office rather than one for public employees. Accepting the state court construction that the law required each candidate to "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt," the Court unanimously sustained the

176–178 (Justices Black and Douglas dissenting), 189 n. 5 (Justices Marshall and Brennan dissenting).

[9] The federal program is primarily grounded in two Executive Orders by President Truman and President Eisenhower, E.O. 9835, 12 Fed. Reg. 1935 (1947), and E.O. 10450, 18 Fed. Reg. 2489 (1953), and a significant amendatory Order issued by President Nixon, E.O. 11605, 36 Fed. Reg. 12831 (1971). Statutory bases include 5 U.S.C. §§ 7311, 7531–7532. Cases involving the program were decided either on lack of authority for the action being reviewed, e.g., *Cole* v. *Young*, 351 U.S. 536 (1956); *Peters* v. *Hobby*, 349 U.S. 331 (1955), or on procedural due process grounds. *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961). *But cf. United States* v. *Robel*, 389 U.S. 258 (1967); *Schneider* v. *Smith*, 390 U.S. 17 (1968). A series of three-judge district court decisions, however, invalidated federal loyalty oaths and inquiries. *Soltar* v. *Postmaster General*, 277 F. Supp. 579 (D.C. N.D. Calif. 1967); *Haskett* v. *Washington*, 294 F. Supp. 912 (D.C.D.C. 1968); *Stewart* v. *Washington*, 301 F. Supp. 610 (D.C.D.C. 1969); *National Assn. of Letter Carriers* v. *Blount*, 305 F. Supp. 546 (D.C.D.C. 1969) (no-strike oath).

[10] So-called negative oaths or test oaths are dealt with in this section; for the positive oaths, *see supra, p.* 1034.

[11] Test oaths had first reached the Court in the period following the Civil War, at which time they were voided as *ex post facto* laws and bills of attainder. *Cummings* v. *Missouri*, 4 Wall. (71 U.S.) 277 (1867); *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1867)

provision in a one-paragraph *per curiam* opinion.[12] Less than two months later, the Court did uphold a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful means nor been a member of an organization within the same period which advised, advocated, or taught such a doctrine; every employee was also required to swear that he was not and had not been a member of the Communist Party.[13] For the Court, Justice Clark perceived no problem with the inquiry into Communist Party membership but cautioned that no issue whether an employee who was or had been a member could be discharged merely for that reason was raised.[14] With regard to the oath, the Court did not discuss First Amendment considerations but stressed that it believed the appropriate authorities would not construe the oath adversely against persons who were innocent of an organization's purpose during their affiliation, or persons who had severed their associations upon knowledge of an organization's purposes, or persons who had been members of an organization at a time when it was not unlawfully engaged.[15] Otherwise, the oath requirement was valid as "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty" and as being "reasonably designed to protect the integrity and competency of the service." [16]

In the following Term, the Court sustained a state statute disqualifying for government employment persons who advocated the overthrow of government by force or violence or persons who were members of organizations which so advocated; the statute had been supplemented by a provision applicable to teachers calling for the drawing up of a list of organizations which advocated violent overthrow and making membership in any listed organization *prima*

[12] *Gerende* v. *Board of Supervisors of Elections*, 341 U.S. 56 (1951). In *Indiana Communist Party* v. *Whitcomb*, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath's language did not comport with the advocacy standards of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), with four Justices concurring more narrowly. Id., 414 U.S., 452 n. 3. *See also Whitcomb* v. *Communist Party of Indiana*, 410 U.S. 976 (1973).

[13] *Garner* v. *Board of Public Works*, 341 U.S. 716 (1951). Justice Frankfurter dissented in part on First Amendment grounds, id., 724, Justice Burton dissented in part, id., 729, as did Justices Black and Douglas wholly, id., 731, on bill of attainder grounds.

[14] Id., 720. Justices Frankfurter and Burton agreed with this ruling. Id., 725–726, 729–730.

[15] Id., 723–724.

[16] Id., 720–721. Justice Frankfurter objected that the oath placed upon the takers the burden of assuring themselves that every organization to which they belonged or had been affiliated with for a substantial period of time had not engaged in forbidden advocacy.

*facie* evidence of disqualification.[17] Justice Minton observed that everyone had a right to assemble, speak, think, and believe as he pleased, but he had no right to work for the State in its public school system except upon compliance with the State's reasonable terms. "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not." [18] A State could deny employment based on a person's advocacy of overthrow of the government for force or violence or unexplained membership in an organization so advocating with knowledge of the advocacy.[19] With regard to the required list, the Justice observed that the state courts had interpreted the law to provide that a person could rebut the presumption attached to his mere membership.[20]

Invalidated the same year was an oath requirement, addressed to membership in the Communist Party and other proscribed organizations, which the state courts had interpreted to disqualify from employment "solely on the basis of organizational membership." Stressing that membership might be innocent, that one might be unaware of an organization's aims, or that he might have severed a relationship upon learning of its aims, the Court struck the law down; one must be or have been a member with knowledge of illegal aims.[21] But subsequent cases firmly reiterated the power of governmental agencies to inquire into the associational relationships of their employees for purposes of determining fitness and upheld dismissals for refusal to answer relevant questions.[22] In *Shelton* v. *Tucker*,[23] however, a five-to-four majority held that, while a State could inquire into the fitness and competence of its teachers, a requirement that every teacher annually list every organization to which he belonged or had belonged in the previous

[17] *Adler* v. *Board of Education*, 342 U.S. 485 (1952). Justices Frankfurter dissented because he thought no party had standing. Id., 497. Justices Black and Douglas dissented on First Amendment grounds. Id., 508.

[18] Id., 492.

[19] Ibid.

[20] Id., 494–496.

[21] *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

[22] *Beilan* v. *Board of Education*, 357 U.S. 399 (1958); *Lerner* v. *Casey*, 357 U.S. 458 (1958); *Nelson* v. *County of Los Angeles*, 362 U.S. 1 (1960). *Compare Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956). The self-incrimination aspects of these cases are considered *infra*, *pp.* 1247–1248, 1250–1251.

[23] 364 U.S. 479 (1960). "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Id., 485–486. Justices Frankfurter, Clark, Harlan, and Whittaker dissented. Id., 490, 496.

five years was invalid because it was too broad, bore no rational relationship to the State's interests, and had a considerable potential for abuse.

Vagueness was then employed by the Court when loyalty oaths aimed at "subversives" next came before it. *Cramp* v. *Board of Public Instruction* [24] unanimously held too vague an oath which required one to swear, *inter alia*, that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." Similarly, in *Baggett* v. *Bullitt*,[25] two oaths, one requiring teachers to swear that they "will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government," and the other requiring all state employees to swear, *inter alia*, that they would not "aid in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration" of government. Although couched in vagueness terms, the Court's opinion stressed that the vagueness was compounded by its effect on First Amendment rights and seemed to emphasize that the State could not deny employment to one simply because he unintentionally lent indirect aid to the cause of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow.[1]

More precisely drawn oaths survived vagueness attacks but fell before First Amendment objections in the next three cases. *Elfbrandt* v. *Russell* [2] involved an oath that as supplemented would have been violated by one who "knowingly and willfully becomes or remains a member of the communist party . . . or any other organization having for its purposes the overthrow by force or violence of the government" with "knowledge of said unlawful purpose of said organization." The law's blanketing in of "knowing but guiltless" membership was invalid, wrote Justice Douglas for the Court, because one could be a knowing member but not subscribe to the illegal goals of the organization; moreover, it appeared that one must as well have participated in the unlawful activities, not just any activities, of the organization in order that public employ-

[24] 368 U.S. 278 (1961). For further proceedings on this oath, *see Connell* v. *Higginbotham*, 305 F. Supp. 445 (D.C.M.D. Fla. 1970), *aff'd in part & rev'd in part*, 403 U.S. 207 (1971).

[25] 377 U.S. 360 (1964). Justices Clark and Harlan dissented. Id., 380

[1] Id., 369–370.

[2] 384 U.S. 11 (1966). Justices White, Clark, Harlan, and Stewart dissented. Id., 20.

ment could be denied.[3] Next, in *Keyishian* v. *Board of Regents*,[4] the oath provisions sustained in *Adler*[5] were declared unconstitutional. A number of provisions were voided as vague[6] but with regard to a new provision making Communist Party membership *prima facie* evidence of disqualification for employment the Court held it invalid because the opportunity to rebut the presumption was too limited. It could be rebutted only by denying membership, denying knowledge of advocacy of illegal overthrow, or denying that the organization advocates illegal overthrow. But "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[7] Similarly, in *Whitehill* v. *Elkins*,[8] the oath, revised, upheld in *Gerende*,[9] was voided because the Court thought it might include within its proscription innocent membership in an organization which advocated illegal overthrow of government.

More recent cases do not permit consideration whether membership changes in the Court presage a change in view with regard to the loyalty-oath question. In *Connell* v. *Higginbotham*[10] an oath provision reading "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" was invalidated because the statute provided for summary dismissal from employment of a person not taking the oath without affording him an opportunity to explain his refusal. *Cole* v. *Richardson*[11] upheld a clause in an oath "that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method" upon the construction that this clause was

[3] Id., 16, 17, 19. "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees." Ibid.

[4] 385 U.S. 589 (1967). Justices Clark, Harlan, Stewart, and White dissented. Id., 620.

[5] *Adler* v. *Board of Education*, 342 U.S. 485 (1952).

[6] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 597–604 (1967).

[7] Id., 608. Note that the statement here makes specific intent or active membership alternatives in addition to knowledge while *Elfbrandt* v. *Russell*, 384 U.S. 11, 19 (1966), requires both in addition to knowledge.

[8] 389 U.S. 54 (1967). Justices Harlan, Stewart, and White dissented. Id., 62.

[9] *Gerende* v. *Board of Supervisors of Elections*, 341 U.S. 56 (1951).

[10] 403 U.S. 207 (1971). Justices Marshall, Douglas, and Brennan concurred, objecting to the implication that the oath would have been valid in the absence of the State's decision to regard unwillingness to take the oath as irrebuttable proof of unfitness. Id., 209. And *see* id., 210 (Justice Stewart concurring and dissenting).

[11] 405 U.S. 676, 683–684 (1972). Justices Douglas, id., 687, and Marshall and Brennan, id., 691, dissented on the basis that the clause did impose additional obligations upon employees which infringed rights of belief.

mere "repetition, whether for emphasis or cadence," of the first part of the oath, which was a valid "uphold and defend" positive oath.

***Legislative Investigations and the First Amendment.***—The power of inquiry by congressional and state legislative committees in order to develop information as a basis for legislation [12] is subject to some uncertain limitation when the power as exercised results in deterrence of or penalization of protected beliefs, associations and conduct. While the Court initially indicated that it would scrutinize closely such inquiries in order to curb First Amendment infringement,[13] later cases balanced the interests of the legislative bodies in inquiring about both protected and unprotected associations and conduct against what were perceived to be limited restraints upon the speech and association rights of witnesses and upheld wide-ranging committee investigations.[14] More recently, the Court has placed the balance somewhat differently and required that the investigating agency show "a subordinating interest which is compelling" to justify the restraint on First Amendment rights which the Court found would result from the inquiry.[15] The issues in this field, thus, must be considered to be unsettled pending further judicial consideration.

***Interference With War Effort.***—Unlike the dissent to United States participation in World War I which provoked several prosecutions,[16] the dissent to United States action in Vietnam was subjected to little legal attack. Possibly the most celebrated governmental action, the prosecution of Dr. Spock and four others for conspiring to counsel, aid, and abet persons to evade or to refuse obligations under the Selective Service System failed to reach the Supreme Court.[17] Aside from a comparatively minor case,[18] the

[12] *Supra, pp.* 85–102.

[13] *See United States* v. *Rumely,* 345 U.S. 41 (1953); *Watkins* v. *United States,* 354 U.S. 178, 197–198 (1957); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 249–251 (1957). Concurring in the last case, Justices Frankfurter and Harlan would have ruled that the inquiry there was precluded by the First Amendment. Id., 255.

[14] *Barenblatt* v. *United States,* 360 U.S. 109 (1959); *Uphaus* v. *Wyman,* 360 U.S. 72 (1959); *Wilkinson* v. *United States,* 365 U.S. 399 (1961); *Braden* v. *United States,* 365 U.S. 431 (1961). Chief Justice Warren and Justices Black, Douglas, and Brennan dissented in each case.

[15] *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963). Justices Harlan, Clark, Stewart, White dissented. Id., 576, 583. *See also DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825 (1966).

[16] *Supra, pp.* 1003–1004, 1015–1017.

[17] *United States* v. *Spock,* 416 F.2d 165 (C.A. 1, 1969).

[18] In *Schacht* v. *United States,* 398 U.S. 58 (1970), the Court reversed a conviction under 18 U.S.C. §702 for wearing a military uniform without authority. Defendant had worn the uniform in a skit in an on-the-street anti-war demonstration and 10 U.S.C. §772(f) authorized the wearing of a military uniform in a "theatrical

Court's encounter with a prosecution in which it was contended that the action involved was protected "symbolic conduct" was *United States* v. *O'Brien.*[19] That case affirmed a conviction and upheld a congressional prohibition against destruction of draft registration certificates; O'Brien had publicly burned his card. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[20] Finding that the Government's interest in having registrants retain their cards at all times was an important one and that the prohibition of destruction of the cards worked no restriction of First Amendment freedoms broader than that needed to serve the interest, the Court upheld the statute.

***Suppression of Communist Propaganda in the Mails.***—A 1962 statute authorizing the Post Office Department to retain all mail from abroad which was determined to be "communist political propaganda" and to forward it to an addressee only upon his request was held unconstitutional in *Lamont* v. *Postmaster General.*[21] The Court held that to require anyone to request receipt of mail determined to be undesirable by the Government was certain to deter and inhibit the exercise of First Amendment rights to receive information.[22]

***Exclusion of Certain Aliens as a First Amendment Problem.***—While a nonresident alien might be able to present no claim, based on the First Amendment or on any other constitutional provision,

production" so long as the performance did not "tend to discredit" the military. This last clause the Court held unconstitutional as an invalid limitation of freedom of speech.

[19] 391 U.S. 367 (1968). Justice Douglas dissented.

[20] Id., 376–377. For recent cases with suggestive language, see *Snepp* v. *United States*, 444 U.S. 507 (1980); *Haig* v. *Agee*, 453 U.S. 280 (1981).

[21] 381 U.S. 301 (1965). The statute, 76 Stat. 840, was the first federal law ever struck down by the Court as an abridgment of the First Amendment speech and press clauses.

[22] Id., 307. Justices Brennan, Harlan, and Goldberg concurred, spelling out in some detail the rationale of the protected right to receive information as the basis for the decision.

to overcome a governmental decision to exclude him from the country, it was arguable that United States citizens who could assert a First Amendment interest in hearing him and receiving from him information, such as the right recognized in *Lamont*, could be able to contest such exclusion.[23] But the Court declined to reach the First Amendment issue and to place it in balance when it found that a governmental refusal to waive a statutory exclusion [24] was on facially legitimate and neutral grounds; the emphasis, however, upon the "plenary" power of Congress over admission or exclusion of aliens seemed to indicate where such a balance might be drawn.[25]

**Particular Governmental Regulations Which Restrict Expression**

Government adopts and enforces many measures which are designed to further a valid interest which may have restrictive effects upon freedom of expression. As an employer, government is interested in attaining and maintaining full production from its employees in a harmonious environment. As enforcer of the democratic method of carrying out selection of public officials, it is interested in outlawing "corrupt practices" and promoting a fair and smoothly-functioning electoral process. As regulator of economic affairs, its interests are extensive. As educator, it desires to impart knowledge and training to the young with as little distraction as possible. All these interests may be achieved with some restriction upon ex-

[23] *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The right to receive information has been prominent in the rationale of several cases, E.g., *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[24] By §§ 212(a)(28)(D) and (G), of the Immigration and Nationality Act of 1952, aliens who advocate or write and publish "the economic, international, and governmental doctrines of world communism" are made ineligible to receive visas and are thus excluded from the United States. 8 U.S.C. §§ 1182(a)(28)(D) and (G). Upon the recommendation of the Secretary of State, however, the Attorney General is authorized to waive these provisions and to admit such an alien temporarily into the country. § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).

[25] *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972). The Court's opinion by Justice Blackmun was joined by Justices Stewart, White, Powell, and Rehnquist, and Chief Justice Burger. Justices Douglas, Marshall, and Brennan dissented. Id., 770, 774. The Court appeared to recognize that the United States citizens had a First Amendment interest in the question, id., 762–763, but declined to apply it because (1) the Court had never recognized any exception to Congress' power over admission or exclusion of aliens and (2) the Attorney General had based his refusal of a waiver upon the claim that Mandel had violated the terms of his previous conditional admission upon waiver. It appeared, however, that Mandel had not been aware that he had been previously admitted on a waiver nor that conditions had been attached thereto. The Court reserved the question whether the First Amendment or other provisions could be asserted to attack a refusal of waiver when no justification was advanced. Id., 765–770.

pression but if the regulation goes too far expression may be abridged and the regulation will fail.[1]

***Government as Employer: Political Activities.***—Abolition of the "spoils system" in federal employment brought with it consequent restrictions upon political activities by federal employees. In 1876, federal employees were prohibited from requesting from, giving to, or receiving from any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with elections.[2] By the Hatch Act, federal employees, and many state employees as well, are forbidden to "take any active part in political management or in political campaigns." [3] As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity.[4] The question is whether government which could not prohibit citizens in general from engaging in these activities may nonetheless so control the off-duty activities of its employees?

In *United Public Workers* v. *Mitchell*,[5] the Court answered in the affirmative. While the Court refused to consider the claims of

[1] Highly relevant in this and subsequent sections dealing with governmental incidental restraints upon expression is the distinction the Court has drawn between content-based and content-neutral regulations, which is designed to ferret out those regulations which indeed serve other valid governmental interests from those which in fact are imposed because of the content of the expression reached. *Compare Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); and *Schacht* v. *United States*, 398 U.S. 58 (1970), with *Greer* v. *Spock*, 424 U.S. 828 (1976); *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973); and *United States* v. *O'Brien*, 391 U.S. 367 (1968). Content-based regulations are subjected to strict scrutiny, while content-neutral regulations are not.

[2] § 6, 19 Stat. 143, 18 U.S.C. §§ 602–603, sustained in *Ex parte Curtis*, 106 U.S. 371 (1882); 22 Stat. 403, as amended, 5 U.S.C. § 7323.

[3] § 9(a), 53 Stat. 1147 (1939), as amended, 5 U.S.C. § 7324(a)(2). By 54 Stat. 767 (1940), as amended, 5 U.S.C. §§ 1501–1508, the restrictions on political activity were extended to state and local governmental employees working in programs financed in whole or in part with federal funds. This provision was sustained against federalism challenges in *Oklahoma* v. *Civil Service Comm.*, 330 U.S. 127 (1947). All the States have adopted laws patterned on the Hatch Act. *See Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

[4] The Commission on Political Activity of Government Personnel, *Findings and Recommendations* (Washington: 1968), 11, 19–24.

[5] 330 U.S. 75, 94–104 (1947). The decision was 4-to-3, with Justice Frankfurter joining the Court on the merits only after arguing the Court lacked jurisdiction.

persons who had not yet engaged in forbidden activities, it did consider and rule against a mechanical employee of the Mint who had engaged in proscribed political activities. The opinion of the Court, by Justice Reed, recognized that the restrictions of political activities imposed by the Act on government employees did in some measure impair First Amendment and other constitutional rights,[6] but it placed its decision upon the established principle that no right is absolute. The standard by which the Court judged the validity of the permissible impairment of First Amendment rights, however, was a due process standard of reasonableness.[7] Thus, changes in the standards of judging incidental restrictions on expression suggested the possibility of a reconsideration of *Mitchell.*[8] But a divided Court, reaffirming *Mitchell,* sustained the Act's limitations upon political activity against a range of First Amendment challenges.[9] It emphasized that the interest of the Government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association;[10] therefore, a statute which barred in plain language a long list of activities would be clearly valid.[11] The issue in *Letter Carriers,* however, was whether the language Congress did enact, forbidding employees to take "an active part in political management or in political campaigns," was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. In respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was to enact that the forbidden activities were the same activities which the

[6] Id., 94–95.

[7] Id., 101, 102.

[8] The Act was held unconstitutional by a divided three-judge district court. *National Association of Letter Carriers* v. *Civil Service Commission,* 346 F. Supp. 578 (D.C.D.C. 1972).

[9] *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973). Justices Douglas, Brennan, and Marshall dissented. Id., 595. In *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the plaintiffs had engaged in conduct that the statute could clearly constitutionally proscribe.

[10] The interests recognized by the Court as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences Id., 413 U.S., 557–567.

[11] Id., 556.

Commission had as of 1940, and reaching back to 1883, "determined are at the time of the passage of this act prohibited on the part of employees . . . by the provisions of the civil-service rules. . . ." This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings made by it which were not available to employees and which were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of 1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. That the Commission had done, it had regularly summarized the rules which it followed in understandable terms, and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and manageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests." [12] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.[13]

***Government as Employer: Free Expression Generally.***—Change has occurred in many contexts, in the main with regard to state and local employees and with regard to varying restrictions placed upon such employees. Foremost among the changes has been the disregarding of the "right-privilege" distinction, and not only in the area of public employment, which was epitomized in the famous sentence of Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [14] In 1950, a divided Court of Appeal upheld the removal of a government employee from her job against due process and First Amendment claims, the majority asserting that "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees

[12] Id., 578–579.
[13] Id., 580–581.
[14] *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517 (1892).

because of their political beliefs, activities or affiliations . . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ." [15] The Supreme Court asserted this doctrine in *Adler* v. *Board of Education*, [16] in which, upholding a prohibition of employment as teachers of persons who, *inter alia*, advocated the desirability of overthrowing the government, it said: "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."

The same year, however, saw the express rejection of the right-privilege doctrine in another loyalty case. Voiding a loyalty oath requirement conditioned on mere membership in suspect organizations, the Court reasoned that the interest of public employees in being free of such an imposition was substantial. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. . . . [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." [17] The premise here that if removal or rejection injures one in some fashion he is therefore entitled to raise constitutional claims against the dismissal or rejection has faded in subsequent cases; the rationale now is that while government may deny employment,

[15] *Bailey* v. *Richardson*, 182 F. 2d 46, 59 (C.A.D.C. 1940), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). Although there was no opinion issued, several Justices touched on the issues in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). Justices Douglas and Jackson in separate opinions rejected the privilege doctrine as applied by the lower court in *Bailey*. Id., 180, 185. Justice Black had previously rejected the doctrine in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 105 (1947) (dissenting opinion).

[16] 342 U.S. 458, 492–493 (1952). Justices Douglas and Black dissented, again rejecting the privilege doctrine. Id., 508. Justice Frankfurter, who dissented on other grounds, had previously rejected the doctrine in another case. *Garner* v. *Board of Public Works*, 341 U.S. 716, 725 (1951) (concurring in part and dissenting in part).

[17] *Wieman* v. *Updegraff*, 344 U.S. 183, 190–191, 192 (1952). Some earlier cases had utilized a somewhat qualified statement of the privilege. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947); *Garner* v. *Board of Public Works*, 341 U.S. 716, 722 (1951).

or any benefit for that matter, to any person for any number of reasons, it may not deny employment, or any benefit, on a basis that infringes that person's constitutionally protected interests. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible." [18]

However, the fact that government does not have *carte blanche* in dealing with the constitutional rights of its employees does not mean it has no power at all. "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." [19] *Pickering* concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. "The problem in any case," Justice Marshall wrote for the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [20] No general standard was laid down by the Court but a suggestive analysis was undertaken. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close, such as day to day personal contact, that problems of discipline or of harmony among coworkers existed nor where the relationship was not so close as to raise problems of personal loyalty and confidence. [21]

[18] *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). In a companion case, the Court noted the Court of Appeals' decision in *Bailey* on due process as being based on the privilege doctrine and observed: "The basis of this holding has been thoroughly undermined in the ensuing years." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 n. 9 (1972). The standard now in due process and other such cases is whether government has conferred a property right in employment which it must respect, *see infra*, pp. 1622–1631, but the inquiry when it is alleged that an employee has been penalized for the assertion of a constitutional right is that stated in the text. A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977); *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410, 416 (1979).

[19] *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

[20] Ibid.

[21] Id., 568–570.

The school board had not shown, in connection with the false statements in the letter, that any harm had resulted and it could not proceed on the assumption that the false statements were *per se* harmful, inasmuch as the statements primarily reflected a difference of opinion between the teacher and the board about the allocation of funds; moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions that the community should be aware of. "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[22]

Combining a balancing test of governmental interest and employee rights with a purportedly limiting statutory construction, the Court, in *Arnett* v. *Kennedy*,[23] sustained the constitutionality of a provision of federal law authorizing removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by the employee. He had charged that his superiors had made an offer of a bribe to a private person. The quoted statutory phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as other conduct." But, recurring to its *Letter Carriers* analysis,[24] it noted that the authority conferred was not impermissibly vague, inasmuch as it is not possible to encompass within a statutory enactment all the myriad different situations that arise in the course of employment and the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[25] Neither was the language overbroad, continued the Court, because it "proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employee. . . . We hold that the language 'such cause as will promote the efficiency of the service' in the Act

[22] Id., 570–573. *Pickering* was extended to private communications of an employee's views to the employer in *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979), although the Court recognized that different considerations might arise in context. That is, with respect to public speech, *content* may be determinative, whereas with private speech, *manner, time,* and *place of delivery* may be as or more important.

[23] 416 U.S. 134 (1974). The quoted language is from 5 U.S.C. § 7501(a).

[24] *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 578–579 (1973).

[25] *Arnett* v. *Kennedy*, 416 U.S. 134, 158–164 (1974).

excludes constitutionally protected speech, and that the statute is therefore not overbroad." [1]

Thus, consistent with the governmental interests in the satisfactory performance of the employee's duties and governmental efficiency,[2] the public employer cannot muzzle its employees or penalize them for their expressions and associations.[3] It may, as may private employers, permit collective bargaining and confer on representatives of its employees the right of exclusive representation,[4] but the fact that its employees may speak does not compel government to listen to them.[5] It may, of course, inquire into the fitness of its employees and potential employees, but it must do so in a manner that does not needlessly endanger the expression and associational rights of those persons.[6] Nevertheless, government retains a great deal of discretion with respect to its employees that it does not enjoy with respect to the citizenry at large.

***Government as Educator.***—While the Court had previously made clear that students in public schools were entitled to some constitutional protection [7] and that minors generally were not outside the range of constitutional protection,[8] its first attempt to establish standards of First Amendment expression guarantees against curtailment by school authorities came in *Tinker* v. *Des Moines Independent Community School District.*[9] There, high

[1] Id., 162. In dissent, Justice Marshall argued: "The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious." Id., 229.

[2] In some contexts, the governmental interest is more far-reaching. *See Snepp* v. *United States*, 444 U.S. 507, 509 n. 3 (1980).

[3] E.g., *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980) (political patronage systems impermissibly infringe into protected belief and associational rights of employees); *Madison School Dist.* v. *WERC*, 429 U.S. 167 (1977) (school teacher may not be prevented from speaking at a public meeting in opposition to position advanced by union with exclusive representation rights).

[4] *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 223–232 (1977).

[5] *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463 (1979) (employees have right to associate to present their positions to their employer but employer not required to engage in collective bargaining).

[6] E.g., *Shelton* v. *Tucker*, 364 U.S. 479 (1969).

[7] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (flag salute); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (limitation of language curriculum to English); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (compulsory school attendance in public rather than choice of public or private schools).

[8] *In re Gault*, 387 U.S. 1 (1967). Of course, children are in a number of respects subject to restrictions which would be impermissible were adults involved. E.g., *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970) (access to objectionable and perhaps obscene materials).

[9] 393 U.S. 503 (1969).

school principals had banned the wearing of black arm-bands by students in school as a symbol of protest against United States actions in Viet Nam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate. . . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." [10] Restriction on expression by school authorities is only permissible to prevent disruption of educational discipline. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." [11]

*Tinker* was reaffirmed by the Court in *Healy* v. *James*,[12] in which it held that the withholding of recognition by a public college administration from a student organization violated the students' right of association which is a construct of First Amendment liberties. Denial of recognition, the Court held, was impermissible if it had been based on the local organization's affiliation with the national SDS, or on disagreement with the organization's philosophy, or on a fear of disruption with no evidentiary support. "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case. . . . And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' . . . Yet, the precedents of this Court

[10] Id., 506, 507.

[11] Id., 509. The internal quotation is from *Burnside* v. *Byars*, 363 F 2d 744, 749 (C.A. 5, 1966). *See also Papish* v. *Board of Curators*, 410 U.S. 667 (1973) (state university could not expel a student for using "indecent speech" in campus newspaper).

[12] 408 U.S. 169 (1972).

leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The college classroom with its surrounding environs is peculiarly the 'market place of ideas' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." [13] But a college may impose reasonable regulations to maintain order and preserve an atmosphere in which learning may take place and it may impose as a condition of recognition that each organization affirm in advance its willingness to adhere to reasonable campus law.[14]

While a college may not be required to open its facilities generally for use by student groups, once it has done so it must justify any discriminations and exclusions under applicable constitutional norms, such as those developed under the public forum doctrine. Thus, it was impermissible for the school to close off its facilities, otherwise open, to students wishing to engage in religious speech.[15] To be sure, a decision to permit access by religious groups had to be evaluated under First Amendment religious standards, but equal access did not violate the religion clauses. Compliance with stricter state constitutional provisions on church-state was a substantial interest, but it could not justify a content-based discrimination in violation of the First Amendment speech clause.[16]

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[13] Id., 180. The internal quotations are from *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506, 507 (1969), and from *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960).

[14] Id., 408 U.S., 193. Because a First Amendment right was in issue, the burden was on the college to justify its rejection of a request for recognition rather than upon the requesters to justify affirmatively their right to be recognized. Id., 184. Justice Rehnquist concurred in the result, because in his view a school administration could impose upon students reasonable regulations that would be impermissible if imposed by the government upon all citizens and consequently cases cited by the Court which had arisen in the latter situation he did not think controlling. Id., 201. *See also Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), in which the Court upheld an ordinance which forbade persons on grounds adjacent to a school during school hours to make noise or to create any other diversion which would willfully and actually or imminently interfere with normal school activities.

[15] *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

[16] Id., 270–276. Whether the holding extends beyond the college level to students in high school or below who are more "impressionable" and perhaps less able to appreciate that equal access does not compromise the school's neutrality toward religion, id., 274 n. 14, is unclear. *See Brandon* v. *Board of Education*, 635 F.2d 971 (C.A. 2, 1980), *cert. den.*, 454 U.S. 1123 (1981).

Resolutions of these issues, although not free of doubt and dissent, were little availing as guides when the Court was confronted with the question of the application of the First Amendment in a conflict between the school system's obligation to inculcate community values in students and the expression rights of those students.[17] Splintering badly, and thus saving any definitive answer for another day, the Court did remand for a full trial a case challenging the authority of a school board to remove certain books from the school library, allegedly because of vulgarity and other content neutral reasons but perhaps because, as well or solely, of political disagreement with contents. The plurality conceded that school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." At the same time, the plurality thought that students retained substantial free expression protections and that among these was the right to receive information and ideas. Carefully limiting its discussion to the removal of books from the school library, excluding acquisition of books and questions of school curricula, the plurality would hold a school board constitutionally disabled from removing library books in order to deny access to ideas with which it disagrees for political reasons.[18] The four dissenters basically rejected the contention that school children have a protected right to receive information and ideas and thought that the proper role of education was to inculcate the community's values, a function into which the federal courts could rarely intrude.[19] The decision provides little guidance to school officials and to the lower courts and assures a revisiting of the controversy by the Supreme Court.

***Government as Regulator of the Electoral Process: Elections.***—Government has increasingly regulated the electoral system by which candidates are nominated and elected, requiring disclosure of contributions and expenditures, limiting contributions and expenditures, and imposing other regulations.[20] These regulations re-

[17] *Board of Education, Island Trees Sch. Dist.* v. *Pico*, 457 U.S. 853 (1982).

[18] Id. 862, 864-869, 870-872. Only Justices Marshall and Stevens joined fully Justice Brennan's opinion. Justice Blackmun joined it for the most part with differing emphases. Id., 875. Justice White refrained from joining any of the opinions but concurred in the result solely because he thought there to be unresolved issues of fact that required a trial. Id., 883.

[19] The principal dissent was by Justice Rehnquist. Id., 904. See also id., 885 (Chief Justice Burger), 893 (Justice Powell), 921 (Justice O'Connor).

[20] The basic federal legislation is spread over several titles of the United States Code. The relevant, principal modern laws are the Federal Election Campaign Act

strict freedom of expression, which comprehends the right to join together for political purposes, to promote candidates and issues, and to participate in the process.[21] However divided the Court may be with respect to many of these federal and state restrictions, when government acts to bar or penalize political speech directly the Justices are united. Thus, when Kentucky attempted to apply a law prohibiting candidates from offering material benefits to voters in consideration for their votes to a campaign promise to serve at a lower salary than that affixed to the office, the application was unanimously voided as infringing the First Amendment.[22]

By enactments, in 1971 and 1974, Congress imposed new and stringent regulation of and limitations on contributions to and expenditures by political campaigns, as well as disclosure of most contributions and expenditures, setting the stage for a landmark Supreme Court decision probing the scope of protection afforded political activities by the First Amendment.[23] In basic unanimity, but with several Justices feeling that the sustained provisions trenched on protected expression, the Court sustained the contribution and disclosure sections of the statute but voided the limitations on expenditures.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." [24] The ex-

of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, 2 U.S.C. 431 *et seq.*, and sections of Titles 18 and 26. The Federal Corrupt Practices Act of 1925, 43 Stat. 1074, was upheld in *Burroughs* v. *United States*, 290 U.S. 534 (1934), but there was no First Amendment challenge. All States, of course, extensively regulate elections.

[21] E.g., *Mills* v. *Alabama*, 384 U.S. 214, 218–219 (1966); *Buckley* v. *Valeo*, 424 U.S. 1, 14, 19 (1976); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776–778 (1978); *Brown* v. *Hartlage*, 456 U.S. 45, 52–54 (1982).

[22] *Brown* v. *Hartlage*, 456 U.S. 45 (1982). *See also Mills* v. *Alabama*, 384 U.S. 214 (1966) (setting aside a conviction and voiding a statute which punished electioneering or solicitation of votes for or against any proposition on the day of the election, applied to publication of a newspaper editorial on election day supporting an issue on the ballot); *Vanasco* v. *Schwartz*, 401 F. Supp. 87 (D.C.E.D.N.Y. 1975) (three-judge court), *aff'd.*, 423 U.S. 1041 (1976) (statute barring malicious, scurrilous, and false and misleading campaign literature is unconstitutionally overbroad).

[23] *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[24] Id., 14, 19.

penditure of money in political campaigns may involve speech alone, conduct alone, or mixed speech-conduct, the Court noted, but all forms of it involve communication and when governmental regulation is aimed directly at suppressing communication it matters not how that communication is defined. As such, the regulation must be subjected to close scrutiny and justified by compelling governmental interests. When this process was engaged in, the contribution limitations, with some construed exceptions, survived, but the expenditure limitation did not.

The contribution limitation was sustained as imposing only a marginal restriction upon the contributor's ability to engage in free communication inasmuch as the contribution is a generalized expression of support for a candidate but it is not a communication of reasons for the support; "the size of the contribution provides a very rough index of the intensity of the contributors' support for the candidate." [25] The political expression that is really involved is when the funds are spent by a candidate and only if the restrictions were set so low as to impede this communication would there arise a constitutional infringement. This incidental restraint upon expression may therefore be justified by Congress' purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.[1]

Of considerable importance to the analysis of the validity of the limitations on contributions was the Court's conclusion voiding a section restricting to $1,000 a year the aggregate expenditure anyone could expend to advocate the election or defeat of a "clearly identified candidate." Though the Court treated the spending limited as purely an expenditure it seems to partake equally of the nature of a contribution on behalf of a candidate that is not given to the candidate but that is spent on his behalf. "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." [2] The Court found that none of the justifications of-

[25] Id., 21.

[1] Id., 14-38. Chief Justice Burger and Justice Blackmun would have struck down the contribution limitations. Id., 235, 241-246, 290. *See also California Medical Assn.* v. *FEC*, 453 U.S. 182 (1981), sustaining a provision barring individuals and unincorporated associations from contributing more than $5,000 per year to any multicandidate political action committee, on the basis of the standards applied to contributions in *Buckley*; and *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982), sustaining provision barring nonstock corporations from soliciting contributions from persons other than their members when the corporation uses the funds for designated federal election purposes.

[2] Id., 48.

fered in support of a restriction on such expression was adequate; independent expenditures did not appear to pose the dangers of corruption that contributions did and it was an impermissible purpose to attempt to equalize the ability of some individuals and groups to express themselves by restricting the speech of other individuals and groups.[3]

Similarly, limitations upon the amount of funds a candidate could spend out of his own resources or those of his immediate family were voided. A candidate, no less than any other person, has a First Amendment right to advocate.[4] The limitations upon total expenditures by candidates seeking nomination or election to federal office could not be justified: the evil associated with dependence on large contributions was met by limitations on contributions, the purpose of equalizing candidate financial resources was impermissible, and the First Amendment did not permit government to determine that expenditures for advocacy were excessive or wasteful.[5]

Outside the context of contributions to candidates, however, the Court has not been convinced of the justifications for limiting such uses of money for political purposes. Thus, a municipal ordinance regulating the maximum amount that could be contributed to or accepted by an association formed to take part in a city referendum was invalidated.[6] While *Buckley* had sustained limits on contributions as a prophylactic measure to prevent corruption or its appearance, no risk of corruption was found in giving or receiving funds in connection with a referendum.

Venturing into the area of the constitutional validity of governmental limits upon political spending or contributions by corporations, a closely-divided Court struck down a state law that prohibited corporations from expending funds in order to influence

[3] Id., 39–51. Justice White dissented. Id., 257. In an oblique return to the right-privilege distinction, the Court agreed that Congress could condition receipt of public financing funds upon acceptance of expenditure limitations. Id., 108–109. In *Common Cause* v. *Schmitt*, 512 F. Supp. 489 (D.C.D.C. 1980), *aff'd. by an equally divided Court*, 455 U.S. 129 (1982), a provision was invalidated which limited independent political committees to expenditures of no more than $1,000 to further the election of any presidential candidate who received public funding. The effect of the equally divided affirmance is limited precedential value.

[4] Id., 51–54. Justices Marshall and White disagreed with this part of the decision. Id., 286.

[5] Id., 54–59. The reporting and disclosure requirements were sustained. Id., 60–84. *See supra, pp.* 1041–1042.

[6] *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1980). It is not clear from the opinion whether the Court was applying a contribution or an expenditure analysis to the ordinance, see id., 301 (Justice Marshall concurring), or whether in this context it makes any difference.

referendum votes on any measure save proposals that materially affected corporate business, property, or assets. The free discussion of governmental affairs "is the type of speech indispensable to decisionmaking in a democracy," the Court said, "and this is no less true because the speech comes from a corporation rather than an individual"[7] It is the nature of the speech, not the status of the speaker, that is relevant for First Amendment analysis, thus allowing the Court to pass by the question of the rights a corporate person may have. The "materially affecting" requirement was found to be an impermissible proscription of speech based on content and identity of interests. The "exacting scrutiny" that restrictions on speech must pass was not satisfied by any of the justifications offerred and the Court in any event found impermissible some of them.

*Bellotti* calls into some question the constitutionality of the federal law that makes it unlawful for any corporation or labor union "to make a contribution or expenditure in connection with any election" for federal office or "in connection with any primary election or political convention or caucus held to select candidates" for such office.[8] Three times the opportunity has arisen for the Court to assess the validity of the statute and each time it has passed it by.[9] One of the dissents in *Bellotti* suggested its application to the federal law, but the Court saw several distinctions.[10]

***Government as Regulator of the Electoral Process: Lobbying.***— Inasmuch as legislators may be greatly dependent upon representations made to them and information supplied to them by interested

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[7] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). Justice Powell wrote the opinion of the Court. Dissenting, Justices White, Brennan, and Marshall argued that while corporations were entitled to First Amendment protection, they were subject to more regulation than were individuals, and substantial state interest supported the restrictions. Id., 802. Justice Rehnquist went further in dissent, finding no corporate constitutional protection. Id., 822.

[8] 2 U.S.C. § 441b. The provision began as § 313 of the Federal Corrupt Practices Act of 1925, 43 Stat. 1074, respecting contributions by corporations. It was made temporarily applicable to labor unions in the War Labor Disputes Act of 1943, 57 Stat. 167, and became permanently applicable in § 304 of the Taft-Hartley Act. 61 Stat. 159.

[9] All three cases involved labor unions and were decided on the basis of statutory interpretation, apparently informed with some constitutional doubts. *United States* v. *CIO*, 335 U.S. 106 (1948); *United States* v. *United Automobile Workers*, 352 U.S. 567 (1957); *Pipefitters* v. *United States*, 407 U.S. 385 (1972).

[10] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 811–812 (1978) (Justice White dissenting). The Court emphasized that *Bellotti* was a referendum case, not a case involving corporate expenditures in the context of partisan candidate elections, in which the problem of corruption of elected representatives was a weighty problem. "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." Id., 787–788 & n. 26.

parties, legislators may desire to know what the real interests of those parties are, what groups or persons they represent, and other such information. But everyone is constitutionally entitled to write his congressman or his state legislator, to cause others to write or otherwise contact legislators, to make speeches and publish articles designed to influence legislators. Conflict inherently exists. In the Federal Regulation of Lobbying Act,[11] Congress by a broadly phrased and ambiguous statute seemed to require detailed reporting and registration by all persons who solicited, received, or expended funds for purposes of lobbying, that is to influence directly or indirectly congressional action. In *United States* v. *Harriss*,[12] stating that it was construing the Act to avoid constitutional doubts,[13] the Court read the Act to require registration and reporting by all persons who solicit or receive funds for lobbying, which the Court read to mean for purposes of directly influencing legislation and that only by direct communication with members of Congress.[14] As so construed, the Court upheld its constitutionality since Congress had "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." The Act was simply a measure of "self-protection." [15]

Other governmental statutes and programs affect lobbying and lobbying activities. It is not impermissible for the Federal Government to deny a tax deduction as a business expense, for money expended to defeat legislation which would have adversely affected one's business.[16] But the antitrust laws may not be applied to a concert of business enterprises that have joined to lobby the legislative branch to pass laws and the executive to enforce them which would have a detrimental effect upon competitors, even if the campaign of lobbying was conducted unethically; [17] allegations, however, that competitors combined to harass and deter others from having free and unlimited access to agencies and courts by resisting before those bodies all petitions of competitors for purposes of

[11] 60 Stat 812, 839 (1946), 2 U.S.C. §§ 261-270.

[12] 347 U.S. 612 (1954).

[13] Id., 623.

[14] Id., 617-624.

[15] Id., 625. Justices Douglas, Black, and Jackson dissented. Id., 628, 633. They thought the Court's interpretation too impermissibly narrow and would have struck the statute down as being too broad and too vague, while not denying Congress the power to enact narrow legislation to get at the substantial evils of the situation. *See also United States* v. *Rumely*, 345 U.S. 41 (1953).

[16] *Cammarano* v. *United States*, 358 U.S. 498 (1959).

[17] *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961). *See also UMW* v. *Pennington*, 381 U.S. 657, 669-671 (1965).

injury to competition is sufficient to implicate antitrust principles.[18]

***Government as Regulator of Labor Relations.***—Numerous problems may arise in this area,[19] but the issue here considered is the balance to be drawn between the free speech rights of an employer and the statutory rights of his employees to engage or not engage in concerted activities free of employer coercion, which may well include threats or promises or other oral or written communications. The Court has upheld prohibitions against employer interference with union activity through speech so long as the speech is coercive[20] and the holding has been reduced to statutory form.[21] Nonetheless, there is a First Amendment tension in this area, with its myriad variations of speech forms that may be denominated "predictions," especially since determination whether particular utterances have an impermissible impact on workers is vested with an agency charged with enforcing the Act and with no particular expertise in the protection of freedom of expression.[22]

***Government as Investigator: Newsman's Privilege.***—Problems dealing with, for example, legislative committee inquiry into associations and beliefs are dealt with elsewhere. The immediate issue is the claim that the First Amendment status of the press compels a recognition by government of an exception to the ancient rule that every citizen owes to his government a duty to give what testimony he is capable of giving.[23] The argument for a limited exemption to permit newsmen to conceal their sources and to keep confidential certain information they obtain and choose at least for the moment not to publish was rejected in *Branzburg* v. *Hayes*[24] by a

[18] *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Justices Stewart and Brennan thought that joining to induce administrative and judicial action was as protected as the concert in *Noerr* but concurred in the result because the complaint could be read as alleging that defendants sought to forestall access to agencies and courts by plaintiffs. Id., 516.

[19] E.g., the speech and associational rights of persons required to join a union, *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225 (1956); *International Assn. of Machinists* v. *Street*, 367 U.S. 740 (1961); *and see Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977) (public employees), restrictions on picketing and publicity campaigns, *Babbitt* v. *United Farm Workers*, 442 U.S. 289 (1979), and application of collective bargaining laws in sensitive areas *NLRB* v. *Yeshiva Univ.*, 444 U.S. 672 (1980) (faculty collective bargaining in private universities); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (collective bargaining in religious schools).

[20] *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

[21] 61 Stat, 142, § 8(c) (1947), 29 U.S.C. § 158(c).

[22] *Cf. NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616–620 (1969).

[23] 8 J. Wigmore, *Evidence* (New York: 3d. ed. 1940), § 2192. *See Blair* v. *United States*, 250 U.S. 273, 281 (1919); *United States* v. *Bryan*, 339 U.S. 323, 331 (1950).

[24] 408 U.S. 665 (1972). "The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their

closely divided Court. "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." [25] Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice White for the Court, the conditional nature of the privilege claimed might not mitigate the deterrent effect, leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of newsmen in avoiding the incidental burden on their newsgathering activities occasioned by such governmental inquiries.[1]

sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." Id. 682.

[25] Id., 690–691.

[1] Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell also submitted a concurring opinion in which he suggested that newsmen might be able to assert a privilege of confidentiality if in each individual case they demonstrated that responding to the governmental inquiry at hand would result in a deterrence of First Amendment rights and privilege and that the governmental interest asserted was entitled to less weight than their interest. Id., 709. Justice Stewart dissented, joined by Justices Brennan and Marshall, and argued that the First Amendment required a privilege which could only be overcome by a governmental showing that the information sought is clearly relevant to a precisely defined subject of inquiry, that it is reasonable to think that the witness has that information, and that there is not any means of obtaining the information less destructive of First Amendment liberties. Id., 725. Justice Douglas also dissented. Id., 711.

The courts have construed *Branzburg* as recognizing a limited privilege which must be balanced against other interests. *See In re Pennington*, 224 Kan. 573, 581 P.2d 812 (1978), *cert. den.*, 440 U.S. 929 (1979); *Riley* v. *City of Chester*, 612 F.2d 708 (C.A. 3, 1979); *United States* v. *Cuthbertson*, 630 F.2d 139 (C.A. 3, 1980); *cf. United States* v. *Criden*, 633 F.2d 346 (C.A. 3, 1980).

The Court observed that Congress and the States were free to develop by statute privileges for reporters as narrowly or as broadly as they chose; while efforts in Congress failed, many States have enacted such laws.[2] The assertion of a privilege in civil cases has met with mixed success in the lower courts, the Supreme Court having not yet confronted the issue.[3]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation.[4] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, although it seemed to doubt that the consequences alleged would occur, but it observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms through particularizations of the type, scope, and intrusiveness that would be permitted in the searches.[5]

[2] At least 26 States have enacted some form of journalists' shield law. E.g., Calif. Evid. Code § 1070; N.J. Rev. Stat. §§ 2A:84A-21, 21a, -29. The reported cases evince judicial hesitancy to give effect to these statutes. *See*, e.g., *Farr* v. *Pitchess*, 522 F. 2d 464 (C.A. 9, 1975), *cert. den.*, 427 U.S. 912 (1976); *Rosato* v. *Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. den.*, 427 U.S. 912 (1976). The greatest difficulty these laws experience, however, is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See Matter of Farber*, 78 N.J. 259, 394 A. 2d 330, *cert. den. sub. nom.*, *New York Times* v. *New Jersey*, 439 U.S. 997 (1978). *See also New York Times* v. *Jascalevich*, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id., 886 (vacating stay).

[3] E.g., *Baker* v. *F. & F. Investment Co.*, 470 F.2d 778 (C.A. 2, 1972), *cert. den.*, 411 U.S. 966 (1973); *Democratic National Com.* v. *McCord*, 356 F. Supp. 1394 (D.C.D.C. 1973).

[4] *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563–567 (1978). Justice Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. Id., 568 (concurring). Justices Stewart and Marshall would have imposed special restrictions upon searches when the press was the object. Id., 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id., 577.

[5] Congress has enacted the Privacy Protection Act of 1980, P.L. 96–440, 94 Stat. 1879, 42 U.S.C. § 2000aa, to protect the press and other persons having material intended for publication from federal or state searches in specified circumstances and creating damage remedies for violations.

***Government and the Conduct of Trials.***—Conflict between constitutionally protected rights is not uncommon. One of the most difficult of resolution has involved that between a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's protection of the rights to obtain and publish information about defendants and trials. Convictions obtained in the context of prejudicial pre-trial publicity [6] and during trials that were media "spectaculars" [7] have been reversed, but the prevention of such occurrences is of paramount importance to the governmental and public interest in the finality of criminal trials and the successful prosecution of criminals. However, the imposition of "gag orders" on press publication of information directly confronts the First Amendment bar on prior restraints,[8] although the courts have a good deal more discretion in preventing the information from becoming public in the first place.[9] Perhaps the most profound debate that has arisen in recent years concerns the right of access of the public and the press to trial and pre-trial proceedings, and in those cases the Court has enunciated several important theorems of First Amendment interpretation.

When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to pre-trial suppression hearings, a major debate flowered that implicated all the various strands of the extent to which, if at all, the speech and press clauses protected the public and the press in seeking to attend trials.[10] The right of access was held protected in *Richmond Newspapers* v. *Virginia,*[11] but the Justices could not agree upon a majority rationale that would permit principled application of the holding to other areas in which access is sought.

Chief Justice Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices (and one of them in a separate concurrence drew conclusions probably going beyond the Chief Justice's opinion).[12] Basic to the Chief Justice's

[6] *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *Rideau* v. *Louisiana,* 373 U.S. 723 (1963).

[7] *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *compare Estes* v. *Texas,* 381 U.S. 532 (1965), *with Chandler* v. *Florida,* 449 U.S. 560 (1981).

[8] *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976).

[9] *Compare Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (C.A. 7, 1975), *cert. den.,* 427 U.S. 912 (1976), *with United States* v. *Tijerina,* 412 F.2d 661 (C.A. 10), *cert. den.,* 396 U.S. 990 (1969).

[10] *Gannett Co.* v. *DePasquale,* 443 U.S. 368 (1979).

[11] 448 U.S. 555 (1980). The decision was 7-to-1, Justice Rehnquist dissenting, id., 604, and Justice Powell not participating. Justice Powell, however, had taken the view in *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 397 (1979) (concurring), that the First Amendment did protect access to trials.

[12] *See Richmond Newspapers* v. *Virginia,* 448 U.S. 555, 582 (1980) (Justice Stevens concurring).

view was an historical treatment which demonstrated that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial." This characteristic flowed not merely from the public interest in seeing fairness and proper conduct in the administration of criminal trials, but, more important, the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt with the commission of many crimes, convincingly demonstrated why the tradition developed and was maintained. Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The presumption has more than custom to command it. "[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted." [13]

Justice Brennan, joined by Justice Marshall, followed a significantly different route to the same conclusion. In his view, "the First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government." It preserves and protects meaningful control over government through public discussion of its operation and government therefore is compelled to see to the availability of information that people need to engage in that meaningful discussion. Thus, there is in fact a right of access that arises in the context of situations implicating self-government, such as, but not limited to, trials.[14] To what degree the other Justices agreed with either Chief Justice Burger or Justice Brennan in their respective premises and resulting implications is sometimes difficult to discern from their opinions.[15]

Although the next case produced a majority opinion and appears to go beyond *Richmond Newpapers,* one cannot confidently assume that the Justices have necessarily settled upon the broader reading. The case involved a statute, unique to one State, that mandated the exclusion of the public and the press from trials for certain sex offenses involving a victim under the age of 18 during

[13] Id., 564–569.

[14] Id., 585–593.

[15] Justice Stevens clearly took the view that the decision stood for the existence of access rights to other kinds of information in the government's control. Id., 583. Justices White and Blackmun concurred without notable analysis and Justice Stewart apparently based his concurrence on the similarity of courtrooms to other public places. Id., 581–582, 598, 601. Justice Powell, in his *Gannett* concurrence, and in his dissents in the prison access cases, *infra,* has also accepted a protected access analysis.

the testimony of the victim.[16] For the Court, Justice Brennan wrote that the First Amendment guarantees press and public access to criminal trials, both because of the tradition of openness [17] and because public scrutiny of a criminal trial serves the valuable functions of enhancing the quality and safeguards of the integrity of the factfinding process, of fostering the appearance of fairness, and of permitting public participation in the judicial process. The right is not absolute, but in order to close all or part of a trial government must show that "the denial is necessitated by a compelling government interest, and [that it] is narrowly tailored to serve that interest." [18] The Court was explicit that the right was to access to *criminal* trials,[19] so that the question of the openness of civil trials remains. Similarly, the issue of access to pre-trial proceedings in criminal cases remains subject to further elucidation.

***Government as Administrator of Prisons.***—A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.[20] The identifiable governmental interests at stake in its administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.[21] In applying these general standards, the Court arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between newsmen and prisoners. Thus, in *Procunier* v. *Martinez*,[22] in which

[16] *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982). Joining Justice Brennan's opinion of the Court were Justices White, Marshall, Blackmun, and Powell. Justice O'Connor concurred in the judgment. Chief Justice Burger, with Justice Rehnquist, dissented, arguing that the tradition of openness that underlay *Richmond Newspapers*, was absent with respect to sex crimes and youthful victims and that *Richmond Newspapers* was unjustifiably extended. Id., 612. Justice Stevens dissented on mootness grounds. Id., 620.

[17] That there was no tradition of openness with respect to the testimony of minor victims of sex crimes was irrelevant, the Court argued. As a general matter, all criminal trials have been open. The presumption of openness thus attaches to all criminal trials and to close any particular kind or part of one because of a particular reason requires justification on the basis of the governmental interest asserted. Id., 605 n. 13.

[18] Id., 606–607. Protecting the well-being of minor victims was a compelling interest, the Court held, and might justify exclusion in specific cases, but it did not justify a mandatory closure rule. The other asserted interest, encouraging minors to come forward and report sex crimes, was not well served by the statute.

[19] The Court throughout the opinion identifies the right as access to criminal trials, even italicizing the word at one point. Id., 605.

[20] *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

[21] *Procunier* v. *Martinez*, 416 U.S. 396, 412 (1974).

[22] 416 U.S. 396 (1974). *But see Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977), in which the Court sustained, while recognizing the First Amend-

the Court struck down mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought the letters "unduly complain[ing]," "express[ing] inflammatory . . . views or beliefs," or were "defamatory" or "otherwise inappropriate," the Court held that the rights of both the prisoner and the person outside were implicated. Whatever the basic right of the prisoner, the outsider's right to communicate with the prisoner, either by sending or by receiving mail, is grounded in the First Amendment. Therefore, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interest of security, order, and rehabilitation, and it must not be utilized simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary or essential to the protection of the particular government interest involved.

However, in subsequent cases, the Court found that neither prisoners nor newsmen had any affirmative First Amendment right to face-to-face interviews, when general public access to prisons was restricted and when there existed alternatives by which the news media could obtain information respecting prison policies and conditions.[23] Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but the justification for the restraint lay in the implementation of security arrangements, affected by the entry of persons into prisons, and the carrying out of rehabilitation objectives, affected by the phenomenon of the "big wheel," the exploitation of access to the news media by certain prisoners; alternatives to face-to-face interviews existed, such as mail and visitation with family, attorneys, clergy, and friends. The existence of alternatives and the presence of justifications for the restraint served to weigh the balance against the asserted First Amendment right, the Court held.[24]

While agreeing with a previous affirmation that "newsgathering is not without some First Amendment protection," [25] the Court

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ment implications, prison regulations barring solicitation of prisoners by other prisoners to join a union, banning union meetings, and denying bulk mailings concerning the union from outside sources. The reasonable fears of correctional officers that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders justified the regulations.

[23] *Pell* v. *Procunier*, 417 U.S. 817 (1974). Justices Douglas, Brennan, and Marshall dissented. Id., 836.

[24] Id., 829–835.

[25] *Branzburg* v. *Hayes*, 408 U.S. 665, 707 (1972), quoted in *Pell* v. *Procunier*, 417 U.S. 817, 833 (1974).

denied that the First Amendment accorded newsmen any affirmative obligation on the part of government. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." [1] Government's obligation is not to impair the freedom of journalists to seek out newsworthy information and not to restrain the publication of news. But it cannot be argued, the Court continued, "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally." [2]

*Pell* and *Saxbe* did not delineate whether the "equal access" rule applied only in cases in which there was public access, so that a different rule for the press might follow when general access was denied, nor did they purport to begin defining what the rules of equal access are. No greater specificity emerged from *Houchins* v. *KQED* [3] in which the broadcaster had sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy with respect to conditions. Following initiation of the suit, the administrator of the prison instituted a policy of limited public tours, for which press representatives could sign up, not including the maximum security area over which much of the controversy existed and not permitting cameras or recording devices. Overturning the injunction obtained in the lower courts, the Supreme Court reiterated that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. . . . [U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally." [4] Justice Stewart,

[1] Id., 834.

[2] Ibid. The holding was applied to federal prisons in *Saxbe* v. *Washington Post*, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that an important societal function of the First Amendment is to preserve free public discussion of governmental affairs, that the press' role was to make this discussion informed through providing the requisite information, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. 850.

[3] 438 U.S. 1 (1978). Part of the decision's imprecision of meaning is attributable to the fact that two Justices did not participate, the opinion of the Court represents the views of three Justices, three Justices dissented, and one Justice concurred in views that departed somewhat from the opinion of the Court.

[4] Id., 15–16.

whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have approved an injunction more narrowly drawn to protect the press right to use cameras and recorders so as to enlarge public access to the information.[5] Thus, any question of special press access appears settled by the decision; yet there still remain the questions raised above. May everyone be barred from access and, once access is accorded, does the Constitution necessitate any limitation on the discretion of prison administrators? [6]

**Governmental Regulation of Communications Industries**

As in the previous section, the governmental regulations here considered may have only the most indirect relation to freedom of expression or that freedom may be clearly implicated, although the purpose of the particular regulation is not to reach the content of the message. First, however, the judicially-formulated doctrine distinguishing commercial expression from other forms will be briefly considered for the light cast on subsequent subsections and upon sections to come.

***Commercial Speech.***—In recent years, the Court's treatment of "commercial speech" has undergone a transformation, from total nonprotection under the First Amendment to qualified protection. The conclusion that expression which proposed a commercial transaction was a different order of speech was arrived at almost casually in *Valentine* v. *Chrestensen,*[1] in which the Court upheld a city ordinance prohibiting distribution on the street of "commercial and business advertising matter" as applied to an exhibitor of a submarine who printed up leaflets describing on one side his submarine and on the other side a protest of the city's refusal of certain dock-

[5] Id., 16.

[6] The dissenters, Justices Stevens, Brennan, and Powell, believe that the Constitution protects the public's right to be informed about conditions within the prison and that total denial of access, such as existed prior to institution of the suit, was unconstitutional. They would have sustained the more narrowly drawn injunctive relief to the press on the basis that no member of the public had yet sought access. Id., 19. It is clear that Justice Stewart did not believe the Constitution affords any relief. Id., 16. While the opinion of the Court, Chief Justice Burger and Justices White and Rehnquist, may be read as not deciding whether any public right of access exists, overall it appears to proceed on the unspoken basis that there is none. The second question, when Justice Stewart's concurring opinion and the dissenting opinion are combined, appears to be answerable qualifiedly in the direction of constitutional constraints upon the nature of access limitation once access is granted.

[1] 316 U.S. 52 (1942). See also *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951). The doctrine was one of the bases upon which the banning of all commercials for cigarettes from radio and television was upheld. *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582 (D.C.D.C. 1971) (three-judge court), *aff'd. per curiam,* 405 U.S. 1000 (1972).

ing facilities. The doctrine was in any event limited to promotion of commercial activities; the fact that expression was disseminated for profit or through commercial channels did not expose it to any greater regulation than if it were offered for free.[2] The doctrine lasted in this form for more than twenty years.

"Commercial speech," the Court has now held, is protected "from unwarranted governmental regulation," although its nature makes such communication subject to greater limitations than would be expression not solely related to the economic interests of the speaker and its audience.[3] Overturning of this exception in free expression doctrine was accomplished within a brief span of time in which the Justices haltingly but then decisively moved to a new position. Reasserting the doctrine at first in a narrow five-to-four decision, the Court sustained the application of a city ordinance banning employment discrimination on the basis of sex to bar sex-designated employment advertising in a newspaper.[4] Granting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell, for the Court, found the placing of want-ads in newspapers to be "classic examples of commercial speech," devoid of expressions of opinions with respect to issues of social policy; the ad "did no more than propose a commercial transaction." But the Justice also noted that employment discrimination, which was facilitated by the advertisements, was itself illegal.[5]

Next, the Court overturned a conviction under a state statute making it illegal, by sale or circulation of any publication, to encourage or prompt the obtaining of an abortion as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another State and detailing the assistance that would be provided state residents in going to and obtaining abortions in the other State.[6]

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[2] Books which are sold for profit, *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Ginzburg* v. *United States*, 383 U.S. 463, 474–475 (1966), advertisements dealing with political and social matters which newspapers carry for a fee, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265–266 (1964), motion pictures which are exhibited for an admission fee, *United States* v. *Paramount Pictures*, 334 U.S. 131, 166 (1948); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501–502 (1952), were all during this period held entitled to full First Amendment protection regardless of the commercial element involved.

[3] *Central Hudson Gas & Electric Corp.* v. *Public Service Comm.*, 447 U.S. 557, 561 (1980).

[4] *Pittsburgh Press Co.* v. *Comm. on Human Relations*, 413 U.S. 376 (1973).

[5] Id., 385, 389. The Court continues to hold that government may ban commercial speech related to illegal activity. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm.*, 447 U.S. 557, 563–564 (1980).

[6] *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

The Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other jurisdiction, and that the State could not prevent its residents from obtaining abortions in the other State nor punish them for doing so.

Then, all these distinctions were swept away as the Court voided a statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.[7] Accepting a suit brought by consumers to protect their right to receive information, the Court held that speech which does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to protection. Consumers' interests in receiving factual information about prices may even be of greater value than political debate, but in any event price competition and access to information about it is in the public interest. State interests asserted in support of the ban, protection of professionalism and the quality of prescription goods, were found either badly served or not served by the statute.[8]

Turning from the interests of consumers to receive information to the asserted right of advertisers to communicate, the Court voided several restrictions. A municipal ordinance which barred the display of "For sale" and "Sold" signs on residential lawns, purportedly so as to prevent the development and strengthening of a "fear psychology" among white residents that the community was unstable in the sense of a high turnover of housing to nonwhites with a consequent "white flight," was voided, the Court finding the right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected; the community interest could have been achieved by less restrictive means and in any event could not be achieved by restricting the free flow of truthful information.[9] Similarly, deciding a question it had reserved in the *Virginia Pharmacy* case, the Court held that a State could not forbid lawyers from advertising the prices they charged for the performance of routine legal services.[10] None of the proffered state justifications for the ban was

[7] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Justice Rehnquist dissented. Id., 781.

[8] Id., 763–764 (consumer's interests), 764–765 (social interest) 766–770 (justifications for the ban).

[9] *Linmark Association* v. *Township of Willingboro*, 431 U.S. 85 (1977).

[10] *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented. Id., 386, 389, 404.

deemed sufficient to overcome the private and societal interest in the free exchange of this form of speech.[11] However, a State has been held to have a much greater countervailing interest in regulating person-to-person solicitation of clients by attorneys and therefore, especially since in-person solicitation is "a business transaction in which speech is an essential but subordinate component," the state interest need only be important rather than compelling.[12]

Moreover, a statute prohibiting the practice of optometry under a trade name was sustained because there was "a significant possibility" that the public might be misled through deceptive utilization of the same or similar trade names.[13] But a state regulatory commission prohibition of utility advertisements "intended to stimulate the purchase of utility services" was held unjustified by the asserted interests in energy consumption and avoidance of subsidization of additional energy costs by all consumers.[14]

While commercial speech is entitled to First Amendment protection, the Court has clearly held that it is not wholly undifferentiable from other forms of expression; it has remarked on the commonsense differences between speech that does no more than propose a commercial transaction and other varieties.[15] In its most

[11] Id., 368–379. *See also In re R.M.J.*, 455 U.S. 191 (1982) (invalidating sanctions imposed on attorney for deviating in some respects from rigid prescriptions of advertising style and for engaging in some proscribed advertising practices, because the State could show neither that his advertising was misleading nor that any substantial governmental interest was served by the restraints).

[12] *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978). *But compare In re Primus*, 426 U.S. 412 (1978).

[13] *Friedman* v. *Rogers*, 440 U.S. 1 (1979).

[14] *Central Hudson Gas & Electric Corp.* v. *Public Service Comm.*, 447 U.S. 557 (1980). *See also Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530 (1980) (voiding a ban on inclusion by utility in monthly bills of inserts discussing controversial issues of public policy).

[15] Commercial speech is viewed by the Court as usually hardier than other speech; because advertising is the *sine qua non* of commercial profits, it is less likely to be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771–772 n. 24 (1976); *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455–456 (1978). It is, of course, important to develop distinctions between commercial speech and other speech for purposes of determining when broader regulation is permissible. The Court's definitional statements have been general, referring to commercial speech as that "proposing a commercial transaction," *Ohralik* v. *Ohio State Bar Assn.*, *supra*, or as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm.*, 447 U.S. 557, 561 (1980). It has simply viewed as noncommercial advertising of views on public policy that would inhere to the economic benefit of the speaker. *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530 (1980).

recent decisions, the Court elaborated from its precedents a four-pronged test by which it will consider the validity of restraints upon commercial expression.

First, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if it does not accurately inform the public about lawful activity, it can be suppressed.[16]

Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The State must assert a substantial interest to be achieved by restrictions on commercial speech.[17]

Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.[18]

Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[19]

Thus, the "different degree of protection" accorded commercial speech means that government need not tolerate inaccuracies to the same extent it must in other areas and it may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it being deceptive.[20] Somewhat broader times, places, and manner regulations are to be tolerated.[21] The rule against prior re-

[16] *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 563, 564 (1980). Within this category fall the cases involving the possibility of deception through such devices as use of trade names, *Friedman* v. *Rogers*, 440 U.S. 1 (1979), and solicitation of business by lawyers, *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction, *Pittsburgh Press Co.* v. *Comm. on Human Relations*, 413 U.S. 376 (1973).

[17] *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 564, 568–569 (1980). The Court deemed the State's interests to be clear and substantial. The pattern here is similar to much due process and equal protection litigation as well as expression and religion cases in which the Court accepts the proffered interests as legitimate and worthy.

[18] Id., 569. The ban here was found to directly advance one of the proffered interests. Contrast this holding with *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), where the restraints were deemed indirect or ineffectual.

[19] *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 565, 569–571 (1980). This test is, of course, the "least restrictive means" standard. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In *Central Hudson*, the Court found the ban more extensive than was necessry to effectuate the governmental purpose.

[20] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383–384 (1977); *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

[21] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977). But in *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting

straints may be inapplicable[22] and disseminators of commercial speech are not protected by the overbreadth doctrine.[23] In any event, courts must now analyze with some care regulations of and limitations on commercial expression, the demise of the exception permitting easy resolution no longer.[24]

***Taxation.***—Disclaiming any intimation that the Court was saying "that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government," the Court voided a state two-percent tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week.[25] In the Court's view, the tax was analogous to the Eighteenth Century English practice of imposing advertising and stamp taxes on newspapers for the express purpose of pricing the opposition penny press beyond the means of the mass of the population.[1] The tax at issue focused exclusively upon newspapers, it imposed a serious burden on the distribution of news to the public, and it appeared to be a discriminatorily selective tax aimed almost solely at the opposition to the state administration.[2] Combined with the standard that government may not impose a tax directly upon the exercise of a constitutional right itself,[3] these tests would seem to permit general business taxes upon receipts of businesses engaged in communicating protected expression without raising any First Amendment issues.[4]

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"For Sale" signs on residential lawns. First, ample alternative channels of communication were not available, and second, the ban was seen rather as a content limitation.

[22] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 n. 24 (1976); *Central Hudson & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 571 n. 13 (1980).

[23] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 379-381 (1977); *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 477 U.S. 557, 565 n. 8 (1980).

[24] Easy resolution of controversies is also made impossible by Supreme Court divisions. *See*, e.g., *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1981), in which the Court held unconstitutional an ordinance prohibiting billboards and other outdoor sign displays, both commercial and noncommercial, subject to a wide array of exceptions which in some respects treated noncommercial signs more severely than commercial ones. It was on the basis of the divergence of treatment that the ordinance was held to fail. Seven of the Justices appear to position themselves in the view that bans on commercial billboards are permissible ways to implement the substantial governmental interests in traffic safety and aesthetics. Id., 503-512 (plurality opinion of Justices White, Stewart, Marshall, and Powell), 540 (Justice Stevens dissenting), 555 (Chief Justice Burger dissenting), 569 (Justice Rehnquist dissenting).

[25] *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[1] Id., 245-248.

[2] Id., 250-251.

[3] *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Follett* v. *McCormick*, 321 U.S. 573 (1944) (license taxes upon Jehovah's Witnesses selling religious literature invalid).

[4] *Cf. City of Corona* v. *Corona Daily Independent*, 115 Cal. App. 2d 382, 252 P.2d 56 (1953), *cert. den.*, 346 U.S. 833 (1953) (Justices Black and Douglas dissenting). *And*

***Labor Relations.***—Just as newspapers and other communications businesses are subject to nondiscriminatory taxation, they are entitled to no immunity from the application of general laws regulating their relations with their employees and prescribing wage and hour standards. In *Associated Press* v. *NLRB*,[5] the application of the National Labor Relations Act to a newsgathering agency was found to raise no constitutional problem. "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . The regulation here in question has no relation whatever to the impartial distribution of news." Similarly, the Court has found no problem with requiring newspapers to pay minimum wages and observe maximum hours.[6]

***Antitrust Laws.***—Resort to the antitrust laws to break up restraints on competition in the newsgathering and publishing field was found not only to present no First Amendment problem but to comport with government's obligation under that Amendment. Said Justice Black: "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not." [7]

Thus, both newspapers and broadcasters, as well as other such industries, may not engage in monopolistic and other anticompetitive activities free of possibility of antitrust law attack,[8] even

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*see Cammarano* v. *United States*, 358 U.S. 498 (1959) (no First Amendment violation to deny as business expense deduction on federal taxes sums allocated in lobbying with regard to measure affecting one's business).

[5] 301 U.S. 103, 132 (1937).

[6] *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946).

[7] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

[8] *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (refusal of newspaper publisher who enjoyed a substantial monopoly to sell advertising to persons also ad-

though it may be contended that freedom of the press may thereby be preserved.[9]

***Radio and Television.***—Because there are a limited number of broadcast frequencies for radio and television use, the Federal Government must license access to these frequencies, permitting some applicants to utilize them and denying the greater number of applicants such permission. The system of licensing, which is in form a variety of prior restraint, does not of itself present a First Amendment issue because of the unique characteristic of scarcity.[10] Thus, the Federal Communications Commission has broad authority to determine the right of access to broadcasting,[11] although, of course, the regulation must be exercised in a manner that is neutral with regard to the content of the materials broadcast.[12] In certain respects, however, governmental regulation does implicate First Amendment values to a great degree; insistence that broadcasters afford persons attacked on the air an opportunity to reply and that they afford a right to reply from opposing points of view when they editoralize on the air was unanimously found to be constitutional.[13] In *Red Lion*, Justice White explained that differences

vertising over a competing radio station violates antitrust laws); *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) (FCC approval no bar to antitrust suit); *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971) (monopolization of color comic supplements). *See also FCC* v. *National Citizens Com. for Broadcasting*, 436 U.S. 775 (1978) (upholding FCC rules prospectively barring, and in some instances requiring divesting to prevent, the common ownership of a radio or television broadcast station and a daily newspaper located in the same community).

[9] *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969) (pooling arrangement between two newspapers violates antitrust laws; First Amendment argument that one paper will fail if arrangement is outlawed rejected). In response to this decision, Congress enacted the Newspaper Preservation Act to sanction certain joint arrangements where one paper is in danger of failing. 84 Stat. 466 (1970), 15 U.S.C. §§1801–1804.

[10] *NBC* v. *United States*, 319 U.S. 190 (1943); *see also Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375–379, 387–389 (1969); *FCC* v. *National Citizens Com. for Broadcasting*, 436 U.S. 775, 798–802 (1978).

[11] *NBC* v. *United States*, 319 U.S. 190 (1943); *Federal Radio Comm.* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933); *FCC* v. *Pottsville*, 309 U.S. 134 (1940); *FCC* v. *ABC*, 347 U.S. 284 (1954); *Farmers Union* v. *WDAY*, 360 U.S. 525 (1958).

[12] "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." *NBC* v. *United States*, 319 U.S. 190, 226 (1943).

[13] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, . . . ." Id., 369. The two issues passed on in *Red Lion* were integral parts of the doctrine.

in the characteristics of various media justify differences in First Amendment standards applied to them.[14] Thus, while there is a protected right of everyone to speak, write, or publish as he will, subject to very few limitations, there is no comparable right of everyone to broadcast. The frequencies are limited and some few must be given the privilege over others. The particular licensee, however, has no First Amendment right to hold that license and his exclusive privilege may be qualified. Qualification by censorship of content is impermissible, but the First Amendment does not prevent a governmental insistence that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Further, said Justice White, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." [15] The broadcasters had argued that if they were required to provide equal time at their expense to persons attacked and to points of view different from those expressed on the air, expression would be curbed through self-censorship, for fear of controversy and economic loss. Justice White thought this possibility "at best speculative," but if it should materialize "the Commission is not powerless to insist that they give adequate and fair attention to public issues." [16]

In *Columbia Broadcasting System* v. *Democratic National Committee*,[17] the Court rejected claims of parties that the broadcast networks were constitutionally required to sell to them broadcasting time for the presentation of views on controversial issues. The ruling thus terminated a broad drive to obtain that result but the fragmented nature of the Court's multiple opinions precludes a satisfactory evaluation of the constitutional implications of the case. Thus, four Justices in the majority appeared to have been swayed by their conclusions on the "state action" aspect of the case [18] and

[14] Id., 386.
[15] Id., 388–390.
[16] Id., 392–393.
[17] 412 U.S. 94 (1973).
[18] On "state action," see *text*, pp. 1680–1695. The four were Chief Justice Burger and Justice Rehnquist, in the opinion of the Court, id., 114–121, Justice Stewart, who wrote separately, id. 132, esp. 140–141, and Justice Douglas concurred separately. Id., 148, 150.

while two of them went on to discuss the First Amendment issue were the "state action" question decided differently, it is not clear what status this portion of their opinion has.[19] Two Justices adopted a finding of no state action for the apparent reason that they felt the contrary conclusion would have required a different result on First Amendment grounds.[20] Three Justices premised their conclusions on the finding that broadcaster refusal to sell time did not violate the First Amendment, although in the instance of two of the three the conclusion is not argued but drawn from the opinion of the Court in which the argument intermeshes statutory construction with constitutional considerations.[21] Two Justices would have found the sale of time to be mandated by the First Amendment.[22]

However, in *CBS* v. *FCC*,[23] the Court held that Congress had conferred on candidates seeking federal elective office an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations, to be administered through FCC control over license revocations, and held such right of access to be within Congress' power to grant, the First Amendment notwithstanding. The constitutional analysis was brief and merely restated the spectrum scarcity rationale and the role of the broadcasters as fiduciaries for the public interest.

Sustaining FCC discipline of a broadcaster who played on the air a record containing a series of repeated "barnyard" words, considered "indecent" but not obscene, the Court posited a new theory, at least in this context, to explain why the broadcast industry is less entitled to full constitutional protection than are other communications entities.[24] "First, the broadcast media have established a

[19] Id., 121–132. The dissenters, id., 170, 171 (Justices Brennan and Marshall), considered this portion of the opinion of the Court dictum, but inasmuch as it was the only portion around which a majority of the Justices could agree, may *it* not be the holding? The discussion of the constitutional issue was intertwined as well with discussion of the broadcasters' obligation under the "public interest" standard of the Communications Act.

[20] Id., 132, 140–141 (Justice Stewart), 148, 150 (Justice Douglas).

[21] Id., 147 (Justices Blackmun and Powell). Justice White separately concurred, id., 146, in that part of the opinion of the Court reaching the First Amendment issue but also wrote, more sharply defining the discussion than the opinion of the Court, that the statutory and regulatory recognition of broadcaster freedom and discretion when combined with the fairness doctrine was consistent with the First Amendment.

[22] Id., 170, 182, 192 (Justices Brennan and Marshall).

[23] 453 U.S. 367 (1981). The dissent argued that the FCC had assumed, and the Court had confirmed it in assuming, too much authority under the congressional enactment. In its view, Congress had not meant to do away with the traditional deference to the editorial judgments of the broadcasters. Id., 397 (Justices White, Rehnquist, and Stevens).

[24] *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder . . . . Second, broadcasting is uniquely accessible to children, even those too young to read . . . . The ease with which children may obtain access to broadcast material . . . amply justify special treatment of indecent broadcasting." [25] The purport of the Court's new theory is hard to divine; while its potential is broad, the Court emphasized "the narrowness of our holding" through the concept of context, which "requires consideration of a host of variables." [1] Time of day of broadcast, the likely audience, the differences between radio, television, and perhaps closed-circuit transmissions were all relevant in the Court's view. It may be, then, that the case will be limited in the future to its particular facts; yet, the pronunciation of a new theory sets in motion a tendency the application of which may not be so easily cabined.

***Governmentally Compelled Right of Reply to Newspapers.***— However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[2] Granting that the number of newspapers had declined over the years, that ownership had become concentrated, that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, while desirable, "is not mandated by the Constitution," while freedom is. The compulsion exerted by government on a newspaper to print that which it would not otherwise print, "a compulsion to publish that which

[25] Id., 748–751. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. Justice Stevens' opinion was joined by Chief Justice Burger and Justices Rehnquist, Powell, and Blackmun. Justices Powell and Blackmun, id. 755, concurred also in a separate opinion, which reiterated the points made in the text. Justices Brennan and Marshall dissented with respect to the constitutional arguments made by Justices Stevens and Powell. Id., 762. Justices Stewart and White dissented on statutory grounds, not reaching the constitutional arguments. Id., 777.

[1] Id., 750. *See also* id., 742–743 (plurality opinion), and id. 755–756 (Justice Powell concurring) ("Court reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").

[2] *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974).

'reason tells them should not be published,' " runs afoul of the free press clause.[3]

**Government Restraint of Content of Expression**

In the three previous sections were considered primarily but not exclusively incidental restraints on expression which flowed from governmental regulatory measures aimed at goals other than control of the content of the expression thus limited; in this section is considered the permissibility of governmental measures which are directly concerned with the content of expression involved.[1]

Premise of this content-oriented treatment of expression was the "two-tier" doctrine of expression, arrived at generally by "definitional balancing," under which some forms of expression are protected by the First Amendment and certain categories of expression are not entitled to protection. This doctrine was basically derived from *Chaplinsky* v. *New Hampshire*,[2] in which the Court opined that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that government may prevent those utterances and punish those uttering them without raising any constitutional problems. If speech fell within the *Chaplinsky* categories, it was unprotected, regardless of its effect; if it did not, it was covered by the First Amendment and it was protected unless the restraint was justified by some test relating to harm, such as clear and present danger or a balancing of presumptively protected expression against a governmental interest which must be compelling.

Over the last two decades, the decided cases have reflected a fairly consistent and sustained march by the Court to the elimination of or a severe narrowing of the "two-tier" doctrine and protection of much expression that hitherto would have been held abso-

[3] Id., 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion.

[1] The distinction was sharply drawn by Justice Harlan in *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 49–51 (1961): "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved."

[2] 315 U.S. 568, 571–572 (1942).

lutely unprotected, seditious speech and seditious libel, fighting words, defamation, and obscenity, a march now deflected by a shift in position with respect to obscenity and the creation of a new category, of non-obscene child pornography. But in the course of this movement, differences surfaced among the Justices on the permissibility of regulation based on content and the interrelated issue of a hierarchy of speech values, according to which some forms of expression, while protected, may be more readily subject to official regulation and perhaps suppression than other protected expression. These differences were compounded by confrontations with cases in which First Amendment expression values came into conflict with other values, either constitutionally protected values such as the right to fair trials in criminal cases or societally valued interests such as those in privacy, reputation, and the protection from disclosure of certain kinds of information.

Attempts to work out these differences are elaborated in the following pages, but the effort to formulate a doctrine of permissible content regulation within categories of protected expression necessitates a brief treatment. It has been, and remains, standard doctrine that it is impermissible to posit regulation of protected expression upon its content.[3] But in recent Terms, Justice Stevens has articulated a theory under which he would permit some governmental restraint based upon content; in his view, there is a hierarchy of speech which the judiciary may define and the appropriate level of protection under the First Amendment depends on where the kind of speech at issue fits into that hierarchy. The place on the continuum of any class of speech is basically settled by reference to *Chaplinsky's* formulation of whether it is "an essential part of any exposition of ideas" and what its "social value as a step to truth" is.[4] Thus, offensive words and portrayals dealing with sex and excretion may be regulated, even though nonobscene, when the expression plays no role or a minimal role in the exposition of ideas.[5] "Whether political oratory or philosophical discussion

[3] *Police Dept.* v. *Mosley*, 408 U.S. 92, 95 (1972); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 208–212 (1975); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Carey* v. *Brown*, 447 U.S. 455 (1980); *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1981) (plurality opinion); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

[4] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942).

[5] *Young* v. *American Mini Theatres*, 427 U.S. 50, 63–73 (1976) (plurality opinion); *Smith* v. *United States*, 431 U.S. 291, 317–319 (1977) (Justice Stevens dissenting); *Carey* v. *Population Services Int.*, 431 U.S. 678, 716 (1977) (Justice Stevens concurring in part and concurring in the judgment); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 744–748 (1978) (plurality opinion); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 80, 83 (1981) (Justice Stevens concurring in judgment); *New York* v. *Ferber*, 458 U.S. 747, 781 (1982) (Justice Stevens concurring in judgment).

moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to 'Specified Sexual Activities' exhibited in the theaters of our choice." [6]

A majority of the Court, however, has not joined in approving Justice Stevens' theory and, in fact, it appears that a majority rejects it.[7] One must note, however, that the Court has in some contexts of covered expression approved restrictions based on content [8] and in still other areas, such as privacy, it has implied that some restraints on expression because of its content would be approved.[9] Moreover, the Court in recent years has emphasized numerous times the role of the First Amendment in facilitating, indeed making possible, political dialogue and the operation of democratic institutions.[10] While this emphasis may be read as being premised on a hierarchical theory of the worthiness of political speech and the subordinate position of less worthy forms of speech, it is more likely to be merely a celebration of the most worthy role speech plays without suggesting that other roles and other kinds of discourses are relevant in determining the measure of protection enjoyed under the First Amendment.[11]

***Seditious Speech and Seditious Libel.***—Opposition to government through speech alone throughout much of history has been subject to punishment under laws proscribing "seditious" utter-

[6] *Young* v. *American Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality opinion).

[7] In *Young*, *supra*, Chief Justice Burger and Justices White and Rehnquist joined the opinion, while Justice Powell, concurring, id., 73, and the four dissenters, id., 84, 88, rejected the position. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), only Chief Justice Burger and Justice Rehnquist joined the relevant part of the opinion, while Justices Powell and Blackmun, concurring, id., 755, and the two dissenting Justices reaching the constitutional merits, id., 762, rejected it. In *New York* v. *Ferber*, 458 U.S. 747, 763 (1982), a majority of the Court joined an opinion quoting much of Justice Stevens' language in these cases, but the opinion rather clearly adopts the proposition that the disputed expression, child pornography, is not covered by the First Amendment, not that it is covered but subject to suppression because of its content. Id., 764. And see id., 781 (Justice Stevens concurring in judgment).

[8] E.g., Commercial speech, which is covered by the First Amendment but is less protected than other speech, is subject to content-based regulation. *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, 447 U.S. 557, 568–569 (1980). *See also Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970) (sexually-oriented, not necessarily obscene mailings).

[9] E.g., *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). *See also Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

[10] E.g., *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776–777, 781–783 (1978); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 299–300 (1982).

[11] E.g., *First National Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S.C. 530, 534 n. 2 (1980).

ances. In this country, the Sedition Act of 1798 made criminal, inter alia, malicious writings which defamed the Government, the President, or the Congress or which brought them into contempt or disrepute or which excited the hatred of the people against them, or which stirred people to sedition.[12] In *New York Times Co.* v. *Sullivan*,[13] the Court surveyed the controversy surrounding the enactment and enforcement of the Sedition Act and concluded that debate "first crystalized a national awareness of the central meaning of the First Amendment. . . . . Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . [That history] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." The "central meaning" discerned by the Court, quoting Madison's comment that in a republican government "the censorial power is in the people over the Government, and not in the Government over the people," is that "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."

Little opportunity to apply this concept of the "central meaning" of the First Amendment in the context of sedition and criminal syndicalism laws has been presented to the Court. In *Dombrowski* v. *Pfister*[14] the Court, after expanding on First Amendment considerations the discretion of federal courts to enjoin state court proceedings, struck down as vague and as lacking due process procedural protections certain features of a state "Subversive Activities and Communist Control Law." In *Brandenburg* v. *Ohio*,[15] a

[12] 1 Stat. 596, *supra*, p. 1001. Note also that the 1918 amendment of the Espionage Act of 1917, 40 Stat. 553, reached "language intended to bring the form of government of the United States . . . or the Constitution . . . or the flag . . . or the uniform of the Army or Navy into contempt, scorn, contumely, or disrepute." *Cf. Abrams* v. *United States*, 250 U.S. 616 (1919). For a brief history of seditious libel here and in Great Britain, *see* Z. Chafee, *Free Speech in the United States* (Cambridge: 1941), 19–35, 497–516.

[13] 376 U.S. 254 273–276 (1964). *See also Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

[14] 380 U.S. 479, 492–496 (1965). A number of state laws were struck down by three-judge district courts pursuant to the latitude prescribed by this case. E.g., *Ware* v. *Nichols*, 266 F. Supp. 564 (D.C.N.D. Miss 1967) (criminal syndicalism law); *Carmichael* v. *Allen*, 267 F. Supp. 985 (D.C.N.D. Ga. 1966) (insurrection statute); *McSurely* v. *Ratliff*, 282 F. Supp. 848 (D.C.E.D. Ky. 1967) (criminal syndicalism). This latitude has now been circumscribed in cases attacking criminal syndicalism and criminal anarchy laws. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

[15] 395 U.S. 444 (1969). *See also Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966), considered *infra*. p. 1005.

state criminal syndicalism statute was held unconstitutional because its condemnation of advocacy of crime, violence, or unlawful methods of terrorism swept within its terms both mere advocacy as well as incitement to imminent lawless action. A seizure of books, pamphlets, and other documents under a search warrant pursuant to a state subversives suppression law was struck down under the Fourth Amendment in an opinion heavy with First Amendment overtones.[16]

***Fighting Words and Other Threats to the Peace.***—In *Chaplinsky* v. *New Hampshire*,[17] the Court unanimously sustained a conviction under a statute proscribing "any offensive, derisive, or annoying word" addressed to any person in a public place under the state court's interpretation of the statute as being limited to "fighting words"—to "words . . . [which] have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." The statute was sustained as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." [18] The case is best known for Justice Murphy's famous dictum. "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [19]

*Chaplinsky* still remains viable for the principle that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently

[16] *Stanford* v. *Texas*, 379 U.S. 476 (1965). In *United States* v. *United States District Court*, 407 U.S. 297 (1972), a Government claim to be free to wiretap in national security cases was rejected on Fourth Amendment grounds in an opinion which called attention to the relevance of the First Amendment.

[17] 315 U.S. 568 (1942).

[18] Id., 573.

[19] Id., 571–572.

likely to provoke violent reaction." [20] But, in actuality, the Court has closely scrutinized statutes on vagueness and overbreadth grounds and set aside convictions as not being within the doctrine. *Chaplinsky* thus remains formally alive but of little vitality.[21]

On the obverse side, the "hostile audience" situation, the Court once sustained a conviction for disorderly conduct of one who refused police demands to cease speaking after his speech seemingly stirred numbers of his listeners to mutterings and threatened disorders.[22] But this case has been significantly limited by cases which hold protected the peaceful expression of views which stirs people to anger because of the content of the expression, or perhaps because of the manner in which it is conveyed, and that breach of the peace and disorderly conduct statutes may not be used to curb such expression.

The cases are not clear to what extent the police must go in protecting the speaker against hostile audience reaction or whether only actual disorder or a clear and present danger of disorder will entitle the authorities to terminate the speech or other expressive conduct.[23] Neither, in the absence of incitement to illegal action,

[20] *Cohen* v. *California*, 403 U.S. 15, 20 (1971). Cohen's conviction for breach of peace, occasioned by his appearance in public with an "offensive expletive" lettered on his jacket, was reversed, in part because the words were not a personal insult and a lack of showing of audience objection.

[21] The cases hold that government may not punish profane, vulgar, or opprobrious words simply because they are offensive but only if they are "fighting words" that do have a direct tendency to cause acts of violence by the person to whom they are directed. *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974); *Lucas* v. *Arkansas*, 416 U.S. 919 (1974); *Kelly* v. *Ohio*, 416 U.S. 923 (1974); *Karlan* v. *City of Cincinnati*, 416 U.S. 924 (1974); *Rosen* v. *California*, 416 U.S. 924 (1974); *and see Eaton* v. *City of Tulsa*, 416 U.S. 697 (1974).

[22] *Feiner* v. *New York*, 340 U.S. 315 (1951). *See also Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941), in which the Court held that a court could enjoin peaceful picketing because violence occurring at the same time against the businesses picketed could have created an atmosphere in which even peaceful, otherwise protected picketing could be illegally coercive. *But compare NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

[23] The principle actually predates *Feiner*. *See Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). For subsequent application, *see Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970). Significant is Justice Harlan's statement of the principle reflected by *Feiner*. "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from *intentionally* provoking a given group to hostile reaction. *Cf. Feiner* v. *New York*, 340 U.S. 315 (1951)." *Cohen* v. *California*, 403 U.S. 15, 20 (1970).

may government punish mere expression nor proscribe ideas,[24] regardless of the trifling or annoying caliber of the expression.[25]

***Group Libel.***—In *Beauharnais* v. *Illinois*,[1] relying on dicta in past cases, the Court upheld a state group libel law which made it unlawful to defame a race or class of people.[2] Defendant had been convicted under this statute after he had distributed a leaflet, a part of which was in the form of a petition to his city government, taking a hard-line white supremacy position and calling for action to keep Negroes out of white neighborhoods. Justice Frankfurter for the Court sustained the statute along the following reasoning. Libel, he established, of an individual was a common-law crime and was now made criminal by statute in every State in the Union. These laws raise no constitutional difficulty because libel is within that class of speech which is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, no good reason appears to deny a State the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State." [3] The Justice then reviewed the history of racial strife in Illinois to conclude that the legislature could reasonably fear substantial evils from unrestrained racial utterances. Neither did the Constitution require the State to accept a defense of truth, inasmuch as historically a defendant had to show not only truth but publication with good motives and for justifable ends.[4] "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.' " [5]

[24] *Cohen* v. *California*, 403 U.S. 15 (1971); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Street* v. *New York*, 394 U.S. 576 (1969); *Schacht* v. *United States*, 398 U.S. 58 (1970); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959); *Stromberg* v. *California*, 283 U.S. 359 (1931).

[25] *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *Cohen* v. *California*, 403 U.S. 15 (1971); *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

[1] 343 U.S. 250 (1952).

[2] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–572 (1942); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 707–708 (1931).

[3] *Beauharnais* v. *Illinois*, 343 U.S. 250, 254–258 (1952).

[4] Id,. 265–266.

[5] Id., 266. That *Beauharnais* is a considerably weakened precedent is confirmed by *Collin* v. *Smith*, 447 F. Supp. 676 (D.C.N.D.Ill.), *aff'd.*, 578 F.2d 1197 (C.A. 7), *stay den.*, 436 U.S. 953 (1978), *cert. den.*, 439 U.S. 916 (1978) (Justices Blackmun and Rehnquist dissenting; Court should review case which is in "some tension" with *Beauharnais*). *But see New York* v. *Ferber*, 458 U.S. 747, 763 (1982) (obliquely citing *Beauharnais* with approval).

***Defamation.***—One of the most seminal shifts in constitutional jurisprudence occurred with the decision in *New York Times Co.* v. *Sullivan.*[6] There, the *Times* had published a paid advertisement by a civil rights organization which in criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King had contained several factual errors. The plaintiff, a city commissioner in charge of the police department, sued, claiming that the advertisement had libeled him although he was not referred to by name or title and although several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court reversed the judgment entered below. To the contention that the First Amendment did not protect libelous publications, the Court replied that constitutional scrutiny could not be foreclosed by the "label" attached to something. "Like . . . the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." [7] "The general proposition, the Court continued, "that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions . . . . [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [8] Because the advertisement was "an expression of grievance and protest on one of the major public issues of our time, [it] would seem clearly to qualify for the constitutional protection . . . [unless] it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent." [9]

Erroneous statement is protected, the Court asserted, there being no exception "for any test of truth." Error is inevitable in any free debate and to place liability upon that score, and especially to place on the speaker the burden of proving truth would introduce self-censorship and stifle the free expression which the First Amendment protected.[10] Neither would injury to official reputa-

[6] 376 U.S. 254 (1964). Justices Black, Douglas, and Goldberg, concurring, would have held libel laws *per se* unconstitutional. Id., 293, 297.

[7] Id., 269.

[8] Id., 269, 270.

[9] Id., 271.

[10] Id., 271-272, 278-279.

tion afford a warrant for repressing otherwise free speech. Public officials are subject to public scrutiny and "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation." [11] That neither, nor the two grounds combined, could penetrate the protective circle of the First Amendment was the "lesson" to be drawn from the great debate over the Sedition Act of 1798 which the Court reviewed in some detail to discern the "central meaning of the First Amendment." [12] Thus, it appears, the libel law under consideration failed the test of constitutionality because of its kinship with seditious libel which violated the "central meaning of the First Amendment." "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [13]

In the wake of the *Times* ruling, the Court decided two cases involving the type of criminal libel statute upon which Justice Frankfurter had relied in analogy to uphold the group libel law in *Beauharnais*.[14] In neither case did the Court apply the concept of *Times* to void them altogether. *Garrison* v. *Louisiana* [15] held that a statute that did not incorporate the *Times* rule of "actual malice" was invalid, while in *Ashton* v. *Kentucky* [16] a common-law definition of criminal libel as "any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable" was too vague to be constitutional.

The teaching of *Times* and the cases following after it is that expression on matters of public interest is within the area of First Amendment protection. When that expression deals with the actions of individuals with regard to matters of public interest it does not fall out of the area of protection. Neither does the fact standing by itself that the expression contains falsehoods deprive it of protection, because otherwise such expression in the public interest would be deterred by monetary judgments and self-censorship imposed for fear of judgments. But, over the years, the Court has developed an increasingly complex set of standards with respect to

[11] Id., 272-273.
[12] Id., 273. *See supra*, p. 1002 n. 13.
[13] Id., 279-280.
[14] *Beauharnais* v. *Illinois*, 343 U.S. 250, 254-258 (1952).
[15] 379 U.S. 64 (1964).
[16] 384 U.S. 195 (1966).

who is protected to what degree with respect to which matters of public and private interest.

Individuals to whom the *Times* rule applies presented one of the first issues for determination. At first, the Court keyed it to the importance of the position held. "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." [17] But over time, this focus seems to have become diffused and the concept of "public official" has appeared to take on overtones of anyone holding public elective or appointive office.[18] Moreover, candidates for public office were subject to the *Times* rule and comment on their character or past conduct, public or private, insofar as it touches upon their fitness for office, is protected.[19]

Thus, with respect to both public officials and candidates, a wide range of reporting about them is protected. Certainly, with regard to public officials, their conduct of their official duties is surely subject to the widest scrutiny and criticism.[20] But the Court has held as well that criticism which reflects generally upon an official's integrity and honesty is protected.[21] Candidates for public

[17] *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966).

[18] Ibid. (supervisor of a county recreation area employed by and responsible to the county commissioners may be public official within *Times* rule). *See Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (elected municipal judges); *Henry* v. *Collins*, 380 U.S. 356 (1965) (county attorney and chief of police); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Greenbelt Cooperative Pub. Assn.* v. *Bresler*, 398 U.S. 6 (1970) (state legislator who was major real estate developer in area); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971) (police captain). The "public official" categorization applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt* v. *Baer*, *supra*, 85. It does not, however, include all government employees. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 119 n. 8 (1979).

[19] *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971).

[20] *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966).

[21] *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), involved charges that the judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Court rejected an attempted distinction that these criticisms were not of the manner in which the judges con-

office, the Court has said, place their whole lives before the public and it is difficult to see what criticisms could not be related to their fitness.[22]

For a time, the Court's decisional process threatened to expand the *Times* privilege so as to obliterate the distinction between private and public figures. First, the Court created a subcategory of "public figure," which included those otherwise private individuals who have attained some prominence, either through their own efforts or because it was thrust upon them, with respect to a matter of public interest, or, in Chief Justice Warren's words, those persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." [23] More recently, the Court has cur-

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ducted their courts but were personal attacks upon their integrity and honesty. "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. . . . The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." Id., 76–77.

[22] In *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 274–275 (1971), the Court said: "The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul' when an opponent or an industrious reporter attempts to demonstrate the contrary. . . . Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case."

[23] *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 164 (1967) (Chief Justice Warren concurring in the result). *Curtis* involved a football coach, and *Associated Press* v. *Walker*, decided in the same opinion, involved a retired general active in certain political causes. The suits arose from reporting that alleged, respectively, the fixing of a football game and the leading of a violent crowd in opposition to enforcement of a desegregation decree. The Court was extremely divided, but the rule that emerged was largely the one developed in the Chief Justice's opinion. Essentially, four Justices opposed application of the *Times* standard to "public figures," although they would have imposed a lesser but constitutionally-based burden on public figure plaintiffs. Id., 133 (plurality opinion of Justices Harlan, Clark, Stewart, and Fortas). Three Justices applied *Times*, id., 162 (Chief Justice Warren), and 172 (Justices Brennan and White). Two Justices would have applied absolutely immunity. Id., 170 (Justices Black and Douglas). *See also Greenbelt Cooperative Pub. Assn.* v. *Bresler*, 398 U.S. 6 (1970).

tailed the definition of "public figure" by playing down the matter of public interest and emphasizing the voluntariness of the assumption of a role in public affairs that will make of one a "public figure." [24]

Second, in a fragmented ruling, the Court applied the *Times* standard to private citizens who had simply been involved in events of public interest, usually, though not invariably, not through their own choosing.[25] But, in *Gertz* v. *Robert Welch, Inc.*[1] the Court set off on a new path of limiting recovery for defamation by private persons than that initially charted in *Rosenbloom*. Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved and punitive damages will be recoverable only upon the *Times* showing of "actual malice."

The Court's opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press of liability for every misstatement would deter not only false speech but much truth as well when the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of its access to information. On the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods. An individual's right to the protection of his own good name is, at bottom, but a reflection of our society's concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officals or public figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public for information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. "We hold that, so long as they do not impose liability without fault,

[24] Public figures "[f] or the most part [are] those who . . . have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

[25] *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). *Rosenbloom* had been prefigured by *Time, Inc.*, v. *Hill*, 385 U.S. 374 (1967), a "false light" privacy case considered *infra*.

[1] 418 U.S. 323 (1974).

the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." [2] Some degree of fault must be shown then.

Generally, juries may award in tort substantial damages for presumed injury to reputation merely upon a showing of publication. But this discretion of juries had the potential to inhibit the exercise of freedom of the press and moreover permits juries to penalize unpopular opinion through the awarding of damages. Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages.[3]

Subsequent cases have revealed a trend toward narrowing the scope of the "public figure" concept. A socially prominent litigant in a particularly messy divorce controversy was held not to be such a person,[4] and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction.[5] Neither was a scientist who sought and received federal grants for research, the results of which were published in scientific journals, a public figure for purposes of allegedly defamatory comment about the value of his research.[6] Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2) have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved and are public figures with respect to comment on those issues.[7]

Commentary about matters of "public interest" when it defames someone is apparently, after *Firestone* and *Gertz*,[8] to be pro-

[2] Id., 347.

[3] Id., 348–350. Justice Brennan would have adhered to *Rosenbloom*, id., 361, while Justice White thought the Court went too far in constitutionalizing the law of defamation. Id., 369.

[4] *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976).

[5] *Wolston* v. *Reader's Digest Assn.*, 443 U.S. 157 (1979).

[6] *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979).

[7] Id., 134 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

[8] *Time, Inc.* v. *Firestone*, 424 U.S. 448, 454 (1976). *See also Wolston* v. *Reader's Digest Assn.*, 443 U.S. 157 (1979).

tected to the degree that the person defamed is a public official or candidate for public office, public figure, or private figure. That there is a controversy, that there are matters that may be of "public interest," is insufficient to make a private person a "public figure" for purposes of the standard of protection in defamation actions.

Satellite considerations beside the issue of who is covered by the *Times* privilege are of considerable importance. The use in the cases of the expression "actual malice" has been confusing in many respects, because it is in fact a concept distinct from the common law meaning of malice or the meanings common sense might give to it.[9] Constitutional "actual malice" means that the defamation was published with knowledge that it was false or with reckless disregard of whether it was false.[10] Reckless disregard is not simply negligent behavior but publication with serious doubts as to the truth of what is uttered.[11] A defamation plaintiff under the *Times* or *Gertz* standard has the burden of proving by "clear and convincing" evidence, not merely the preponderance of evidence standard ordinarily borne in civil cases, that the defendant acted with knowledge of falsity or with reckless disregard.[12] A plaintiff suing the press[13] for defamation under the *Times* or *Gertz* standards is not limited to attempting to prove his case without resort to discovery of the defendant's editorial processes in the establishment of "actual malice." [14] The state of mind of the defendant may be inquired into and the thoughts, opinions, and conclusions with respect to the material gathered and its review and handling are proper subjects of discovery. As with other areas of protection or qualified protection under the First Amendment (as well as some other constitutional provisions), appellate courts, and ultimately

[9] *See, e.g., Herbert* v. *Lando*, 441 U.S. 153, 199 (1979) (Justice Stewart dissenting).

[10] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64, 78 (1964); *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 251–252 (1974).

[11] *St. Amant* v. *Thompson*, 390 U.S. 727, 730–733 (1968); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967).

[12] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 331–332 (1974); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 83 (1967). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285–286 (1964) ("convincing clarity").

[13] Because the defendants in these cases have typically been media defendants, but see *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Henry* v. *Collins*, 380 U.S. 356 (1965), and because of the language in the Court's opinions, some have argued that only media defendants are protected under the press clause and individuals and others are not protected by the speech clause in defamation actions. *See supra*, pp. 1006–1008.

[14] *Herbert* v. *Lando*, 441 U.S. 153 (1979).

the Supreme Court, must independently review the findings below to ascertain that constitutional standards were met.[15]

Finally, while the Supreme Court has yet to speak clearly on the matter, it appears that only assertions of fact are actionable and assertions of opinion are absolutely protected; that is, false assertions of fact may be defamatory, subject to constitutional standards of privilege, but false statements of opinion are not.[16]

***Invasion of Privacy.***—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amendment rights. Privacy is a concept composed of several aspects.[17] As a tort concept, it embraces at least four branches of protected interests, protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from publicity which unreasonably places one in a false light before the public.[18]

While the Court has variously recognized valid governmental interests in extending protection to privacy,[19] it has at the same time interposed substantial free expression interests in the balance. Thus, in *Time, Inc.* v. *Hill,*[20] the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. When in *Gertz* v. *Robert Welch, Inc.,*[21] the Court held that the *Times* privilege was not applicable in defamation cases unless the plaintiff is a public official or public figure, even though plaintiff may have been involved in a matter of public interest, there

[15] *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 284–286 (1964). *See, e.g., NAACP* v. *Claiborne Hardware Co.,* 458 U.S. 886, 933–934 (1982).

[16] *Cf. Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 339–340 (1974); *See, e.g., Greenbelt Cooperative Publishing Assn.* v. *Bresler,* 398 U.S. 6 (1970); *Letter Carriers* v. *Austin,* 418 U.S. 264 (1974).

[17] *See, e.g.,* W. Prosser, *Law of Torts* (Minneapolis: 4th ed. 1971); § 117; Prosser, "Privacy," 48 Calif. L. Rev. 383 (1960); T. Emerson, *The System of Freedom of Expression* (New York: 1970), 544–561. It should be noted that we do not have here the question of the protection of one's privacy from governmental invasion.

[18] *Restatement of the Law (Second),* Torts (Tent. Draft No. 13, 1967), 652A–652E, and see id., (Tent. Draft No. 21, 1975), 86–91.

[19] *Time, Inc.* v. *Hill,* 385 U.S. 374, 383 n. 7 (1967); and id. 402, 404 (Justice Harlan, concurring in part and dissenting in part); 411, 412–415 (Justice Fortas dissenting); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 487–489 (1975).

[20] 385 U.S. 374 (1967). *See also Cantrell* v. *Forest City Publishing Co.,* 419 U.S. 245 (1974).

[21] 418 U.S. 323 (1974).

was called into question the applicability of *Hill* to all "false-light" cases or only such cases involving public officials or public figures.[22] And, more important, it left unresolved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press." [23]

In *Cox Broadcasting*, the Court declined to pass on the broad question, holding instead that the accurate publication of information obtained from public records is absolutely privileged. Thus, the State could not permit a civil recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court.[24] Nevertheless, the Court in appearing to retreat from what had seemed to be settled principle, that truth is a constitutionally required defense in any defamation action, whether plaintiff be a public official, public figure, or private individual, may have preserved for itself the discretion to recognize a constitutionally permissible tort of invasion of privacy through publication of truthful information.[25] But in recognition of the conflicting interest—in expression and in privacy—it is evident that the judicial process in this area will be cautious.

[22] *Cf. Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 250–251 (1974); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 n. 19 (1975).

[23] *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

[24] More specifically, the information was obtained "from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." Id., 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. Id., 493, 494–496.

[25] Thus, Justice White for the Court noted that the defense of truth is constitutionally required in suits by public officials or public figures. But "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamatory action brought by a private person as distinguished from a public official or public figure." Id., 490. If truth is not a constitutionally required defense, then it would be possible for the States to make truthful defamation of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. *See Brusco* v. *Reader's Digest*, 4 Cal. 3d 520, 483 P. 2d 34, 93 Cal. Rptr. 866 (1971); *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E. 2d 610 (1969), *cert. den.*, 398 U.S. 960 (1970). Concurring in *Cohn*, 420 U.S., 497, Justice Powell contended that the question of truth as a constitutionally required defense was long settled in the affirmative and that *Gertz* itself, which he wrote, was explainable on no other basis. But he too would reserve the question of actionable invasions of privacy through truthful reporting. "In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." Id., 500.

***"Right of Publicity" Tort Actions.***—In *Zacchini* v. *Scripps-Howard Broadcasting Co.*,[1] the Court held unprotected by the First Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of his suit for damages against the company for having "appropriated" his act, of having injured his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information which would be made available to the public, whereas permitting this tort action would have an impact only on "who gets to do the publishing." [2] In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.[3]

***Publication of Legally Confidential Information.***—While a State may have numerous and important valid interests in assuring the confidentiality of certain information, it may not maintain this confidentiality through the criminal prosecution of nonparticipant third parties, including the press, who disclose or publish the information.[4] The case arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body's proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute which the state courts construed to apply to nonparticipant divulging. Al-

[1] 433 U.S. 562 (1977). The "right of publicity" tort is conceptually related to one of the privacy strands, "appropriation" of one's name or likeness for commercial purposes. Id., 569–572. Justices Powell, Brennan, and Marshall dissented finding the broadcast protected, id., 579, and Justice Stevens dissented on other grounds. Id., 582.

[2] Id., 573–574. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

[3] Id., 576–578. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court's emphasis is that they encourage the production of work for the public's benefit.

[4] *Landmark Communications* v. *Virginia*, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. Id., 848. *See also Smith* v. *Daily Mail Pub. Co.*, 433 U.S. 97 (1979).

though the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here "lies near the core of the First Amendment" because the free discussion of public affairs, including the operation of the judicial system, is primary and the State's interests were simply insufficient to justify the encroachment on freedom of speech and of the press.[5] The scope of the privilege thus conferred by this decision on the press and on individuals is, however, somewhat unclear, because the Court appeared to reserve consideration of broader questions than those presented by the facts of the case,[6] but it does appear that government would find it difficult to punish the publication of almost any information by a nonparticipant to the process in which the information was developed to the same degree as it would be foreclosed from obtaining prior restraint of such publication.[7]

***Obscenity.***—Although public discussion of political affairs may be protected expression within the "central meaning" of the First Amendment, the guarantees of speech and press, it should have been noticed from the previous subsections, are not so limited. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right." [8] The right to impart and to receive "information and ideas, regardless of their social worth . . . is fundamental to our free society." [9] Indeed, it is primarily with regard to the entertaining function of expression that the law of obscenity is concerned, inasmuch as the Court has rejected any concept of "ideological" obscenity.[10] However, this function is not

[5] Id., 838–842. The state court's utilization of the clear-and-present-danger test was disapproved in its application; additionally, the Court questioned the relevance of the test in this case. Id., 842–845.

[6] *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), in the context of a civil proceeding, had held that the First Amendment did not permit the imposition of liability on the press for truthful publication of information released to the public in official court records, id., 496, but had expressly reserved the question "whether the publication of truthful information withheld by law from the public domain is similarly privileged," id., 497 n. 27, and *Landmark* on its face appears to answer the question affirmatively. Caution is impelled, however, by the Court's similar reservation. "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment." Id., 435 U.S., 840.

[7] *See Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976).

[8] *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

[9] *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

[10] *Winters* v. *New York*, 333 U.S. 507 (1948); *Burstyn* v. *Wilson*, 343 U.S. 495 (1952); *Commercial Pictures Corp.* v. *Regents*, 346 U.S. 587 (1954); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959). The last case involved the banning of the

the reason why obscenity is outside the protection of the First Amendment, although the Court has never really been clear with regard to the reasons it is outside.

Adjudication with regard to the federal constitutional law of obscenity began in *Roth* v. *United States*,[11] in which the Court in an opinion by Justice Brennan settled the "dispositive question," "Whether obscenity is utterance within the area of protected speech and press."[12] The Court then undertook a brief historical survey to demonstrate that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." All or practically all of the States which ratified the First Amendment had laws making blasphemy or profanity or both crimes and provided for prosecutions of libels as well. It was this history which had caused the Court in *Beauharnais* to conclude that "libelous utterances are not within the area of constitutionally protected speech," and this history was deemed to demonstrate as well that "obscenity, too, was outside the protection intended for speech and press."[13] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[14] It has been objected that obscenity legis-

movie version of *Lady Chatterley's Lover* on the ground that it dealt too sympathetically with adultery. "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Id., 688–689.

[11] 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was *Alberts* v. *California*, involving, of course, a state obscenity law. The Court's first opinion in the obscenity field was *Butler* v. *Michigan*, 352 U.S. 380 (1957), considered *infra*, p. 1113 n. 18. Earlier the Court had divided four-to-four and thus affirmed a state court judgment that Edmund Wilson's *Memoirs of Hecate County* was obscene. *Doubleday & Co.* v. *New York*, 335 U.S. 848 (1948).

[12] *Roth* v. *United States*, 354 U.S. 476, 481 (1957).

[13] Id., 482–483. The reference is to *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952).

[14] *Roth* v. *United States*, 354 U.S. 476, 484 (1957). There then followed the well-known passage from *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–572 (1942), see *supra*, p. 1098.

lation punished because of incitation to impure thoughts and without proof that obscene materials create a clear and present danger of antisocial conduct. But since obscenity was not protected at all, such tests as clear and present danger were irrelevant.[15]

"However," Justice Brennan continued, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."[16] The standard which the Court thereupon adopted for the designation of material as unprotected obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[17]

In the years after *Roth*, the Court struggled with many obscenity cases with varying degrees of success and defeat. The cases could be grouped topically, but with the exception of those cases dealing with obscenity and children,[18] unwilling adult recipients,[19]

[15] 354 U.S., 486, also quoting *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (1952).
[16] 354 U.S., 487, 488.
[17] Id., 489. The Court's definition of prurient is at id., 487 n. 20. Chief Justice Warren concurred, emphasizing the *conduct* of defendants as purveyors of materials appealing to the "morbid and shameful craving" of their customers. Id., 494. Justice Harlan dissented in *Roth* because he thought the activities were solely of state interest and concurred in *Alberts* on the basis that, while the First Amendment applied to the States, the same standards did not govern federal and state action, and it was not irrational for the States to believe that distribution of the materials at issue constituted evils they should prevent. Id., 496. Justices Black and Douglas dissented. Id., 508.
[18] In *Butler* v. *Michigan*, 352 U.S. 380 (1957), the Court unanimously reversed a conviction under a statute which punished general distribution of materials unsuitable for children. Protesting that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children," the Court pronounced the statute void. Narrowly drawn proscriptions for distribution or exhibition of materials to children which would not be obscene for adults are permissible, *Ginsberg* v. *New York*, 390 U.S. 629 (1968), although the Court insists on a high degree of specificity. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676 (1968); *Rabeck* v. *New York*, 391 U.S. 462 (1968). Protection of children in this context is concurred in even by those Justices who would proscribe obscenity regulation for adults. *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 73, 113 (1973) (Justice Brennan dissenting). But children do have First Amendment protection and government may not bar dissemination of everything to them. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212-214 (1975) (in context of nudity on movie screen). *See also FCC* v. *Pacifica*, 438 U.S. 726, 749-750 (1978); *Pinkus* v. *United States*, 436 U.S. 293, 296-298 (1978).

and procedure,[20] these cases are best explicated by a chronological procession.

*Manual Enterprises* v. *Day*[21] upset a Post Office ban upon the mailing of certain magazines addressed to homosexual audiences but resulted in no majority opinion of the Court. Neither did a majority opinion emerge in *Jacobellis* v. *Ohio*,[22] in which conviction

[19] Protection of unwilling adults was the emphasis in *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970), which upheld a scheme by which recipients of objectionable mail could put their names on a list and require the mailer to send no more such material. But, absent intrusions into the home, *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content, in the context of materials not meeting constitutional standards for denomination as pornography, to protect the sensibilities of some. It is up to offended individuals to turn away. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 208–212 (1975). *But see Pinkus* v. *United States*, 436 U.S. 293, 298–30[illegible]978) (jury in passing on what community standards are must include "sensitive persons" within the community).

[20] The First Amendment requires that procedures for suppressing distribution of obscene materials provide for expedited consideration, placing burden of proof on government, and hastening judicial review. *Supra*, p. 1012–1013. Additionally, Fourth Amendment search and seizure law has been suffused with First Amendment principles, so that the law with regard to searches for and seizures of allegedly obscene materials is more stringent than in most other areas. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979); *and see Walter* v. *United States*, 447 U.S. 649 (1980). *Scienter*—that is, knowledge of the nature of the materials—is a prerequisite to conviction, *Smith* v. *California*, 361 U.S. 147 (1959), but the prosecution need only prove the defendant knew the contents of the material, not that he knew they were legally obscene. *Hamling* v. *United States*, 418 U.S. 87, 119–124 (1974). *See also Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (public nuisance injunction of showing future films on basis of past exhibition of obscene films); *McKinney* v. *Alabama*, 424 U.S. 669 (1976) (effort to bind criminal defendants to finding of obscenity of materials in prior civil proceeding).

[21] 370 U.S. 478 (1962). The prevailing opinion was by Justice Harlan whom Justice Stewart joined. The Justice did not decide whether materials aimed at a select audience must be judged in terms of that audience or in terms of an adult audience in general. Rather, the "prurient interest" test was found not to be the sole test; a test of "patent offensiveness," that is, whether materials can be "deemed so offensive on their face as to affront current community standards of decency," must also be applied. The "community" whose standards must be assessed must, since a federal statute was involved, be the "national community," "a national standard of decency" must be looked to. Judged by these standards, the magazines were not obscene. Id., 482, 487–491. Justice Black concurred without opinion, id., 495, while Justices Brennan, Douglas, and Chief Justice Warren concurred on procedural grounds. Ibid. Justice Clark dissented. Id., 519.

[22] 378 U.S. 184 (1964). The prevailing opinion was by Justice Brennan whom Justice Goldberg joined. *Roth's* standards were restated so that material was obscene if to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest, the material must be "utterly" without social importance, it must go substantially beyond customary limits of candor, it apparently must be patently offensive, and the community standards must be national standards whether a federal or state law is involved. Id., 191. Justice White concurred without opinion, id., 196, and Justices Black and Douglas concurred, reaffirming their now settled opposition to all censor-

for exhibiting a motion picture was reversed. Chief Justice Warren's concurrence in *Roth* [23] was adopted by a majority in *Ginzburg* v. *United States*,[24] in which Justice Brennan for the Court held that in "close" cases materials which under the *Roth* standards could be defined as "obscene" or "nonobscene" could be determined to be obscene if the seller "pandered" them in a way to his audience that indicated he was catering to prurient interests. The same five-Justice majority, with Justice Harlan concurring, the same day affirmed a state conviction of a distributor of books addressed to a sado-masochistic audience, applying the "pandering" test and concluding that material could be held legally obscene if it appealed to the prurient interests of the deviate group to which it is directed.[25] Unanimity was shattered, however, when on the same day the Court held that *Fanny Hill*, a novel at that point 277 years old, was not legally obscene.[1] The prevailing opinion again restated the *Roth* tests to require for an obscene label that the material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.[2]

ship. Ibid. Justice Stewart concurred, arguing that "criminal laws in this area are limited to hard-core pornography," which he would not attempt to define, but "I know it when I see it, and the motion picture involved in this case is not that." Id., 197. Chief Justice Warren whom Justice Clark joined dissented, arguing that local instead of national standards should prevail and that there was sufficient evidence to uphold the finding below that the movie was obscene. Id., 199. Justice Harlan dissented because he did not believe the State had exceeded the latitude permitted it under the Fourteenth Amendment. Id., 203. Without opinion, citing *Jacobellis*, the Court reversed a judgment that Henry Miller's *Tropic of Cancer* was obscene. *Grove Press* v. *Gerstein*, 378 U.S. 577 (1964). The *Jacobellis* dissenters were joined by Justice White.

[23] *Roth* v. *United States*, 354 U.S. 476, 494 (1957).

[24] 383 U.S. 463 (1966). Pandering remains relevant in pornography cases. *Splawn* v. *California*, 431 U.S. 595 (1977); *Pinkus* v. *United States*, 436 U.S. 293, 303–304 (1978).

[25] *Mishkin* v. *New York*, 383 U.S. 502 (1966). Discussion of the legal issue raised by the limited appeal of the material is at id., 507–510. Justice Harlan's concurrence was based on his view that state suppression of allegedly obscene material was constitutional so long as it has a rational basis. Id., 515. Justices Black, Douglas, and Stewart dissented along the same lines as their dissents in *Ginzburg*. Id., 515, 482, 518. *Mishkin* remains viable. *Ward* v. *Illinois*, 431 U.S. 767 (1977).

[1] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966).

[2] Id., 418. Because the state court had found the book to have "some minimal literary value," its judgment of obscenity was reversed. Chief Justice Warren and Justice Fortas concurred in the prevailing opinion. Justices Black and Stewart concurred on the basis of their dissents in *Ginzburg* and *Mishkin*. Id., 421. Justice Douglas concurred, broadly criticizing the Court's approach. Id., 424. Justice Clark in dissent rejected the test of social value or importance and called for a two-pronged test: (1) a book must be judged as a whole, not by its parts, and (2) it must

After the divisions engendered by the entering of opinions in the three 1966 cases, the Court over the next several years submerged its differences by *per curiam* dispositions of nearly three dozen cases, in all but one of which it reversed convictions or civil determinations of obscenity. The initial case was *Redrup* v. *New York*,[3] in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juveniles, protection of unwilling adult recipients, or proscription of pandering,[4] the Court succinctly summarized the varying positions of the seven Justices in the majority and said: "Whichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand . . . ." [5] And so things went for several years.[6]

Changing membership on the Court raised increasing speculation about the renewed vitality of *Roth* or about its demise; it seemed unlikely the Court would long continue its *Redrup* approach.[7] The change when it occurred strengthened the powers of government, federal, state, and local, to outlaw or restrictively regulate the sale and dissemination of materials found objectionable and developed new standards for determining what objectionable materials were legally obscene.

At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented

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be judged in terms of its appeal to the prurient interest of the average person, applying contemporary standards. Id., 441, Justice Harlan dissented, agreeing that *Fanny Hill* was not hardcore pornography and could not be banned by the Federal Government but he could not say it was irrational for a State to do so. Id., 455. Justice White in dissent rejected the social value or importance test. "In my view, 'social importance' is not an independent test of obscenity but is relevant to determining the predominant prurient interest of the material, . . . ." Id., 460, 462. On the precedential effect of the *Memoirs* plurality opinion, see *Marks* v. *United States*, 430 U.S. 188, 192-194 (1977).

[3] 386 U.S. 767 (1967). Justices Harlan and Clark dissented on the basis that the Court's disposition of the cases was on a basis excluded from consideration by the limited grant of review. Id., 771.

[4] Id., 771.

[5] Id., 770-771. The majority was thus composed of Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, and Fortas.

[6] See *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 82-83 & n. 8 (1973) (Justice Brennan dissenting) (describing *Redrup* practice and listing 31 cases decided on the basis of it).

[7] *See United States* v. *Reidel*, 402 U.S. 351 (1971) (federal prohibition of dissemination of obscene materials through the mails is constitutional); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) (customs seizures of obscene materials from baggage of travelers are constitutional). In *Grove Press* v. *Maryland State Board of Censors*, 401 U.S. 480 (1971), a state court determination that the motion picture "I Am Curious (Yellow)" was obscene was affirmed by an equally divided Court, Justice Douglas not participating. And *Stanley* v. *Georgia*, 394 U.S. 557, 560-564, 568 (1969), had insisted that *Roth* remained the governing standard.

films or of sexually oriented pictorial magazines, when surrounded by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[8] By a five-to-four vote the following Term, the Court adhered to the principle established in *Roth* that obscene material is not protected by the First and Fourteenth Amendments.[9] Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It matters not that the States may be acting on the basis of unverifiable assumptions in arriving at the conclusion to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Neither is there some constitutionally prescribed concept of *laissez faire*, no concept of privacy, no right, no imposition of Millean "free will" to curb governmental efforts to suppress pornography.[10]

In *Miller* v. *California*,[11] the Court then undertook to enunciate standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined "to works which depict or describe sexual conduct." That conduct must be specifically defined by the applicable statute, whether as written or

[8] *Paris Adult Theatre* v. *Slaton*, 408 U.S. 921 (1972); *Alexander* v. *Virginia*, 408 U.S. 921 (1972).

[9] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 (1973).

[10] Id., 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court's *Roth* approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other but more basically by deterrence of protected expression caused by the uncertainty. Id., 73. "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." Id., 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id., 70.

[11] 413 U.S. 15 (1973). The same standards were held applicable to federal laws, *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123 (1973) (importation of pornography); *United States* v. *Orito*, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce); *Hamling* v. *United States*, 418 U.S. 87 (1974) (use of the mails).

as authoritatively construed by the courts.[12] The law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[13] The standard that a work must be "utterly without redeeming social value" before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of the fact sits. Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[14] The Court reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment; its idea of the content of "hard core" pornography was revealed in its example of the types of conduct that could not be portrayed: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[15] Neither did the

[12] *Miller* v. *California*, 413 U.S. 15, 24 (1973). The Court stands ready to import into the general phrasings of federal statutes the standards it has now formulated. *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973) (Court is prepared to construe statutes proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard core" pornography reachable under the *Miller* standards); *Hamling* v. *United States*, 418 U.S. 87, 110–116 (1974). The Court's insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in *Ward* v. *Illinois*, 431 U.S. 767 (1977).

[13] *Miller* v. *California*, 413 U.S.15, 24 (1973).

[14] Id., 30–34. "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling* v. *United States*, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community." In federal cases, it will probably be the judicial district from which the jurors are drawn, Id., 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the State within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. *Smith* v. *United States*, 431 U.S. 291 (1977).

[15] *Miller* v. *California*, 413 U.S. 15, 25–28 (1973). Quoting *Miller's* language in *Hamling* v. *United States*, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions

portrayal have to be limited to pictoral representation; books containing only descriptive language, no pictures, were subject to suppression under the standards.[16]

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[17] But the Court had conferred on juries as triers of fact determination whenever something was "patently offensive" as a question essentially of fact based upon their understanding of community standards. Did not this virtually immunize these questions from appellate review? In *Jenkins* v. *Georgia*,[18] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Miller* was intended to make clear that only "hard-core" materials could be supressed and this concept and the Court's descriptive itemization of some types of hardcore materials were "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." The Court's own viewing of the motion picture in question convinced it that "[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment."[19] But in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[20]

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there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." Referring in *Ward* v. *Illinois* to, 431 U.S. 767 (1977), this language, the Court upheld a state court's power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.

[16] *Kaplan* v. *California*, 413 U.S. 115 (1973).

[17] *Miller* v. *California*, 413 U.S. 15, 25 (1973).

[18] 418 U.S. 153 (1974).

[19] Id., 161.

[20] *Hamling* v. *United States*, 418 U.S. 87 (1974). In *Smith* v. *United States*, 431 U.S. 291, 305–306 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community does not mean the determination is unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a sensitive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." Whether it meant this, and by its failure to list them meant, to exclude prurient interest and patent offensiveness from appellate review is a question of considerable importance. *See* id., 311, 315–316 (Justice Stevens dissenting).

Despite the narrowness by which the decisions in this area from *Slaton* and *Miller* on have been rendered, the Court appears settled on its course.[21] Only a change of membership in the Court's majority seems likely to alter the approach it is taking on pornography regulation and a change among the minority Justices could of course strengthen the majority's position.[22]

Even as to materials falling within the constitutional definition of obscene, however, the Court has recognized an overriding private, protected interest in possession within the home.[23] *Stanley* was an appeal from a state conviction for possession of obscene films discovered in appellant's home by police officers armed with a search warrant for other items which were not found. Unanimously,[24] the Court reversed, holding that the mere private possession of obscene materials in the home cannot be made a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and "that right takes on an added dimension" in the context of a prosecution for possession of something in one's own home. "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions to one's privacy." [25] Despite the unqualified assertion in *Roth* that obscenity was not protected by the First Amendment, the Court observed, it and the cases following were concerned with the governmental interest in regulating commercial distribution of obscene materials. "*Roth* and the cases following that decision are not impaired by today's decision," the Court insisted,[1] but in its rejection of each of the state

[21] *See* the decisions in *Marks* v. *United States*, 430 U.S. 188 (1977); *Smith* v. *United States*, 431 U.S. 291 (1977); *Splawn* v. *California*, 431 U.S. 595 (1977); *Ward* v. *Illinois*, 431 U.S. 767 (1977). Each was a five-to-four decision.

[22] The three *Slaton-Miller* dissenters on the Court continue to insist on their constitutional interpretation. See e.g., *Ward* v. *Illinois*, 431 U.S. 767, 777 (1977) (dissenting); *Smith* v. *United States*, 431 U.S. 291, 310 (1977) (dissenting). Justice Stevens, replacing Justice Douglas, has taken the position that criminal enforcement of obscenity law should be constitutionally proscribed, that First Amendment interests cannot adequately be protected through such a process, but that pornography should be regulated under civil abatement of nuisance forms of procedure. Id., 311.

[23] *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[24] Justice Marshall wrote the opinion of the Court and was joined by Justices Douglas, Harlan, and Fortas, and Chief Justice Warren. Justice Black concurred. Id., 568. Justice Stewart concurred and was joined by Justices Brennan and White on a search and seizure point. Justice Stewart, however, had urged the First Amendment ground in an earlier case. *Mapp* v. *Ohio*, 367 U.S. 643, 686 (1961) (concurring opinion).

[25] 394 U.S., 564.

[1] Id., 560–564, 568.

contentions made in support of the conviction the Court appeared to be rejecting much of the basis of *Roth*. First, there is no governmental interest in protecting an individual's mind from the effect of obscenity. Second, the absence of ideological content in the films was irrelevant, since the Court will not draw a line between transmission of ideas and entertainment. Third, there is no empirical evidence to support a contention that exposure to obscene materials may incite a person to antisocial conduct and even if it does enforcement of laws proscribing that conduct is the answer. Fourth, punishment of mere possession is not necessary to punishment of distribution. Fifth, there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination, exposure to children and unwilling adults.[2]

But any possible implication that Stanley was applicable outside the home and recognized a right to obtain pornography or a right in someone to supply was soon dispelled.[3]

***Child Pornography.***—In *New York* v. *Ferber*,[4] the Court recognized another category of expression that is outside the coverage of the First Amendment, the pictorial representation of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The basic reason such depictions could be prohibited was the governmental interest in protecting the physical and psychological well-being of children whose participation in the production of these materials would subject them to exploitation and harm. The state was not limited to barring the activity, the use of the children, because without being permitted to prohibit the exhibition and dissemination of the materials and advertising about them it was not possible for government adequately to protect children. Thus, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." [5] But, since expression is

[2] Id., 565–568.

[3] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 65–68 (1973). Transportation of unprotected material for private use may be prohibited, *United States* v. *Orito*, 413 U.S. 139 (1973), and the mails, *United States* v. *Reidel*, 402 U.S. 351 (1971), and channels of international movement, *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971); *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123 (1973), may be closed.

[4] 458 U.S. 747 (1982). Decision of the Court was unanimous, although there were several limiting concurrences. *Compare*, e.g., 775 (Justice Brennan, arguing for exemption of "material with serious literary, scientific, or educational value"), with 774 (Justice O'Connor, arguing that such material need not be excepted). The Court did not pass on the question, inasmuch as the materials before it were well within the prohibitable category. Id., 766–774.

[5] Id., 763–764.

involved, government must carefully define what conduct is to be prohibited and may reach only "works that *visually* depict sexual conduct by children below a specified age." [6]

***Nonobscene But Sexually Explicit and Indecent Expression.***— There is expression, either spoken or portrayed, which is offensive to some but is not within the constitutional standards of unprotected obscenity. Nudity portrayed in films or stills cannot be presumed obscene [7] nor can offensive language ordinarily be punished simply because it offends someone.[8] But government may be able to take notice in some instances of objective conditions attributable to the commercialization of sexually explicit but nonobscene materials. Thus, the Court sustained a municipal zoning ordinance, providing that "adult theaters" showing motion pictures that depicted "specified sexual activities" or "specified anatomical areas" could not be located within 100 feet of any two other establishments included within the ordinance or within 500 feet of a residential area, as a valid utilization of the locality's zoning power to prevent deterioration of urban areas.[9] However, a city was held unable constitutionally to make it a public nuisance for a drive-in motion picture theater to show films containing nudity if the screen were visible from a public street or place.[10]

Of course, "live" productions, thus blending expression and conduct, are protected by the First Amendment also.[11] What has engaged the Court's attention in recent years has not often been live theatrical productions, but the validity of governmental efforts to proscribe nude dancing in bars and other establishments has increased First Amendment lore. Nude dancing (and other nudity as

[6] Id., 764. The Court's statement of the modified *Miller* standards for child pornography is at id., 764–765.

[7] *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212–214 (1975).

[8] E.g., *Cohen* v. *California*, 403 U.S. 15 (1971). In the special field of broadcasting, indecent language at some times and under some circumstances, can be proceeded against. *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

[9] *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976). Four of the five majority Justices thought the speech involved deserved less First Amendment protection than other expression, id., 63–71, while Justice Powell, concurring, thought the ordinance was sustainable as a measure that served valid governmental interests and only incidentally affected expression. Id., 73. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id., 84, 88.

[10] *Erznoznik* v. *City of Jacksonville*, 422 U.S. 204 (1975). Justice Powell's opinion for the Court was dissented from by Chief Justices Burger and Justices White and Rehnquist. Id., 218, 224.

[11] *Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (1975) (invalidating the refusal of a public auditorium for a production of the musical "Hair," in the absence of procedural safeguards that must accompany a system of prior restraint, without passing on the application of constitutional standards to "Hair" itself); *Schacht* v. *United States*, 398 U.S. 58 (1970).

well) is entitled to some degree of First Amendment protection,[12] so long as alcoholic beverages are not served on the premises.[13] A municipality's effort to apply a zoning ordinance, construed to forbid all "live entertainment" in its commercial zone, to stamp out nude dancing in one of its establishments was invalidated as an overbroad infringement into protected expressive activities.[14] Presumably, this is a fertile field in which the "foliage of the First Amendment" may flower.[15]

### Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating

Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or writing in newspapers, periodicals, and pamphlets. There is also "expressive conduct" which includes picketing, patrolling, and marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, door-to-door solicitation and many forms of "sit-ins." There is also a class of conduct now only vaguely defined which has been denominated "symbolic conduct" which includes such actions as flag desecration and draft-card burnings. Because all these ways of expressing oneself involve conduct—action—rather than mere speech, they are all much more subject to regulation and restriction than is simple speech and some of them may be forbidden altogether. But to the degree that these actions are intended to communicate a point of view the First Amendment is relevant and protects some of them to a great extent. Sorting out the conflicting lines of principle and doctrine is the point of this section.

***The Public Forum.***[1]—In 1895 while he was a member of the highest court of Massachusetts, Justice Holmes rejected a conten-

[12] *California* v. *LaRue*, 409 U.S. 109, 118 (1972); *Southeastern Promotions* v. *Conrad*, 420 U.S. 546, 557–558 (1975); *Doran* v. *Salem Inn*, 422 U.S. 922, 932 (1975); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 716, 718 (1981).

[13] *California* v. *LaRue*, 409 U.S. 109 (1972); *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714 (1981).

[14] *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981). The proprietor of the establishment with nude dancing was permitted to attack the ordinance as overbroad. Therefore, it was the banning of all "live entertainment" which the municipality failed to justify and the Court did not pass upon the validity of an ordinance narrowly drawn to bit nude performances only. Id., 66. Mount Ephraim's attempt to rely on *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976), was unavailing, the Court explaining that the ordinance there dispersed adult theaters and did not foreclose protected speech, whereas Mount Ephraim was attempting to cut off all such speech. Id., 452 U.S., 71–72.

[15] Id., 80 (Justice Stevens concurring).

[1] Kalven, "The Concept of the Public Forum: *Cox* v. *Louisiana*," 1965 Sup. Ct. Rev. 1.

tion that public property was by right open to the public as a place where the right of speech could be recognized,[2] a rejection endorsed in its rationale on review by the United States Supreme Court.[3] This point of view was rejected by the Court in *Hague* v. *CIO*,[4] where Justice Roberts wrote: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." While this opinion was not itself joined by a majority of the Justices, the view was subsequently endorsed by the Court in several opinions.[5]

It was called into question in the 1960's, however, when the Court seemed to leave the issue open [6] and when a majority endorsed an opinion of Justice Black's which asserted his own narrower view of speech rights in public places.[7] More recent decisions have restated and quoted the Roberts language from *Hague* and that is now the position of the Court.[8] Public streets and parks [9] as well as the grounds of legislative bodies,[10] courthouses,[11] and

[2] *Commonwealth* v. *Davis*, 162 Mass. 510, 511 (1895). "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."

[3] *Davis* v. *Massachusetts*, 167 U.S. 43, 48 (1897).

[4] 307 U.S. 496, 515 (1939). Only Justice Black joined the opinion and Chief Justice Hughes generally concurred in it, but only Justices McReynolds and Butler dissented from the result.

[5] E.g., *Schneider* v. *State*, 308 U.S. 147, 163 (1939); *Kunz* v. *New York*, 340 U.S. 290, 293 (1951).

[6] *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965).

[7] *Adderley* v. *Florida*, 385 U.S. 39 (1966). *See* id., 47–48; *Cox* v. *Louisiana*, 379 U.S. 559, 578 (1965) (Justice Black concurring in part and dissenting in part); *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943) (Justice Black for the Court).

[8] E.g., *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 152 (1969); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972); *Carey* v. *Brown*, 447 U.S. 455, 460 (1980).

[9] *Hague* v. *CIO*, 307 U.S. 496 (1939); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Greer* v. *Spock*, 424 U.S. 828, 835–836 (1976); *Carey* v. *Brown*, 447 U.S. 455 (1980).

[10] *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Jeanette Rankin Brigade* v. *Capitol Police Chief*, 342 F. Supp. 575 (D.C.D.C. 1972) (three-judge court), *aff'd*., 409 U.S. 972 (1972) (voiding statute prohibiting parades and demonstrations on United States Capitol grounds).

[11] Narrowly drawn statutes which serve the State's interests in security and in preventing obstruction of justice and influencing of judicial officers are constitutional. *Cox* v. *Louisiana*, 379 U.S. 559 (1965).

public libraries [12] are open to public demonstrations, although the use to which certain places are dedicated may shape the range of permissible expression and conduct which may occur there, even in public forums.[13] Moreover, not all public properties are thereby public forums. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." [14] "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." [15] Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not subject to the same openness for expression that streets and parks are.[16] Even as to them, government may open the forums for expressive activities, and, while it need not foreclose itself from withdrawing this permission, it may not during the time it has opened the property discriminate on the basis of content or viewpoint in according access.[17] The Court in accepting the public forum concept has nevertheless been divided with respect to the reach of the doctrine.[18] The concept is likely, therefore, to be a focal point of judicial debate in coming years.

Speech in public forums is subject to time, place, and manner regulations, which are restrictions that take into account such matters as control of traffic in the streets, the occurrence of two meetings or demonstrations at the same time and place, the preventing of blockages of entrances to buildings, and the like.[19] Such regula-

[12] *Brown* v. *Louisiana*, 383 U.S. 131 (1966).

[13] E.g., *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972) (sustaining ordinance prohibiting making noise adjacent to school during school hours which actually or imminently threatens to interfere with the conduct of the school); *Brown* v. *Louisiana*, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (preservation of access to courthouse).

[14] *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981).

[15] *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972).

[16] E.g., *Adderley* v. *Florida*, 385 U.S. 39 (1966) (jails); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space in city rapid transit cars); *Greer* v. *Spock*, 424 U.S. 828 (1976) (military bases); *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U.S. 114 (1981) (letterboxes).

[17] E.g., *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (municipal theater); *Madison School District* v. *WERC*, 429 U.S. 167 (1976) (school board meeting); *Heffron* v. *ISKCON*, 452 U.S. 640 (1981) (state fair grounds); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (university meeting facilities).

[18] *Compare United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 454 U.S. 114, 128–131 (1981), with id., 136–140 (Justice Brennan concurring), and 142 (Justice Marshall dissenting).

[19] *See*, e.g., *Heffron* v. *ISKCON*, 452 U.S. 640, 647–650 (1981), and id., 656 (Justice Brennan concurring in part and dissenting in part) (stating law and discussing cases).

tions are closely scrutinized in order to protect free expression, and, to be valid, they must be justified without reference to the content or subject matter of speech,[20] they must serve a significant governmental interest,[21] and they must leave open ample alternative channels for communication of the information.[22] Corollary to the rule forbidding regulation premised on content is the principle, a merging of free expression and equal protection standards, that government may not discriminate between different kinds of messages in affording access.[23] In order to ensure against covert forms of discrimination against expression and between different kinds of content, the Court has insisted that licensing systems be constructed as free as possible of the opportunity for arbitrary administration,[24] and it has applied to permit systems and judicial restraint of such expression the guarantees it has accorded other prior restraints of speech.[25]

[20] *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Madison School District* v. *WERC*, 429 U.S. 167 (1976); *Carey* v. *Brown*, 447 U.S. 455 (1980); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). *In Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), a divided Court permitted the city to sell commercial advertising space on the walls of its rapid transit cars but to refuse to sell political advertising space.

[21] E.g., *Heffron* v. *ISKCON*, 452 U.S. 640, 650 (1981) (governmental interest in safety and convenience of persons using public forum); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972) (preservation of learning atmosphere in school); *Cox* v. *Louisiana*, 379 U.S. 536, 554–555 (1965) (traffic and pedestrian safety); *Kunz* v. *New York*, 340 U.S. 290, 293–294 (1951); *Hague* v. *CIO*, 307 U.S. 496, 515–516 (1939).

[22] *Heffron* v. *ISKCON*, 452 U.S. 640, 654–655 (1981); *Consolidated Edison Co.* v. *PSC*, 447 U.S. 530, 535 (1980).

[23] *Police Department* v. *Mosley*, 408 U.S. 92 (1972) (ordinance void which barred all picketing around school building except labor picketing); *Carey* v. *Brown*, 447 U.S. 455 (1980) (same); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (college rule permitting access to all student organizations except religious groups); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (permission of use of parks for some groups but not for others).

[24] E.g., *Hague* v. *CIO*, 307 U.S. 496, 516 (1939); *Schneider* v. *State*, 308 U.S. 147, 164 (1939); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953); *Staub* v. *City of Baxley*, 355 U.S. 313, 321–325 (1958); *Cox* v. *Louisiana*, 379 U.S. 536, 555–558 (1965); *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150–153 (1969). Justice Stewart described these and other cases as "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." Ibid. A person faced with an unconstitutional licensing law may ignore it, engage in the desired conduct, and challenge the constitutionality of the permit system upon a subsequent prosecution for violating it. Id., 151; *Jones* v. *Opelika*, 316 U.S. 584, 602 (1942) (Chief Justice Stone dissenting), *adopted per curiam on rehearing*, 319 U.S. 103 (1943). *But see Walker* v. *City of Birmingham*, 388 U.S. 307 (1967) (same rule not applicable to injunctions).

[25] In *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), the Court reaffirmed the holdings of the earlier cases, and, additionally, both Justice Stewart, for the Court, id., 155 n. 4, and Justice Harlan concurring, id., 162–164, asserted that the principles of *Freedman* v. *Maryland*, 380 U.S. 51 (1965), governing systems of prior censorship of motion pictures, were relevant to permit systems for parades

It appears that government may not deny access to the public forum for demonstrators on the ground that the past meetings of these demonstrators resulted in violence,[1] but the Court's position with regard to the "heckler's veto," the governmental termination of a speech or demonstration because of hostile crowd reaction, remains quite unclear.[2]

***Quasi-Public Places.***—The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses or other property to those wishing to communicate about a particular topic.[3] But it may be that in some instances private property is so functionally akin to public property that private owners may not forbid expression upon it. In *Marsh* v. *Alabama*,[4] a company town, one wholly owned by a pri-

and demonstrations. These standards include prompt and expeditious administrative handling of requests and prompt judicial review of adverse actions. *See National Socialist Party* v. *Village of Skokie*, 432 U.S. 43 (1977). The Court also voided an injunction against a protest meeting which was issued *ex parte*, without notice to the protestors and with, or course, no opportunity for them to rebut the representations of the seekers of the injunction. *Carroll* v. *President & Comrs. of Princess Anne*, 393 U.S. 175 (1968).

[1] The only available precedent is *Kunz* v. *New York*, 340 U.S. 290 (1951), in which the holding was on a much more narrow basis, but in dictum the Court said: "The court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence." Id., 294. But in the context of labor picketing, *see Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941) (background of violence supports prohibition of all peaceful picketing).

[2] Dicta clearly indicate that a hostile reaction will not justify suppression of speech. *Hague* v. *CIO*, 307 U.S. 496, 502 (1939); *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965); *Bachellar* v. *Maryland*, 397 U.S. 564, 567 (1970), and one holding appears to point this way. *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969). On the other hand, the Court has upheld a breach of the peace conviction of a speaker who refused to cease speaking upon the demand of police who feared imminent violence. *Feiner* v. *New York*, 340 U.S. 315 (1951). In *Niemotko* v. *Maryland*, 340 U.S. 268, 273 (1951) (concurring opinion), Justice Frankfurter wrote: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker."

[3] In *Garner* v. *Louisiana*, 368 U.S. 157, 185, 201–207 (1961), Justice Harlan, concurring, would have reversed breach of peace convictions of "sit-in" demonstrators who conducted their "sit-in" at lunch counters of department stores. He asserted that the protestants were sitting at the lunch counters where they knew they would not be served in order to demonstrate that segregation at such counters existed. "Such a demonstration . . . is as much a part of the 'free trade in ideas' . . . as is verbal expression, more commonly thought of as 'speech.'" Conviction for breach of peace was void in the absence of a clear and present danger of disorder. The Justice would not, however protect "demonstrations conducted on private property over the objection of the owner . . . , just as it would surely not encompass verbal expression in a private home if the owner has not consented." He had read the record to indicate that the demonstrators were invitees in the stores and that they had never been asked to leave by the owners or managers.

[4] 326 U.S. 501 (1946).

vate corporation, had all the attributes of any American municipality, aside from its ownership, and was functionally like any other town. In those circumstances, the Court held that the private owner could not forbid distribution of religious materials by a Jehovah's Witness on a street in the town's business district. Said the Court: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." [5] This precedent lay unused for some twenty years until the Court first indicated a substantial expansion of it and then withdrew to a narrow interpretation.

In the first case, the Court held constitutionally protected the picketing of a store located in a shopping center by a union objecting to the store's employment of nonunion labor. Finding that the shopping center was the functional equivalent of the business district involved in *Marsh*, the Court announced there was "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership." [6] [T]he State," said Justice Marshall, "may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." [7] The Court observed that it would have been hazardous to attempt to distribute literature at the entrances to the center and it reserved for future decision "whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." [8] Four years later, the Court answered the reserved question contrary to the answer given in the former case. Several members of an antiwar group attempted to distribute leaflets on the mall of a large shopping center calling on the public to attend a protest meeting. Center guards invoked a trespass law against them and the Court held they could rightfully be excluded. The center had not dedicated its property to a public use, the Court said; rather, it

[5] Id., 506.

[6] *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 319 (1968). Justices Black, Harlan, and White dissented. Id., 327, 333, 337.

[7] Id., 319–320.

[8] Id., 320 n. 9.

invited the public in specifically to carry on business with those stores located in the center. Plaintiffs' leafleting was unrelated to any activity in the center and was directed to no store nor to the customers *qua* customers of any of the stores. Unlike the previous case, there were reasonable alternatives by which plaintiffs could reach those who used the center. Thus, in the absence of a relationship between the purpose of the expressive activity and the business of the shopping center, the property rights of the center owner will overbalance the expressive rights to persons who would use their property for communicative purposes.[9]

Then, the Court formally overruled *Logan Valley Plaza*, holding that shopping centers are not functionally equivalent to the company town involved in *Marsh*.[10] The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation is generally to be governed by federal labor laws,[11] although state constitutional provisions may be interpreted more expansively by state courts to protect some kinds of public issue picketing in shopping centers and similar places.[12] Henceforth, only when private property has taken on *all* the attributes of a municipality is it to be treated as a public forum.[13]

***Picketing and Boycotts by Labor Unions.***—Though "logically relevant" to what might be called "public issue" picketing, the cases dealing with the invocation of economic pressures by labor unions are set apart by different "economic and social interests."[14]

[9] *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972). The majority opinion was by Justice Powell and was joined by Justices White, Blackmun, and Rehnquist, and Chief Justice Burger. The dissent by Justice Marshall was joined by Justices Douglas, Brennan, and Stewart. Id., 570.

[10] *Hudgens* v. *NLRB*, 424 U.S. 507 (1976). Justice Stewart's opinion for the Court asserted that *Logan Valley* had in fact been overruled by *Lloyd Corp.*, id., 517–518, but the author of the *Lloyd Corp.* opinion did not believe that to be the case, id., 523, and neither did Justice White. Id., 524. Justices Marshall and Brennan dissented. Id., 525.

[11] *But see Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. U.S. 180 (1978).

[12] In *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court held that a state court interpretation of the state constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights.

[13] *Hudgens* v. *NLRB*, 424 U.S. 507, 516–517 (1976) (quoting Justice Black's dissent in *Amalgamated Food Employees Union* v. *Valley Plaza*, 391 U.S. 308, 332–333 (1968).

[14] *Niemotko* v. *Maryland*, 340 U.S. 268, 276 (1951) (Justice Frankfurter concurring).

Therefore, these cases are dealt with separately here. It was, however, in a labor case that the Court first held picketing to be entitled to First Amendment protection.[15] Striking down a flat prohibition on picketing to influence or induce someone to do something, the Court said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . .

"[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." [16] Peaceful picketing in a situation in which violence had occurred and was occurring was, however, held proscribable.[17] In the absence of violence, the Court continued to find picketing protected,[18] but there soon was decided a class of cases in which the Court sustained injunctions against peaceful picketing in the course of a labor controversy when such picketing was counter to valid state policies in a domain open to state regulations.[19] These cases proceeded upon a distinction drawn by Justice Douglas. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulations." [20] The apparent cul-

[15] *Thornhill* v. *Alabama*, 310 U.S. 88, 102, 104–105 (1940). Picketing as an aspect of communication was recognized in *Senn* v. *Tile Layers Union*, 301 U.S. 468 (1937).

[16] *See also Carlson* v. *California*, 310 U.S. 106 (1940). In *AFL* v. *Swing*, 312 U.S. 321 (1941), the Court held unconstitutional an injunction against peaceful picketing based on a State's common-law policy against picketing in the absence of an immediate dispute between employer and employee.

[17] *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941).

[18] *Bakery & Pastry Drivers Local* v. *Wohl*, 315 U.S. 769 (1942); *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722 (1942); *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293 (1943).

[19] *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *International Brotherhood of Teamsters Union* v. *Hanke*, 339 U.S. 470 (1950); *Building Service Emp. Intern. Union* v. *Gazzam*, 339 U.S. 532 (1950); *Local Union, Journeymen* v. *Graham*, 345 U.S. 192 (1953).

[20] *Bakery & Pastry Drivers Local* v. *Wohl*, 315 U.S. 769, 776—777 (1942) (concurring opinion).

mination of this course of decision was the *Vogt* case in which Justice Frankfurter broadly rationalized all the cases and derived the rule that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether anounced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." [21] There the matters rests, although there is some indication that *Thornhill* stands for something more than that a State may not enforce a blanket prohibition on picketing.[22]

***Public Issue Picketing and Parading.***—The early cases held that picketing and parading were forms of expression entitled to some First Amendment protection.[23] Those early cases did not, however, explicate with any clarity the difference in application of First Amendment principles which the difference between mere expression and speech-plus would entail. Many of these cases concerned disruptions or feared disruptions of the public peace occasioned by the expressive activity and the ramifications of this on otherwise protected activity.[24] A series of other cases concerned the permissible characteristics of permit systems in which parades and meetings were licensed and more recent cases have expanded the procedural guarantees which must accompany a permissible licensing system.[25] In one case, however, the Court applied the rules developed with regard to labor picketing to uphold an injunction against the picketing of a grocery chain by a Negro group to compel the chain to adopt a quota-hiring system for blacks. The state courts held that while no law prevented the chain from hiring Negroes on a quota basis, picketing to coerce the adoption of that policy was contrary to the public policy of the State and on this ground the Supreme Court affirmed.[1]

[21] *International Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284, 293 (1957). *See also American Radio Assn.* v. *Mobile Steamship Assn.*, 419 U.S. 215, 228–232 (1974); *NLRB* v. *Retail Store Employees*, 447 U.S. 607 (1980); *International Longshoremens' Assn.* v. *Allied International*, 456 U.S. 212, 226–227 (1982).

[22] *Cf.* the opinions in *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58 (1964); *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139 (1957) (indicating that where violence is scattered through time and much of it was unconnected with the picketing, the State should proceed against the violence rather than the picketing).

[23] *Hague* v. *CIO*, 307 U.S. 496 (1939); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

[24] *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949); *Feiner* v. *New York*, 340 U.S. 315 (1951).

[25] *Supra*, p. 1126.

[1] *Hughes* v. *Superior Court*, 339 U.S. 460 (1950).

A series of civil rights picketing and parading cases has led the Court to the beginning of a formulation of standards much like those it has established in the labor field, although these standard are more protective of expressive activity. The process begins with *Edwards* v. *South Carolina*,[2] in which the Court reversed a breach of the peace conviction of several Negroes upon their refusal to disperse on the basis that the statute was so vague as to permit conviction because the demonstrators' presence "disturbed" people. But describing the demonstration upon the grounds of the legislative building in South Carolina's capital, Justice Stewart observed: "The circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form." [3] In subsequent cases, the Court observed: "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech." [4] "The conduct which is the subject to this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." [5]

As was previously observed, however, the governmental interests justifying regulation are times, places, and manner rules.[6] In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions imposed for disobeying restrictions, based on general statutory proscriptions, such as ordinances penalizing breaches of the peace, when, in the Court's view, unrest and some disturbance resulted from opposition to the messages being uttered by demonstrators.[7] The Justices did not confront cases that presented really close questions, three times, for example, failing to reach the permissibility of bans on residential picketing,[8] and not again, until 1982, facing a case like

[2] 372 U.S. 229 (1963).

[3] Id., 235. *See also Fields* v. *South Carolina*, 375 U.S. 44 (1963); *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964).

[4] *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965).

[5] *Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965).

[6] *Supra*, p. 1126.

[7] *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970). *See also Collin* v. *Smith*, 447 F. Supp. 676 (D.C.N.D.Ill.), *aff'd.*, 578 F.2d 1197 (C.A. 7), *stay den.*, 436 U.S. 953, *cert. den.*, 439 U.S. 916 (1978).

[8] *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Carey* v. *Brown*, 447 U.S. 455 (1980).

that in *Hughes* v. *Superior Court* [9] raising an example of picketing and parading on a broad "contrary-to-public-policy" ground.

*NAACP* v. *Claiborne Hardware Co.* [10] may join in terms of importance such cases as *New York Times Co.* v *Sullivan* [11] in requiring the States to observe new and enhanced constitutional standards in order to impose liability upon persons for engaging in expressive conduct implicating the First Amendment. The case arose in the context of a protest of racial conditions by black citizens in Port Gibson, Mississippi. Listing demands that included desegregation of public facilities, hiring of black policemen, hiring of more black employees by local stores, and ending of verbal abuse by police, a group of several hundred blacks unanimously voted to boycott the area's white merchants. The boycott was carried out through speeches and nonviolent picketing and solicitation of others to cease doing business with the merchants; individuals were designated to watch stores and to list blacks patronizing the stores and the names were announced at meetings and published. Persuasion of others included social pressures and threats of social ostracism. Acts of violence did occur from time to time, directed in the main at blacks who did not observe the boycott.

The state Supreme Court imposed liability, joint and several, upon leaders and participants in the boycott, and upon the NAACP, for all of the merchants' lost earnings during a seven-year period on the basis of the common law tort of malicious interference with the merchants' business, holding that the existence of acts of physical force and violence and the use of force, violence, and threats to achieve the ends of the boycott deprived it of any First Amendment protection.

Reversing, the Court observed that the goals of the boycotters were legal and that most of their means were constitutionally protected; while violence was not protected, its existence alone did not deprive the other activities of First Amendment coverage. Thus, speeches and nonvi lent picketing both to inform the merchants of their grievances and to encourage other blacks not to patronize the merchants were protected activities that individuals had entered into in association with their fellows and the association was protected.[12] That some members of the group might have engaged in

[9] 339 U.S. 460 (1950).

[10] 458 U.S. 886 (1982). The decision was unanimous, with Justice Rehnquist concurring in the result and Justice Marshall not participating. The Court's decision was by Justice Stevens.

[11] 376 U.S. 254 (1964).

[12] *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907–908 (1982).

violence or might have advocated violence did not result in loss of protection for association, absent a showing that those associating had joined in activities aware of the unprotected activities and intending to further them.[13] Nonparticipants were urged by speech, by picketing, by identification, by threats of social ostracism, and by other expressive acts to join. "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."[14] The result of the boycott was disruptive effect upon local economic conditions and loss of business for the merchants. Government may certainly regulate certain economic activities, even though it has an incidental effect upon speech, such as labor picketing or businessmen's cooperative restriction of competition, but that power of government does not carry over to reaching picketing and other boycott activities involving, as this case did, speech upon matters of public affairs and with the intent of affecting governmental action and motivating private actions to achieve racial equality.[15]

The critical issue, however, had been the occurrence of violent acts and the lower court's conclusion that they deprived otherwise protected conduct of protection. "The First Amendment does not protect violence. . . . No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons

[13] Id., 908.

[14] Id., 910. The Court cited *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945), a labor picketing case, and *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971), a public issues picketing case, which had also relied on the labor cases. *Compare NLRB* v. *Retail Store Employees*, 447 U.S. 607, 618–619 (1980) (Justice Stevens concurring) (labor picketing that coerces or "signals" others to engage in activity that violates valid labor policy, rather than attempting to engage reason, prohibitable). To the contention that liability could be imposed on "store watchers" and on a group known as "Black Hats" who also patrolled stores and identified black patronizers of the businesses, the Court did not advert to the "signal" theory. "There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." Id., 458 U.S., 925.

[15] Id., 912–915. In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of *United States* v. *O'Brien*, 391 U.S. 367, 376–377 (1968), which requires the power exercised to be within the constitutional power of government, that it further an important or substantial governmental interest, that it be unrelated to the suppression of speech, and that it impose no greater restraint on expression than is essential to achievement of the interest.

who may be held accountable for those damages." [16] In other words, the States may impose damages for the consequences of violent conduct, but they may not award compensation for the consequences of nonviolent, protected activity.[17] Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence and to leave out of account losses suffered by the merchants as a result of all the other activities comprising the boycott. And only those nonviolent persons who associated with others with an awareness of violence and an intent to further it could similarly be held liable.[18] Since most of the acts of violence had occurred early on, in 1966, there was no way constitutionally that much if any of the later losses of the merchants could be recovered in damages.[19] As to the head of the local NAACP, the Court refused to permit imposition of damages based upon speeches that could be read as advocating violence, inasmuch as any violent acts that occurred were some time after the speeches, and a "clear and present danger" analysis of the speeches would not find them punishable.[20] The award against the NAACP fell with the denial of damages against its local head, and, in any event, the protected right of association required a rule that would immunize the NAACP without a finding that it authorized, either actually or apparently, or ratified unlawful conduct.[21]

*Claiborne Hardware* is, thus, a seminal decision in the Court's effort to formulate standards governing state power to regulate or to restrict expressive conduct that comes close to or crosses over the line to encompass some violent activities; it requires great specificity and the drawing of fine discriminations by government so as to reach only that portion of the activity that does involve violence or the threat of violence and forecloses the kind of "public policy"

[16] Id., 458 U.S., 916–917.

[17] Id., 917–918.

[18] Id., 918–929, relying on a series of labor cases and on the subversive activities association cases, e.g., *Scales* v. *United States*, 367 U.S. 203 (1961), and *Noto* v. *United States*, 367 U.S. 290 (1961).

[19] Id., 458 U.S., 920–926. The Court distinguished *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941), in which an injunction had been sustained against both violent and nonviolent activity, not on the basis of special rules governing labor picketing, but because the violence had been "pervasive." Id., 923.

[20] Id. 926–929. The head's "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969)."

[21] Id., 929–932. In ordinary business cases, the rule of liability of an entity for actions of its agents is broader. E.g., *American Society of Mech. Engrs.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982). The different rule in cases of organizations formed to achieve political purposes rather than economic goals appears to require substantial changes in the law of agency with respect to such entities. Note, 96 Harv. L. Rev. 171, 174–176 (1982).

limit on demonstrations that was approved in *Hughes* v. *Superior Court.*[22]

***Leafleting, Handbilling, and the Like.***—In *Lovell* v. *Griffin,*[23] the Court struck down a permit system applying to the distribution of circulars, handbills, or literature of any kind. The First Amendment, the Court said. "necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." [24] Responding to what appeared to be a hint in this case that prevention of littering and other interests might be sufficient to sustain a flat ban on literature distribution,[25] state courts upheld total prohibitions and were reversed. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. . . . We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." [1] In *Talley* v.

[22] "Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.

"[P]etitioners' ultimate objectives were unquestionably legitimate. The charge of illegality . . . derives from the the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

"The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. [The burden can be met only] by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognizes the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees." Id., 458 U.S., 933-934.

[23] 303 U.S. 444 (1938).

[24] Id., 452.

[25] Id., 451.

[1] *Schneider* v. *Irvington,* 308 U.S. 147, 161, 162 (1939). The Court noted that the right to distribute leaflets was subject to certain obvious regulations, id., 160, and called for a balancing with the weight inclined to the First Amendment rights. *See also Jamison* v. *Texas,* 318 U.S. 413 (1943).

*California,*[2] the Court struck down an ordinance which banned all handbills that did not carry the name and address of the author, printer, and sponsor; conviction for violating the ordinance was set aside on behalf of one distributing leaflets urging boycotts against certain merchants because of their employment discrimination. The basis of the decision is not readily ascertainable. On the one hand, the Court celebrated anonymity. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all . . . . [I]dentification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance." [3] On the other hand, responding to the City's defense that the ordinance was aimed at providing a means to identify those responsible for fraud, false advertising, and the like, the Court noted that it "is in no manner so limited . . . [and] [t]herefore we do not pass on the validity of an ordinance limited to these or any other supposed evils." [4]

***Sound Trucks, Noise.***—Physical disruption may occur by other means than the presence of large numbers of demonstrators. For example, the use of sound trucks to convey a message on the streets may disrupt the public peace and may disturb the privacy of persons off the streets. The cases, however, afford little basis for a general statement of constitutional principle. *Saia* v. *New York,*[5] while it spoke of "loud speakers as today indispensable instruments of effective public speech," held only that a particular prior licensing system was void. A five-to-four majority upheld a statute in *Kovacs* v. *Cooper,*[6] which was ambiguous with regard to whether all sound trucks were banned or only "loud and raucous" trucks and which the state court had interpreted as having the latter meaning. Most recently, the Court upheld an antinoise ordinance which the state courts had interpreted narrowly to bar only noise which actually or immediately threatened to disrupt normal school activity during school hours.[7] But the Court was careful to tie its

[2] 362 U.S. 60 (1960).

[3] Id., 64, 65.

[4] Id., 64. In *Zwickler* v. *Koota,* 389 U.S. 241 (1967), the Court set aside the refusal of a lower court to consider the constitutionality of a statute which made it a criminal offense to publish or distribute election literature without identification of the name and address of the printer and of the persons sponsoring the literature. The lower court voided the law, but changed circumstances on a new appeal caused the Court to dismiss. *Golden* v. *Zwickler,* 394 U.S. 103 (1969).

[5] 334 U.S. 558, 561 (1948).

[6] 336 U.S. 77 (1949).

[7] *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972).

ruling to the principle that the particular requirements of education necessitated observance of rules designed to preserve the school environment.[8]

***Door-to-Door Solicitation.***—In another Jehovah's Witness case, the Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community, the aim of the ordinance being to protect privacy, to protect the sleep of many who worked nightshifts, and to protect against burglars posing as canvassers. The five-to-four majority concluded that on balance "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." [9]

More recently, while striking down an ordinance because of vagueness, the Court observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." [10] The Court indicated that its precedents supported measures that would require some form of notice to officials and the obtaining of identification in order that persons could canvas house-to-house for charitable or political purposes.

However, an ordinance which limited solicitation of contributions door-to-door by charitable organizations to those which use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation, salaries, overhead, and other administrative expenses, was invalidated as overbroad.[11] A

[8] Id., 117. Citing *Saia* and *Kovacs* as examples of reasonable time, place, and manner regulation, the Court observed: "If overamplified loudspeakers assault the citizenry, government may turn them down." Id., 116.

[9] *Martin* v. *City of Struthers*, 319 U.S. 141, 147 (1943).

[10] *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 616–617 (1976). Justices Brennan and Marshall did not agree with the part of the opinion approving the regulatory power. Id., 623.

[11] *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980). *See also Larson* v. *Valente*, 456 U.S. 228 (1982) (state law distinguishing between religious organizations and their solicitation of funds on basis of whether organizations received more than half of their total contributions from members or from public solicitation violates establishment clause).

privacy rationale was rejected, inasmuch as just as much intrusion was likely by permitted solicitors as by unpermitted ones. A rationale of prevention of fraud was unavailing, inasmuch as it could not be said that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest.

***The Problem of "Symbolic Speech."***—Very little expression is "mere" speech. If it is oral, it may be noisy enough to be disturbing,[12] and, if it is written, it may be litter;[13] in either case, it may amount to conduct which is prohibitable in specific circumstances.[14] Moving beyond these simple examples, one may see as well that conduct may have a communicative content, may be intended to express a point of view. This expression may consist in flying a particular flag as a symbol [15] or in refusing to salute a flag as a symbol.[16] Sit-ins and stand-ins may effectively express a protest about certain things.[17]

Justice Jackson wrote: "There is no doubt that, in connection with the pledge, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind." [18] When conduct or action has a communicative content to it, the First Amendment is implicated in any regulation or prohibition by government of that conduct or action but this does not mean that such conduct or action is necessarily any more immune from governmental process than other forms of "speech," such as picketing and leafleting. Thus, while the Court has had few opportunities to formulate First Amendment standards in this area, in upholding a congressional prohibition on draft-card burnings, it has stated the generally applicable rule. "[A] government regulation is sufficiently justified if

[12] E.g., *Saia* v. *New York*, 334 U.S. 558 (1948); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

[13] E.g., *Schneider* v. *Irvington*, 308 U.S. 147 (1939).

[14] *Cf. Cohen* v. *California*, 403 U.S. 15 (1971).

[15] *Stromberg* v. *California*, 283 U.S. 359 (1931).

[16] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[17] In *Brown* v. *Louisiana*, 383 U.S. 131 (1966), the Court held protected a peaceful, silent stand-in in a segregated public library. Speaking of speech and assembly, Justice Fortas said for the Court: "As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." Id., 141–142. *See also Garner* v. *Louisiana*, 368 U.S. 157, 185, 201 (1961) (Justice Harlan concurring).

[18] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943).

it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that government interest." [19]

Although almost unanimous in formulating and applying the test in *O'Brien*, the Court splintered when it had to deal with one of the more popular forms of "symbolic" conduct of the late 1960s and early 1970s, flag burning and other forms of flag desecration. As suggestive was the Court's treatment of the cases was, no unifying theory capable of application to a wide range of possible flag abuse actions emerged. Thus, in *Street* v. *New York*,[20] defendant had been convicted under a statute punishing desecration "by words or act" upon evidence that when he burned the flag he had uttered contemptuous words. The conviction was set aside because it might have been premised on his words alone or on his words and the act together, and no valid governmental interest supported penalizing verbal contempt for the flag.[21]

Two other flag desecration cases were decided by the Court in a manner that indicated a beginning of an effort to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith* v. *Goguen*,[22] the conviction of one for wearing a small United States flag sewn to the seat of his trousers, under a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States . . .", was set aside because that portion of the statute was void for vagueness. "The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." [23]

[19] *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

[20] 394 U.S. 576 (1969).

[21] Id., 591–593. Four dissenters concluded that the First Amendment did not preclude a flat proscription of flag burning or flag desecration for expressive purposes. Id., 594 (Chief Justice Warren), 609 (Justice Black), 610 (Justice White), and 615 (Justice Fortas). In *Radich* v. *New York*, 401 U.S. 531 (1971), *aff'g.*, 26 N.Y. 2d 114, 257 N.E. 2d 30 (1970), an equally divided Court, Justice Douglas not participating, sustained a flag desecration conviction of one who displayed sculptures in a gallery, using the flag in some apparently sexually bizarre ways to register a social protest. Defendant subsequently obtained his release on *habeas corpus*, *United States ex rel. Radich* v. *Criminal Court*, 459 F. 2d 754 (C.A. 2, 1972), *cert. den.* 409 U.S. 115 (1973).

[22] 415 U.S. 566 (1974).

[23] Id., 578. The holding was thus founded on due process rather than the First Amendment.

Justice White thought the statute not vague but concurred on First Amendment grounds; in his view, government could properly legislate against acts expressive of ideas or opinions involving the flag when the object was to protect the physical integrity of the flag or to protect against acts interfering with proper use of the flag.[24] The First Amendment was the basis for reversal in *Spence* v. *Washington*,[25] in which a conviction under a statute punishing the display of a United States flag to which something is attached or superimposed was set aside; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, the factual context and environment in which it was undertaken, the Court held it to be protected. The factual context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the State had a valid interest in preserving the flag as a national symbol but whether this interest extends beyond protecting the physical integrity of the flag is unclear.[26] In sum, the Court's opinion is so based upon the particularities of Spence's conduct that the guidance afforded for other cases is highly speculative.[27]

## RIGHTS OF ASSEMBLY AND PETITION

The right of petition took its rise from the modest provision made for it in chapter 61 of Magna Carta (1215).[1] To this meagre

[24] Id. 583. Dissenting, Justices Rehnquist and Blackmun and Chief Justice Burger thought government could protect the integrity of the flag, as from burning or tearing it, and could protect its status as a symbol from acts which abused the symbol, although not from verbal contempt. Id., 591, 592.

[25] 418 U.S. 405 (1974).

[26] Id., 408–411, 412–413. Justice Blackmun concurred in the result and Justices Rehnquist and White and Chief Justice Burger dissented. Id., 416. They would permit government to prevent the use of the flag as "a background for communication" as a way of preserving the character of the flag.

[27] Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. *Sutherland* v. *Illinois*, 418 U.S. 907 (1974); *Farrell* v. *Iowa*, 418 U.S. 907 (1974). The Court did, however, dismiss, "for want of a substantial federal question," an appeal from a conviction under a flag desecration statute of one who, with no apparent intent to communicate but in the course of "horseplay," blew his nose on a flag, simulated masturbation on it, and finally burned it, *Van Slyke* v. *Texas*, 418 U.S. 907 (1974).

[1] C. Stephenson & F. Marcham, *Sources of English Constitutional History* (London: 1937), 125.

beginning, Parliament itself and its procedures in the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by "petition of right" are all in some measure traceable. Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Commons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch, and as it increased in importance it came to claim the right to dictate the form of the King's reply, until, in 1414, Commons declared itself to be "as well assenters as petitioners." Two hundred and fifty years later, in 1669, Commons further resolved that every commoner in England possessed "the inherent right to prepare and present petitions" to it "in case of grievance," and of Commons "to receive the same" and to judge whether they were "fit" to be received. Finally Chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and "all commitments and prosecutions for such petitioning to be illegal." [2]

Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if the First Amendment read: "the right of the people peaceably to assemble" *in order to* "petition the government." [3] Today, however, the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental . . . . [It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. . . . The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question . . . is not as to the auspices under which the meeting is held but as to its purposes; not as to the relation of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." [4] Furthermore, the right of petition has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the Government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politi-

[2] 12 *Encyclopedia of the Social Sciences* 98 (1934).

[3] *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1876), reflects this view.

[4] *De Jonge* v. *Oregon*, 299 U.S. 353, 364, 365 (1937). *See also Herndon* v. *Lowry*, 301 U.S. 242 (1937).

cally contentious matters.[5] The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." [6]

The right of petition recognized by the First Amendment first came into prominence in the early 1830's, when petitions against slavery in the District of Columbia began flowing into Congress in a constantly increasing stream, which reached its climax in the winter of 1835. Finally on January 28, 1840, the House adopted as a standing rule: "That no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever." Because of efforts of John Quincy Adams, this rule was repealed five years later.[7] For many years now the rules of the House of Representatives have provided that members having petitions to present may deliver them to the Clerk and the petitions, except such as in the judgment of the Speaker are of an obscene or insulting character, shall be entered on the Journal and the Clerk shall furnish a transcript of such record to the official reporters of debates for publication in the Record.[8] Even so, petitions for the repeal of the espionage and sedition laws and against military measures for recruiting resulted, in World War I, in imprisonment.[9] Processions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the Capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The Administration,

[5] *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961).

[6] *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). *See also NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913–915 (1982); *Missouri* v. *NOW*, 620 F.2d 1301 (C.A. 8), *cert. den.*, 449 U.S. 842 (1980) (boycott of States not ratifying ERA may not be subjected to antitrust suits for economic losses because of its political nature).

[7] The account is told in many sources. E.g., S. Bemis, *John Quincy Adams and the Union* (New York: 1956), chs. 17, 18 and pp. 446–447.

[8] Rule 22, parag. 1, *Rules of the House of Representatives*, H. Doc. 97-271, 97th Congress, 2d sess. (1983), 571.

[9] *Annual Report of the Attorney General* (Washington: 1918), 48.

however, regarded it as a threat against the Constitution and called out the army to expel the bonus marchers and burn their camps. Marches and encampments have become more common since, but the results have been mixed.

***The Cruikshank Case.***—The right of assembly was first before the Supreme Court in 1876 [10] in the famous case of *United States* v. *Cruikshank.*[11] The Enforcement Act of 1870 [12] forbade conspiring or going onto the highways or onto the premises of another to intimidate any other person from freely exercising and enjoying any right or privilege granted or secured by the Constitution of the United States. Defendants had been indicted under this Act on charges of having deprived certain citizens of their right to assemble together peaceably with other citizens "for a peaceful and lawful purpose." While the Court held the indictment inadequate because it did not allege that the attempted assembly was for a purpose related to the Federal Government, its dicta broadly declared the outlines of the right of assembly. "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States." [13] Absorption of the assembly and petition clauses into the liberty protected by the due process clause of the Fourteenth Amendment means, or course, that the *Cruikshank* limitation is no longer applicable.[14]

***The Hague Case.***—Illustrative of this expansion is *Hague* v. *CIO,*[15] in which the Court, though splintered with regard to rea-

[10] *See,* however, *Crandall* v. *Nevada,* 6 Wall. (73 U.S.) 35 (1868), in which the Court gave as one of its reasons for striking down a tax on persons leaving the State its infringement of the right of every citizen to come to the seat of government and to transact any business he might have with it.

[11] 92 U.S. 542 (1876).

[12] 16 Stat. 141 (1870), 18 U.S.C. § 241.

[13] *United States* v. *Cruikshank,* 92 U.S 542, 552–553 (1876).

[14] *De Jonge* v. *Oregon,* 299 U.S. 353 (1937); *Hague* v. *CIO,* 307 U.S. 496 (1939); *Bridges* v. *California,* 314 U.S. 252 (1941); *Thomas* v. *Collins,* 323 U.S. 516 (1945).

[15] 307 U.S. 496 (1939).

soning and rationale, struck down an ordinance which vested an uncontrolled discretion in a city official to permit or deny any group the opportunity to conduct a public assembly in a public place. Justice Roberts, in an opinion which Justice Black joined and with which Chief Justice Hughes concurred, found protection against state abridgment of the rights of assembly and petition in the privileges and immunities clause of the Fourteenth Amendment. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." [16] Justices Stone and Reed invoked the due process clause of the Fourteenth Amendment for the result, thereby claiming the rights of assembly and petition for aliens as well as citizens. "I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose." [17] This due process view of Justice Stone has carried the day over the privileges and immunities approach.

Later cases tend to merge the rights of assembly and petition into the speech and press clauses, and, indeed, all four rights may well be considered as elements of an inclusive right to freedom of expression. Certain conduct may call forth a denomination of petition [18] or assembly,[19] but there seems little question that no substantive issue turns upon whether one may be said to be engaged in speech or assembly or petition.

[16] Id., 515.

[17] Id., 525.

[18] E.g., *United States* v. *Harriss*, 347 U.S. 612 (1954); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961).

[19] E.g., *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971).

## BEARING ARMS

### SECOND AMENDMENT

A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

In spite of extensive recent discussion and much legislative action with respect to regulation of the purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there is no definitive resolution by the courts of just what right the Second Amendment protects. The opposing theories, perhaps oversimplified, are an "individual rights" thesis whereby individuals are protected in ownership, possession, and transportation, and a "states' rights" thesis whereby it is said the purpose of the clause is to protect the States in their authority to maintain formal, organized militia units.[1] Whatever the Amendment may mean, it is a bar only to federal action, not extending to state [2] or private [3] restraints. The Supreme Court has given effect to the dependent clause of the Amendment in the only case in which it has tested a congressional enactment against the constitutional prohibition, seeming to affirm individual protection

[1] A sampling of the diverse literature in which the same historical, linguistic, and case law background is the basis for strikingly different conclusions is: Shalhope, "The Ideological Origins of the Second Amendment," 69 J. Amer Hist. 599 (1982); Cross, "An Armed Community: The Origins and Meaning of the Right to Bear Arms," 71 J. Amer. Hist. 22 (1984), and "An Exchange," Id., 587-593; Halbrook "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment (1787-1791)," 10 N. Ky. L. Rev. 13 (1982); Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 Geo. Mason U.L. Rev. 1 (1981); Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," 10 Hastings Const. L. Q. 285 (1983); Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich. L. Rev. 204 (1983); Caplan, "Restoring the Balance: The Second Amendment Revisited," 5 Ford. Urb. L. Rev. 31 (1976); Weatherup, "Standing Armies and Armed Citizens: An Analysis of the Second Amendment," 2 Hastings Const. L. Q. 961 (1975); Levin. "The Right to Bear Arms: The Development of the American Experience," 48 Chi.-Kent L. Rev. 148 (1971); Staff of Subcom. on the Constitution, Senate Committee on the Judiciary, *The Right to Keep and Bear Arms*, 97th Congress, 2d sess. (1982) (Comm. Print).

[2] *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886). *See also Miller* v. *Texas*, 153 U.S. 535 (1894); *Robertson* v. *Baldwin*, 165 U.S. 275, 281-282 (1897). The non-application of the Second Amendment to the States is good law today. *Quilici* v. *Village of Morton Grove*, 695 F. 2d 261 (C.A. 7, 1982), *cert. den.*, 464 U.S. 863 (1983).

[3] *United States* v. *Cruikshank*, 92 U.S. 542 (1875).



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but only in the context of the maintenance of a militia or other such public force.

In *United States* v. *Miller*,[4] it sustained a statute requiring registration under the National Firearms Act of sawed-off shotguns. After reciting the original provisions of the Constitution dealing with the militia, the Court observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view." [5] The significance of the militia, the Court continued, was that it was composed of "civilians primarily, soldiers on occasion." It was upon this force that the States could rely for defense and securing of the laws, on a force that "comprised all males physically capable of acting in concert for the common defense," who, "when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." [6] Therefore, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." [7]

Since this decision, Congress has placed greater limitations on the receipt, possession, and transportation of firearms,[8] and propos-

[4] 307 U.S. 174 (1939). The defendants had been released on the basis of the trial court determination that prosecution would violate the Second Amendment and no briefs or other appearances were filed on their behalf; the Court acted on the basis of the Government's representations.

[5] Id., 178.

[6] Id., 179.

[7] Id., 178. In *Cases* v. *United States*, 131 F. 2d 916, 922 (C.A. 1, 1942), *cert. den.*, 319 U.S. 770 (1943), the court, upholding a similar provision of the Federal Firearms Act, said: "Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia." *See Lewis* v. *United States*, 445 U.S. 55, 65 n. 8 (1980) (dictum: *Miller* holds that "Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia' ").

[8] Enacted measures include the Gun Control Act of 1968, 82 Stat. 226, 18 U.S.C. §§ 921–928. The Supreme Court's dealings with these laws have all arisen in the context of prosecutions of persons purchasing or obtaining firearms in violation of a provisions against such conduct by convicted felons. *Lewis* v. *United States*, 445 U.S. 55 (1980); *Barrett* v. *United States*, 423 U.S. 212 (1976); *Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Bass*, 404 U.S. 336 (1971).

als for national registration or prohibition of firearms altogether have been made.[9] At what point regulation or prohibition of what classes of firearms would conflict with the Amendment, if at all, the *Miller* case does little more than cast a faint degree of illumination toward an answer.

[9] E.g., National Commission on Reform of Federal Criminal Laws, *Working Papers* (Washington: 1970), 1031–1058, and *Final Report* (Washington: 1971), 246–247.

## QUARTERING SOLDIERS

### THIRD AMENDMENT

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

There has been no Supreme Court explication of this Amendment, which was obviously one guarantee of the preference for the civilian over the military.[1]

[1] In fact, save for the curious case of *Englom* v. *Carey*, 677 F. 2d 957 (C.A. 2, 1982), *on remand*, 572 F. Supp. 44 (D.C.S.D.N.Y.), *aff'd. per curiam*, 724 F. 2d 28 (C.A. 2, 1983), there has been no judicial explication at all.

# FOURTH AMENDMENT

## SEARCH AND SEIZURE

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## FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## SEARCH AND SEIZURE

### History and Scope of the Amendment

***History.***—Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment did, embodying as it did the protection against the utilization of the "writs of assistance." But while the insistence on freedom from unreasonable searches and seizures as a fundamental right gained expression in the Colonies late and as a result of experience,[1] there was a rich English experience to draw on. "Every man's house is his castle" was a maxim much celebrated in England, as was demonstrated in *Semayne's Case,* decided in 1603.[2] A civil case of execution of process, the case nonetheless in its language recognized the right of the homeowner to defend his house against unlawful entry even by the King's agents but contrarily as well recognized the authority of the appropriate officers to break and enter upon notice in order to arrest or to execute the King's process. Most famous of the English cases was *Entick* v. *Carrington,*[3] one of a series of civil

[1] Apparently the first statement of freedom from unreasonable searches and seizures appeared in The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772, in the drafting of which Samuel Adams took the lead. 1 B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 199, 205-206.

[2] 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604). One of the most forceful expressions of the maxim was that of William Pitt in Parliament in 1763: "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

[3] 19 Howell's State Trials 1029, 95 Eng. 807 (1705).

actions against state officers who had pursuant to general warrants raided many homes and other places in search of materials connected with John Wilkes' polemical pamphlets attacking not only governmental policies but the King himself.[4]

Entick, an associate of Wilkes, sued because agents had forcibly broken into his house, broken into locked desks and boxes, and seized many printed charts, pamphlets and the like. In an opinion sweeping in terms, the court declared the warrant and the behavior it authorized subversive "of all the comforts of society" and the issuance of a warrant for the seizure of all of a person's papers and not those only alleged to be criminal in nature "contrary to the genius of the law of England."[5] Besides its general character, said the court, the warrant was bad because it was not issued on a showing of probable cause and no record was required to be made of what had been seized. *Entick* v. *Carrington*, the Supreme Court has said, is a "great judgment," "one of the landmarks of English liberty . . . one of the permanent monuments of the British Constitution" and a guide to an understanding of what the Framers meant in writing the Fourth Amendment.[6]

In the colonies, smuggling rather than seditious libel afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize "prohibited and uncustomed" goods and commanded all subjects to assist in these endeavors. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter. When upon the death of George II in 1760 the authorities were required to obtain the issuance of new writs, opposition was led by James Otis who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism.[7] Otis lost and the writs were issued and utilized,

[4] *See also Wilkes* v. *Wood*, 98 Eng. 489 (C.P. 1763); *Huckle* v. *Money*, 95 Eng. Rep. 768 (K.B. 1763), *aff'd* 19 Howell's State Trials 1002 at 1028, 97 Eng. Rep. 1075 (K.B. 1765).

[5] 95 Eng. Rep. 817, 818.

[6] *Boyd* v. *United States*, 116 U.S. 616, 626 (1886).

[7] The argument of Otis and others as well as much background material are contained in Quincy's *Massachusetts Reports*, 1761–1772, App. I, pp. 395–540, and in 2 *Legal Papers of John Adams*, Wroth & Zobel eds. (Boston: 1965) 106–147. *See also* Dickerson, "Writs of Assistance as a Cause of the American Revolution," in R. Morris (ed), *The Era of the American Revolution: Studies Inscribed to Evarts Boutell Greene* (New York: 1939), 40.

but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.

***Scope of the Amendment.***—The language of the provision which became the Fourth Amendment underwent some modest changes on its passage through the Congress and it is possible that the changes reflected more than a modest significance in the interpretation of the relationship of the two clauses. Madison's introduced version provided "The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." [8] As reported from committee, with an inadvertent omission corrected on the floor,[9] the section was almost identical with the introduced version, and the House defeated a motion to substitute "and no warrant shall issue" for "by warrants issuing" in the committee draft. In some fashion, the rejected amendment was inserted in the language before passage by the House and is the language of the ratified constitutional provision.[10]

As we have noted above, the noteworthy disputes over search and seizure in England and the colonies revolved about the character of warrants. There were, however, lawful warrantless searches, primarily searches incident to arrest, and these apparently gave rise to no disputes. Thus, the question arises whether the Fourth Amendment's two clauses must be read together to mean that the only searches and seizures which are "reasonable" are those which meet the requirements of the second clause, that is, are pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that searches under warrant must comply with the second clause but that there are "reasonable" searches under the first clause which need not comply with the second clause.[11] This issue has divided the Court for some time,

[8] 1 *Annals of Congress* 434–435 (June 8, 1789).

[9] The word "secured" was changed to "secure" and the phrase "against unreasonable seizures and searches" was reinstated. Id., 754 (August 17, 1789).

[10] Ibid. It has been theorized that the author of the defeated revision, who was chairman of the committee appointed to arrange the amendments prior to House passage, simply inserted his provision and that it passed unnoticed. N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (Baltimore: 1937), 101–103.

[11] The amendment was originally in one clause as quoted above; it was the insertion of the defeated amendment to the language which changed the text into two clauses and arguably had the effect of extending the protection against unreasonable searches and seizures beyond the requirements imposed on the issuance of war-

has seen several reversals of precedents, and is important for the resolution of many cases. It is a dispute which has run most consistently throughout the cases involving the scope of the right to search incident to arrest.[12] While the right to search the person of the arrestee without a warrant is unquestioned, how far afield into areas within and without the control of the arrestee a search may range is an interesting and crucial matter.

The Court has drawn a wavering line.[13] In *Harris* v. *United States,*[14] it approved as "reasonable" the search of a four-room apartment without a warrant pursuant to the arrest of the man found there. A year later, however, a reconstituted Court majority set aside a conviction based on evidence seized by a warrantless search pursuant to an arrest and adopted the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." [15] This rule was set aside two years later by another reconstituted majority which adopted the premise that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Whether it was reasonable or not, the Court said, "must find resolution in the facts and circumstances of each case." [16] However, the Court soon returned to its emphasis upon the warrant. "The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part." [17] Therefore, "the police must, whenever

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rants. It is also possible to read the two clauses together to mean that some seizures even under warrants would be unreasonable and this reading has indeed been effectuated in certain cases, although for independent reasons. *Boyd* v. *United States,* 116 U.S. 616 (1886); *Gouled* v. *United States,* 255 U.S. 298 (1921), overruled by *Warden* v. *Hayden,* 387 U.S. 294 (1967); *but see* id., 303 (reserving the question whether "there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.")

[12] Approval of warrantless searches pursuant to arrest first appeared in dicta in several cases. *Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Carroll* v. *United States,* 267 U.S. 132, 158 (1925); *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). Whether or not there is to be a rule or a principle generally preferring or requiring searches pursuant to warrant to warrantless searches, however, has ramifications far beyond the issue of searches pursuant to arrest. *United States* v. *United States District Court,* 407 U.S. 297, 320 (1972).

[13] Compare *Marron* v. *United States,* 275 U.S. 192 (1927), with *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931), and *United States* v. *Lefkowitz,* 285 U.S. 452 (1932).

[14] 331 U.S. 145 (1947).

[15] *Trupiano* v. *United States,* 334 U.S. 699, 705 (1948). *See also McDonald* v. *United States,* 335 U.S. 451 (1948).

[16] *United States* v. *Rabinowitz,* 339 U.S. 56, 66 (1950).

[17] *Chimel* v. *California,* 395 U.S. 752, 761 (1969).

practicable, obtain advance judicial approval of searches and seizures through a warrant procedure," [18] and exceptions to searches under warrants were to be closely contained by the rationale undergirding the necessity for the exception and the scope of a search under one of the exceptions was similarly limited.[19]

Again, changing membership on the Court made problematical adherence to either a "reasonableness" standard or a "warrants-with-narrow-exceptions" standard, although what appears to have emerged is a two-tier standard, the highest tier applying the latter standard, the lower tier the former. In the beginning of the process, the Court was closely divided, essentially 4–1–4, on which standard to apply.[20] While there remain dissenters to emphasis

[18] *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). In *United States* v. *United States District Court*, 407 U.S. 297, 321 (1972), Justice Powell explained that the "very heart" of the Amendment's mandate is "that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." Thus, what is "reasonable" in terms of a search and seizure derives content and meaning through reference to the warrant clause. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 473–484 (1971). *See also Davis* v. *Mississippi*, 394 U.S. 721, 728 (1969); *Katz* v. *United States*, 389 U.S. 347, 356–358 (1967); *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967).

[19] *Chimel* v. *California*, 395 U.S. 752, 762–764 (1969) (limiting scope of search incident to arrest). *See also United States* v. *United States District Court*, 407 U.S. 297 (1972) (rejecting argument that it was "reasonable" to allow President through Attorney General to authorize warrantless electronic surveillance of persons thought to be endangering the national security); *Katz* v. *United States*, 389 U.S. 347 (1967) (although in engaging in electronic seizures of conversations from telephone booth officers acted with great self-restraint and reasonably, self-imposition was not enough and magistrate's judgment required); *Preston* v. *United States*, 376 U.S. 364 (1964) (warrantless search of seized automobile not justified because not within rationale of exceptions to warrant clause). There were exceptions. E.g., *Cooper* v. *California*, 386 U.S. 58 (1967) (warrantless search of impounded car was reasonable); *United States* v. *Harris*, 390 U.S. 234 (1968) (warrantless inventory search of automobile).

[20] In *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), Justices Stewart, Douglas, Brennan, and Marshall adhered to the warrant-based rule, while Justices White, Blackmun, and Rhenquist, and Chief Justice Burger placed greater emphasis upon the question of reasonableness without necessary regard to the warrant requirement, Id., 285. Justice Powell generally agreed with the former group of Justices, id., 275 (concurring), *and see South Dakota* v. *Opperman*, 428 U.S. 364, 382 (1976) (concurring), but he joined opinions taking the other view, although in each instance the result was supportable upon other considerations. E.g., *Cady* v. *Dombrowski*, 413 U.S. 433 (1973); *United States* v. *Edwards*, 415 U.S. 800 (1974). Justice Stevens, replacing Justice Douglas, appears to follow the warrant emphasis, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 326 (1978) (dissenting) (distinguishing between criminal searches and regulatory inspections); *United States* v. *Ross*, 456 U.S. 798, 824–825 (1982) (delivering opinion of Court), although he has joined opinions premised on the "reasonableness" standard. E.g., *South Dakota* v. *Opperman*, *supra*, although the result in that case appears not to be dictated by this premise. *See* Id., 428 U.S. 382 (Justice Powell concurring), 396 (Justice White dissenting).

upon the warrants clause,[21] the more recent cases state with the concurrence of substantial majorities, and occasionally unanimously, the principle that warrantless searches are per se unreasonable, with a few carefully prescribed exceptions as the governing rule.[22] Significantly, however, the result now is not the result that prevailed previously when the rule applied; the difference is that the Court has bifurcated its approach to determining what exceptions exist to the rule and, highly importantly, the scope of those exceptions.[23] That difference arises in the Court's approach to the variable expectation of privacy approach to coverage of the Fourth Amendment.

***The Interest Protected.***—For the Fourth Amendment to be applicable to a particular set of facts, there must be a "search" and a "seizure" occurring typically in a criminal case with a subsequent attempt to use judicially what was seized. Whether there was a search and seizure within the meaning of the Amendment, whether a complainant's interests were constitutionally infringed, will turn often upon consideration of his interest and whether it was officially abused. What does the Amendment protect? Under the common law, there was no doubt. Said Lord Camden in *Entick* v. *Carrington:*[24] "The great end for which men entered in society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole . . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing . . . ." Protection of property interests as the basis of the Fourth Amendment found easy acceptance in the Supreme

[21] E.g., *Robbins* v. *California*, 453 U.S. 420, 437 (1981) (Justice Rhenquist dissenting).

[22] E.g., *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352–353 (1977) (unanimous); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *Michigan* v. *Tyler*, 436 U.S. 499, 506 (1978); *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978) (unanimous); *Arkansas* v. *Sanders*, 442 U.S. 743, 758 (1979); *United States* v. *Ross*, 456 U.S. 798, 824–825 (1982).

[23] E.g., *Chambers* v. *Maroney*, 399 U.S. 42 (1970) (warrantless search of automobile taken to police station); *Texas* v. *White*, 423 U.S. 67 (1975) (same); *New York* v. *Belton*, 453 U.S. 454 (1981) (search incident to arrest); *United States* v. *Ross*, 456 U.S. 798 (1982) (automobile search at scene). On the other hand, the warrant-based standard did preclude a number of warrantless searches. E.g., *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (warrantless stop and search of auto by roving patrol near border); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (warrantless administrative inspection of business premises); *Mincey* v. *Arizona*, 437 U.S. 385 (1978) (warrantless search of home that was "homicide scene").

[24] 19 Howell's State Trials 1029, 1035, 95 Eng. Reg. 807, 817–818 (1765).

Court [25] and that acceptance controlled decision in numerous cases.[1] For example, in *Olmstead* v. *United States*,[2] one of the two premises underlying the holding that wiretapping was not covered by the Amendment was that there had been no actual physical invasion of the defendant's premises, and where there had been an invasion, a technical trespass, electronic surveillance was deemed subject to Fourth Amendment restrictions.[3] But "[t]he premise that property interests control the right of the Government to search and seize has been discredited . . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." [4] Thus, because the Amendment "protects people, not places," the requirement of actual physical trespass is dispensed with and electronic surveillance was made subject to the Amendment's requirements.[5]

The new test is whether there is an expectation of privacy upon the part of one on which he may "justifiably" rely.[6] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But that he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." [7] That is, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was

[25] *Boyd* v. *United States*, 116 U.S. 616, 627 (1886); *Adams v. New York*, 192 U.S. 585, 598 (1904).

[1] Thus, the rule that "mere evidence" could not be seized but rather only the fruits of crime, its instrumentalities, or contraband, turned upon the question of the right of the public to possess the materials or the police power to make possession by the possessor unlawful. *Gouled* v. *United States*, 255 U.S. 298 (1921), overruled by *Warden* v. *Hayden*, 387 U.S. 294 (1967). *See also Davis* v. *United States*, 328 U.S. 582 (1946). Standing to contest unlawful searches and seizures was based upon property interests, *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Jones* v. *United States*, 362 U.S. 257 (1960), as well as decision upon the validity of a consent to search. *Chapman* v. *United States*, 365 U.S. 610 (1961); *Stoner* v. *California*, 376 U.S. 483 (1964); *Frazier* v. *Culp*, 394 U.S. 731, 740 (1969).

[2] 277 U.S. 438 (1928). *See also Goldman* v. *United states*, 316 U.S. 129 (1942) (detectaphone placed against wall of adjoining room; no search and seizure).

[3] *Silverman* v. *United States*, 365 U.S. 505 (1961) (spike mike pushed through a party wall until it hit a heating duct.

[4] *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967).

[5] *Katz* v. *United States*, 389 U.S. 347, 353 (1967).

[6] Ibid. Justice Harlan, concurring, formulated a two pronged test for determining whether the privacy interest is paramount: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " Id., 361.

[7] Id. 351–352.

one in which there was reasonable expectation of freedom from governmental intrusion." [8]

The two-part test that Justice Harlan suggested in *Katz* [9] has purported to guide the Court in its deliverations, but its consequences are unclear. On the one hand, there is no difference in result between many of the old cases premised on property concepts and more recent cases in which the reasonable expectation of privacy flows from ownership concepts.[10] On the other hand, many other cases have presented close questions that have sharply divided the Court.[11] As to the first element, the "subjective expectation" of privacy, that has largely dwindled as a viable standard, because, as Justice Harlan noted in a subsequent case, "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." [12] As for the second element, whether one has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, the Court has said that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." [13] Thus, protection of the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others; [14] but ownership of other things, i.e., automobiles, does not carry a similar high degree of protection.[15] That

[8] *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968) (official had a reasonable expectation of privacy in an office he shared with others, although he owned neither the premises nor the papers seized). *Cf. Rakas* v. *Illinois*, 439 U.S. 128 (1978).

[9] Justice Harlan's opinion has been much relied upon. E.g., *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968); *Rakas* v. *Illinois*, 439 U.S. 12, 143–144 n. 12 (1978); *Smith* v. *Maryland*, 442 U.S. 735, 740–741 (1979); *United States* v. *Salvucci*, 448 U.S. 83, 91–92 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 105–106 (1980).

[10] E.g., *Alderman* v. *United States*, 394 U.S. 165 (1969) (home owner could object to electronic surveillance of conversations emanating from his home, even though he was not party to the conversations).

[11] E.g., *Rakas* v. *Illinois*, 439 U.S. 128 (1978) (4–1–4 decision: passengers in automobile who own neither the car nor the property seized did not have protected rights that were invaded; had no legitimate expectation of privacy in areas searched).

[12] *United States* v. *White*, 401 U.S. 745, 786 (1971). *See Smith* v. *Maryland*, 442 U.S. 735, 740 n. 5 (1979) (government could not condition "subjective expectations" by, say, announcing that henceforth all homes would be subject to warrantless entry and thus destroy the "legitimate expectation of privacy").

[13] *Rakas* v. *Illinois*, 439 U.S. 128, 143–144 n. 12 (1978).

[14] E.g., *Alderman* v. *United States*, 394 U.S. 165 (1969); *Mincey* v. *Arizona*, 437 U.S. 385 (1978); *Payton* v. *New York*, 445 U.S. 573 (1980).

[15] E.g., *United States* v. *Ross*, 456 U.S. 798 (1982). *See also Donovan* v. *Dewey*, 452 U.S. 594 (1981) (commercial premises).

a person has taken normal precautions to maintain his privacy, that is, precautions customarily taken by those seeking to exclude others, is usually a significant factor in determining legitimacy of expectation.[16] Some expectations, the Court has held, are simply not those which society is prepared to accept.[17] While perhaps not clearly expressed in the opinions, what seems to have emerged is a balancing standard, which requires "an assessing of the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." As the intrusions grow more extensive and significantly jeopardize the sense of security of the individual, greater restraint of police officers through the warrant requirement is necessary.[18]

Application of this balancing test, because of the Court's weighing in of law enforcement investigative needs[19] and the Court's subjective evaluation of privacy needs, has led to the creation of a two-tier or sliding tier scale of privacy interests. As promulgated, the privacy test was designed to permit a determination that a Fourth Amendment protected interest has been invaded.[20] If it had, then the Fourth Amendment governed the intrusion and ordinarily a warrant was required to make it reasonable, subject only to the narrowly defined exceptions and the scope of the search under those exceptions was "strictly tied to and justified by the circumstances which rendered its initiation permissible."[21] But the Court now uses the test to determine whether the interest invaded is important or persuasive enough so that a warrant is required to justify it;[22] if the individual has a lesser expectation of privacy,

[16] E.g., *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977); *Katz* v. *United States*, 389 U.S. 347, 352 (1967). *But compare South Dakota* v. *Opperman*, 428 U.S. 364 (1976)(automobile; doors locked and windows rolled up, but still no legitimate expectation). In *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), the fact that defendant had dumped into companion's purse a cache of drugs, having known her for only a few days and knowing others had access to the purse, was taken to establish that he had no legitimate expectation the purse would be free from intrusion.

[17] E.g., *United States* v. *Miller*, 425 U.S. 435 (1976) (bank records); *Smith* v. *Maryland*, 442 U.S. 735 (1979) (numbers dialed from one's telephone).

[18] *United States* v. *White*, 401 U.S. 745, 786-787 (1971) (Justice Harlan dissenting).

[19] E.g., *Robbins* v. *California*, 453 U.S. 420, 429, 433-434 (1981) (Justice Powell concurring), quoted approvingly in *United States* v. *Ross*, 456 U.S. 798, 815-816 & n. 21 (1982).

[20] *Katz* v. *United States*, 389 U. S. 347, 351-352 (1967).

[21] *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968).

[22] The prime example is the home, so that for entries either to search or to arrest, ' the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton* v. *New York*, 445 U.S. 573, 590 (1980); *Steagald* v. *United States*, 451 U.S. 204, 212 (1981). *And see Mincey* v. *Arizona*, 437 U.S. 385 (1978).

then the invasion may be justified, absent a warrant, by the reasonableness of the intrusion.[23] Exceptions to the warrant requirement are no longer evaluated by, at least solely, the justifications for the exception, i.e., exigent circumstances, and the scope of the search is no longer tied to and limited by the justification for the exception.[24] The result has been a considerable expansion of the power of police and other authorities to conduct searches than probably existed prior to *Katz*.

***Arrests and Other Detentions.***—That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice Marshall [25] and is now established law.[1] At the common law, it was proper to arrest one who had committed a breach of the peace or a felony without a warrant,[2] and this history is reflected in the fact that the Fourth Amendment is satisfied if the arrest is made in a public place on probable cause, regardless whether a warrant has been obtained or not.[3] However, in order to effectuate an arrest in the home, absent consent or exigent circumstances, police officers must have a warrant.[4] The Fourth Amendment applies to "sei-

[23] One has a diminished expectation of privacy in automobiles. *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979) (collecting cases); *United States* v. *Ross*, 456 U.S. 798, 804–809 (1982). A person's expectancy of privacy in personal luggage and other closed containers is substantially greater than in an automobile, *United States* v. *Chadwick*, 433 U.S. 1, 13 (1977); *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), although if it is found in an automobile as to which there exists probable cause to search the legitimate expectancy diminishes accordingly. *United States* v. *Ross*, *supra*.

[24] E.g., *Texas* v. *White*, 423 U.S. 67 (1975) (if probable cause to search automobile existed at scene, it can be removed to station and searched without warrant); *United States* v. *Robinson*, 414 U.S. 218 (1973) (once an arrest has been validly made, search pursuant thereto is so minimally intrusive in addition that scope of search is not limited by necessity of security of officer); *United States* v. *Edwards*, 415 U.S. 800 (1974) (incarcerated suspect; officers need no warrant to take his clothes for test because little additional intrusion). *But see Ybarra* v. *Illinois*, 444 U.S. 85 (1979) (officers on premises to execute search warrant of premises may not without more search persons found on premises).

[25] *Ex parte Burford*, 3 Cr. (7 U.S.) 448 (1806).

[1] *Giordennello* v. *United States*, 357 U.S. 480, 485–486 (1958); *United States* v. *Watson*, 423 U.S. 411, 416–418 (1976); *Payton* v. *New York*, 445 U.S. 573, 583–586 (1980); *Steagald* v. *United States*, 451 U.S. 204, 211–213 (1981).

[2] 1 J. Stephen, *A History of the Criminal Law of England*, (London: 1883), 193.

[3] *United States* v. *Watson*, 423 U.S. 411 (1976). *See also United States* v. *Santana*, 427 U.S. 38 (1976) (sustaining warrantless arrest of suspect in her home when she was initially approached in her doorway and then retreated into house). However, a suspect arrested on probable cause but without a warrant is entitled to a prompt, nonadversary hearing before a magistrate under procedures designed to provide a fair and reliable determination of probable cause in order to keep the arrestee in custody. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[4] *Payton* v. *New York*, 445 U.S. 573 (1980) (voiding state law authorizing police to enter private residence without a warrant to make an arrest); *Steagald* v. *United States*, 451 U.S. 204 (1981) (officers with arrest warrant for A entered B's home without search warrant and discovered incriminating evidence; violated Fourth Amendment in absence of warrant to search the home).

zures" and it is not necessary that a detention be a formal arrest in order to bring to bear the requirements of warrants or probable cause in instances in which warrants may be forgone.[5] Some objective justification must be shown to validate all seizures of the person, including seizures that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary.[6]

The legality of arrests has until recently not often been litigated in the Supreme Court, inasmuch as, unlike evidence obtained as a result of an unlawful search, a person detained pursuant to an arbitrary seizure remains subject to custody and presentation to court.[7] But the application of self-incrimination and other exclusionary rules to the States and the heightening of their scope as against the States and the Federal Government brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be excluded.[8] Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed "tainted" by the former.[9] Similarly,

[5] *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Justice Stewart) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."). *See also Reid* v. *Georgia*, 448 U.S. 438 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry* v. *Ohio*, 392 U.S. 1, 16–19 (1968).

[6] *Adams* v. *Williams*, 407 U.S. 143, 146–149 (1972); *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979); *Brown* v. *Texas*, 443 U.S. 47, 51 (1979); *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980); *Michigan* v. *Summers*, 452 U.S. 692 (1981).

[7] *Ker* v. *Illinois*, 119 U.S. 436, 440 (1886); *and see Albrecht* v. *United States*, 273 U.S. 1 (1927); *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

[8] *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Such evidence is the "fruit of the poisonous tree," *Nardone* v. *United States*, 308 U.S. 338, 341 (1939), that is, evidence derived from the original illegality. Previously, if confessions were voluntary for purposes of the self-incrimination clause, they were admissible notwithstanding any prior official illegality. *Colombe* v. *Connecticut*, 367 U.S. 568 (1961).

[9] Although there is a presumption that the illegal arrest is the cause of the subsequent confession, the presumption is rebuttable by a showing that the confession is the result of "an intervening . . . act of free will." *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963). The factors used to determine whether the taint has been dissipated are the time between the illegal arrest and the confession, whether there were intervening circumstances (such as consultation with others, *Miranda* warnings, etc.), and the degree of flagrancy and purposefulness of the official conduct. *Brown* v. *Illinois*, 422 U.S. 590 (1975) (*Miranda* warnings alone insufficient); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Taylor* v. *Alabama*, 457 U.S. 687 (1982). In *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), the fact that the suspect had been taken before a magistrate who advised him of his rights and set bail, after which he confessed, established a sufficient intervening circumstance.

fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed.[10]

***Searches and Inspections in Noncriminal Cases.***—Certain early cases held that the Fourth Amendment was applicable only when a search was undertaken for criminal investigatory purposes,[11] and the Supreme Court until recently employed a reasonableness test for such searches without requiring either a warrant or probable cause in the absence of a warrant.[12] But in 1967, the Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objected.[13] "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." [14] Certain administrative inspections utilized to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute.[15]

*Camara* and *See* were reaffirmed in *Marshall* v. *Barlow's, Inc.*,[16] in which the Court held violative of the Fourth Amendment

[10] *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Taylor* v. *Alabama*, 457 U.S. 687 (1982). In *United States* v. *Crews*, 445 U.S. 463 (1980), the Court, unanimously but for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The court identification was not tainted by either the arrest or the subsequent in-custody identification.

[11] *In re Strouse*, 23 Fed. Cas. 261 (No. 13,548) (D. Nev. 1871); *In re Meador*, 16 Fed. Cas. 1294, 1299 (No. 9375) ( N.D. Ga. 1869).

[12] *Abel* v. *United States*, 362 U.S. 217 (1960); *Frank* v. *Maryland*, 359 U.S. 360 (1959); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946).

[13] *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) (home); *See* v. *City of Seattle*, 387 U.S. 541 (1967) (commercial warehouse).

[14] *Camara* v. *Municipal Court*, 387 U.S. 523, 530 (1967).

[15] *Colonade Catering Corp.* v. *United States*, 397 U.S. 72 (1970); *United States* v. *Biswell*, 406 U.S. 311 (1972). *Colonade*, involving liquor, was based on the long history of close supervision of the industry. *Biswell*, involving firearms, introduced factors that were subsequently to prove significant. Thus, while the statute was of recent enactment, firearms constituted a pervasively regulated industry, so that dealers had no reasonable expectation of privacy, inasmuch as the law provides for regular inspections. Further, warrantless inspections were needed for effective enforcement of the statute.

[16] 436 U.S. 307 (1978). Dissenting, Justice Stevens, with Justices Rehnquist and Blackmun, argued that not the warrant clause but the reasonableness clause should govern administrative inspections. Id., 325.

a provision of the Occupational Safety and Health Act which authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations, without a warrant or other legal process. The liquor and firearms exceptions were distinguished on the basis that there was in those industries a long tradition of close government supervision, so that one in those businesses gave up his privacy inspections. But OSHA was a relatively recent statute and it regulated practically every business in or affecting interstate commerce; it was not open to a legislature to extend regulation and then follow it with warrantless inspections. Additionally, OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and certainly with no assurances as to limitation on scope and standards of inspections. Further, warrantless inspections were not necessary to serve an important governmental interest, inasmuch as most businesses would consent to inspection and it was not inconvenient to require OSHA to resort to an administrative warrant in order to inspect sites where consent was refused.[17]

In *Donovan* v. *Dewey*,[18] however, *Barlow's* was substantially limited and a new standard permitting extensive governmental inspection of commercial property,[19] absent warrants, emerged. Under the Federal Mine Safety and Health Act, governing underground and surface mines (including stone quarries), federal officers are directed to inspect underground mines at least four times a year and surface mines at least twice a year, pursuant to extensive regulations as to standards of safety. The statute specifically provides for absence of advanced notice and requires the Secretary

[17] Administrative warrants issued on the basis of less than probable cause but only on a showing that a specific business had been chosen for inspection on the basis of a general administrative plan would suffice. Even without a necessity for probable cause, the requirement would assure the interposition of a neutral officer to establish that the inspection was reasonable and was properly authorized. Id., 321, 323. The dissenters objected that the warrant clause was being constitutionally diluted. Id., 325. Administrative warrants were approved also in *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967). Previously, one of the reasons given for finding administrative and noncriminal inspections not covered by the Fourth Amendment was the fact that the warrant clause would be as rigorously applied to them as to criminal searches and seizures. *Frank* v. *Maryland*, 359 U.S. 360, 373 (1959). *See also Almeida-Sanchez* v. *United States*, 413 U.S. 266, 275 (2973) (Justice Powell concurring) (suggesting a similar administrative warrant procedure empowering police and immigration officers to conduct roving searches of automobiles in areas near the Nation's borders.) *See* id., 270 n. 3, 288; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 547 n. 2, 562 n. 15 (1976).

[18] 452 U.S. 594 (1982).

[19] There is no suggestion that warrantless inspections of homes is broadened. Id., 598. *See also Michigan* v. *Tyler*, 436 U.S. 499 (1978).

of Labor to institute court actions for injunctive and other relief in cases in which inspectors are denied admission. Sustaining the statute, the Court proclaimed that government had a "greater latitude" to conduct warrantless inspections of commercial property than of homes, because of "the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections." [20]

*Dewey* was seen to be different from *Barlow's* in several dispositive ways. First, *Dewey* involved a single industry, unlike the broad coverage in *Barlow's*. Second, the OSHA statute gave minimal direction to inspectors as to time, scope, and frequency of inspections, while FMSHA specified a regular number of inspections pursuant to standards. Third, Congress had determined that unannounced inspections were necessary if the safety laws were to be effectively enforced and that judgment would be deferred to. Fourth, FMSHA provided businesses the opportunity to contest the search by resisting in the civil proceeding the Secretary had to bring if consent was denied.[21] The standard of a long tradition of government supervision permitting warrantless inspections was dispensed with, because it would lead to "absurd results," in that new and emerging industries posing great hazards would escape regulation.[22]

The Court is thus at an intermediate point between no Fourth Amendment application and the *Barlow's* requirement of administrative warrants in order to inspect. *Dewey*, however, appears to afford legislatures great discretion in structuring warrantless inspection authorizations by including within the statute a requirement that all covered entities be inspected within a prescribed period and listing standards or authorizing the administering agency to prescribe standards. There is a practical limitation inasmuch as the entities which could be subject to inspections within a given period would be limited in number, but theoretically, at

[20] *Donovan* v. *Dewey*, 452 U.S. 594, 598–599 (1981).

[21] Id., 596–597, 604–605. Pursuant to the statute, however, the Secretary has promulgated regulations providing for the assessment of civil penalties for denial of entry and *Dewey* had been assessed a penalty of $1,000. Id., 597 n. 3. It was also true in *Barlow's* that the Government resorted to civil process upon refusal to admit. *Supra*, 436 U.S., 317 & n. 12.

[22] *Donovan* v. *Dewey*, 452 U.S. 594, 606 (1981). Duration of regulation will now be a factor in assessing the legitimate expectation of privacy of a business. Ibid.

least, so long as the legislature carefully drafts its statute warrantless inspections of commercial establishments seem permissible.

In other contexts, the Court has also elaborated the constitutional requirements affecting administrative inspections and searches. Thus, in *Michigan* v. *Tyler*,[23] it subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is, of course, an exception based on exigent circumstances and no warrant or consent is needed; firemen on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and requires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant.[24]

One curious case has approved a system of "home visits" by welfare caseworkers in which the recipients are required to admit the worker or lose eligibility to benefits.[25]

With respect to automobiles, the holdings are mixed. Random stops of automobiles to check drivers' licenses, vehicle registrations, and safety conditions were condemned as too intrusive into the individual's legitimate expectations of privacy, which was not outweighed by the degree to which random stops would advance the legitimate governmental interests involved.[26] On the other hand, in *South Dakota* v. *Opperman*,[27] the Court sustained the admission

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[23] 436 U.S. 499 (1978).

[24] The Court also held that, after the fire was extinguished, if fire investigators were unable to proceed at the moment, because of dark, steam, and smoke, it was proper for them to leave and return at daylight without any necessity of complying with its mandate for administrative or criminal warrants. Id., 510–511.

[25] *Wyman* v. *James*, 400 U.S. 309 (1971). It is not clear what rationale the majority utilized. It appears to have proceeded on the assumption that a "home visit" was not a search and that the Fourth Amendment does not apply when criminal prosecution is not threatened. Neither premise is valid under *Camara* and its progeny, although *Camara* preceded *Wyman*. Presumably, the case would today be analyzed under the expectation of privacy/need/structural protection theory of the more recent cases.

[26] *Delaware* v. *Prouse*, 440 U.S. 648 (1979). Standards applied in this case had been developed in the contexts of automobile stops at fixed points or by roving patrols in border situations. *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *United States* v. *Ortiz*, 422 U.S. 891 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976).

[27] 428 U.S. 364 (1976). *See also Cady* v. *Dombrowski*, 413 U.S. 433 (1973) (sustaining admission of criminal evidence found when police conducted a warrantless search of an out-of-state policeman's automobile following an accident, in order to find and safeguard his service revolver). The Court in both cases emphasized the reduced expectancy of privacy in automobiles and the noncriminal purposes of the searches.

of evidence found when police impounded an automobile from a public street for multiple parking violations and entered the car to secure and inventory valuables for safekeeping. Marijuana was discovered in the glove compartment.

**Searches and Seizures Pursuant to Warrant**

Emphasis upon the necessity of warrants places the judgment of an independent magistrate between law enforcement officers and the privacy of citizens, requires that that privacy be invaded only upon a showing which constitutes probable cause, and limits that invasion by specification of the person to be seized, the place to be searched, and the evidence to be sought.[1] While a warrant is issued *ex parte*, its validity may be contested in a subsequent suppression hearing if incriminating evidence is found and a prosecution is brought.[2]

***Issuance by Neutral Magistrate.***—In numerous cases, the Court has referred to the necessity that warrants be issued by a "judicial officer" or a "magistrate." [3] "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nul-

[1] While the exceptions may be different as between the two, insofar as warrants for arrest and warrants for a search are concerned, the requirements for the issuance of the two are the same. *Aguilar* v. *Texas*, 378 U.S. 108, 112 n. 3 (1964). Also, the standards by which the validity of warrants are to be judged are the same, whether federal or state officers are involved. *Ker* v. *California*, 374 U.S. 23 (1963).

[2] Most often, in the suppression hearings, the defendant will challenge the sufficiency of the evidence presented to the magistrate to constitute probable cause. *Spinelli* v. *United States*, 393 U.S. 410 (1969); *United States* v. *Harris*, 403 U.S. 573 (1971). He may challenge the veracity of the statements used by the police to procure the warrant and otherwise contest the accuracy of the allegations going to establish probable cause, but the Court has carefully hedged his ability to do so. *Franks* v. *Delaware*, 438 U.S. 154 (1978). He may also question the power of the official issuing the warrant, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449–453 (1971), or the specificity of the particularity required. *Marron* v. *United States*, 275 U.S. 192 (1927).

[3] *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932); *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958); *Jones* v. *United States*, 362 U.S. 257, 270 (1960); *Katz* v. *United States*, 389 U.S. 347, 356 (1967); *United States* v. *United States District Court*, 407 U.S. 297, 321 (1972); *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977); *Lo-Ji Sales* v. *New York*, 442 U.S. 319, 326 (1979).

lity and leave the people's homes secure only in the discretion of police officers." [4] These cases do not mean that only a judge or an official who is a lawyer may issue warrants, but they do stand for two tests of the validity of the power of the issuing party to so act. "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." [5] The first test cannot be met when the issuing party is himself engaged in law enforcement activities,[6] but the Court has not required that an issuing party have that independence of tenure and guarantee of salary which characterizes federal judges.[7] And in passing on the second test, the Court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause.[8]

***Probable Cause.***—The concept of "probable cause" is central to the meaning of the warrant clause. Neither the Fourth Amendment nor the federal statutory provisions relevant to the area define "probable cause;" the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. "In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a

[4] *Johnson* v. *United States*, 333 U.S. 10, 13–14 (1948).

[5] *Shadwick* v. *City of Tampa*, 407 U.S. 345, 354 (1972).

[6] *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449–451 (1971) (warrant issued by state attorney general who was leading investigation and who as a justice of the peace was authorized to issue warrants); *Mancusi* v. *DeForte*, 392 U.S. 364, 370–372 (1968) (subpoena issued by district attorney could not qualify as a valid search warrant); *Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979) (justice of the peace issued open-ended search warrant for obscene materials, accompanied police during its execution, and made probable cause determinations at the scene as to particular items).

[7] *Jones* v. *United States*, 362 U.S. 257, 270–271 (1960) (approving issuance of warrants by United States Commissioners, many of whom were not lawyers and none of whom had any guarantees of tenure and salary); *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972) (approving issuance of arrest warrants for violation of city ordinances by city clerks who were assigned to and supervised by municipal court judges). The Court reserved the question "whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many person may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.' Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations." Id., 352.

[8] Id., 350–354 (placing on defendant the burden of demonstrating that the issuing official lacks capacity to determine probable cause). *See also Connally* v. *Georgia*, 429 U.S. 245 (1977) (unsalaried justice of the peace who receives a sum of money for each warrant issued but nothing for reviewing and denying a warrant not sufficiently detached).

reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant." [9] Probable cause is to be determined according to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." [10] Warrants are favored in the law and utilization of them will not be thwarted by a hypertechnical reading of the supporting affidavit and supporting testimony.[11] For the same reason, reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." [12] Courts will sustain the determination of probable cause so long as "there was substantial basis for [the magistrate] to conclude that" there was probable cause.[13]

Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough.[14] In *United States* v. *Ventresca,*[15] however, an affidavit by a law enforcement officer asserting his belief that an illegal distillery was being operated in a certain place, in which the officer asserted that the belief was based upon his own observations and upon information given to him by fellow investigators based on their personal observations and in which the officer detailed a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. "Recital of some of the underlying circumstances in the affidavit is essential," the Court said, observing that "where these cir-

[9] *Dumbra* v. *United States*, 268 U.S. 435, 439, 441 (1925). "[T]he term 'probable cause' . . . means less than evidence which would justify condemnation." *Lock* v. *United States*, 7 Cr. (11 U.S.) 339, 348 (1813). *See Steel* v. *United States*, 267 U.S. 498, 504–505 (1925). It may rest upon evidence which is not legally competent in a criminal trial, *Draper* v. *United States*, 358 U.S. 307, 311 (1959), and it need not be sufficient to prove guilt in a criminal trial. *Brinegar* v. *United States*, 338 U.S. 160, 173 (1949). *See United States* v. *Ventresca*, 380 U.S. 102, 107–108 (1965).

[10] *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949).

[11] *United States* v. *Ventresca*, 380 U.S. 102, 108–109 (1965).

[12] *Jones* v. *United States*, 362 U.S. 257, 270–271 (1960).

[13] *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964). It must be emphasized that the issuing party "must judge for himself the persuasiveness of the facts relied on by a [complainant] to show probable cause." *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958). An insufficient affidavit cannot be rehabilitated by testimony after issuance concerning information possessed by the affiant but not disclosed to the magistrate. *Whiteley* v. *Warden*, 401 U.S. 560 (1971).

[14] *Byars* v. *United States*, 273 U.S. 28 (1927) (affiant stated he "has good reason to believe and does believe" that defendant has contraband materials in his possession); *Giordenello* v. *United States*, 357 U.S. 480 (1958) (complainant merely stated his conclusion that defendant had committed a crime). *And see Nathanson* v. *United States*, 290 U.S. 41 (1933).

[15] 380 U.S. 102 (1965).

cumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause," the reliance on the warrant process should not be deterred by insistence on too stringent a showing.[16]

Presentation by the affiant of information received from an informant to establish probable cause has divided the Court in several cases.[17] Although involving a warrantless arrest, *Draper* v. *United States* [18] may be said to have begun the line of cases. A previously reliable, named informant reported to an officer that defendant would arrive with narcotics on a particular train and described the clothes he would be wearing and the bag he would be carrying, but the informant gave no basis for his information. FBI agents met the train and observed defendant who fully answered the description. The Court held that the corroboration of part of the informer's tip established probable cause to support the arrest. A case involving a search warrant, *Jones* v. *United States,*[19] apparently utilized a test of considering the affidavit as a whole to see whether the tip plus the corroborating information provided a substantial basis for finding probable cause, but the affidavit as well set forth the reliability of the informer and sufficient detail which indicated the tip was based on the informer's personal observation. *Aguilar* v. *Texas* [20] held insufficient an affidavit which merely asserted that the police had "reliable information from a credible person" that narcotics were in a certain place and held that when the affiant relies on an informer's tip he must present to the magistrate two types of evidence. First, the affidavit must indicate the circumstances from which the informer concluded that evidence was present or that crimes had been committed, and, second, the affiant must present information which would permit the magistrate to decide whether or not the informer was trustworthy. Then, in *Spinelli* v. *United States,*[21] the Court applied *Aguilar* in a situa-

[16] Id., 109.

[17] *See also McCray* v. *Illinois,* 386 U.S. 300 (1967) (holding that an officer need not reveal the name of his informant in the subsequent suppression hearing); *Rugendorf* v. *United States,* 376 U.S. 528 (1964).

[18] 358 U.S. 307 (1959). Justice Douglas dissented, id., 314, and Chief Justice Warren and Justice Frankfurter did not participate.

[19] 362 U.S. 257 (1960).

[20] 378 U.S. 108 (1964).

[21] 393 U.S. 410 (1969). The opinion of the Court was by Justice Harlan, who was joined by Chief Justice Warren, and Justices Douglas and Brennan. Justice White concurred with them to prevent an equally-divided Court and pending a reconciliation of *Draper* on the one hand and *Aguilar* on the other. Id., 423. Justices Black, Stewart, and Fortas dissented, id., 429, 435, with Justice Black calling for the overruling of *Aguilar. See also Whiteley* v. *Warden,* 401 U.S. 560 (1971).

tion in which the affidavit contained both an informant's tip and police information of a corroborating nature.

The Court rejected the "totality" test which seemed to come from *Jones* and held that the informer's tip and the corroborating evidence must be separately considered. The former was rejected because the affidavit contained neither any information which showed the basis of the tip nor any information which showed the informer's credibility. The corroborating evidence was rejected as insufficient because it did not establish any element of criminality but merely related to details which were innocent in themselves. The Court also found inadequate corroboration a police assertion that defendant was a known gambler, which was what the tip related to. The most recent case, *United States* v. *Harris*,[22] saw the Court returning to the totality test and approving a warrant issued largely on an informer's tip that he had purchased illegal whiskey from defendant at his residence over a two-year period, most recently within two weeks of the tip, with rather detailed information about the concealment of the whiskey. The affidavit asserted the informer was a "prudent person," that defendant had a reputation as a bootlegger, that other persons had supplied similar information about him, and that he had been found in control of illegal whiskey within the previous four years. The Court determined that the detailed nature of the tip, the personal observation thus revealed, and the fact that the informer had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable and that the supporting evidence, including defendant's reputation, could supplement this determination.

***Particularity.***—"The requirement that warrants shall particularily describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[23] This

[22] 403 U.S. 573 (1971). The opinion of the Court was by Chief Justice Burger and was joined by Justices Black and Blackmun. Justice Stewart joined the portion of the opinion which concluded that the averments of the informant's information and the supporting evidence constituted sufficient showing to show probable cause and Justice White joined the portion of the opinion finding in the fact that the informant made a declaration against penal interest was a basis for crediting the tip but he concluded as well that the affidavit considered as a whole was sufficient. Id., 585. Justice Black called for overruling *Aguilar* and *Spinelli* and Justice Blackmun would overrule *Spinelli*. Ibid. The dissent was by Justice Harlan, who was joined by Justices Douglas, Brennan, and Marshall. Id., 586, *See Adams* v. *Williams*, 407 U.S. 143 (1972).

[23] *Marron* v. *United States*, 275 U.S. 192, 196 (1927). *See Stanford* v. *Texas*, 379 U.S. 476 (1965). Of course, police being lawfully on the premises pursuant to a war-

requirement thus acts to limit the scope of the search, inasmuch as the executing officers should be limited to looking in places where the described object could be expected to be found and not in others.[24]

***First Amendment Bearing on Probable Cause and Particularity.***—Where the warrant process is used to authorize seizure of books and other items entitled either to First Amendment protection or to First Amendment consideration, the Court has required government to observe more exacting standards than in other cases.[25] Thus, in *Marcus* v. *Search Warrant,*[1] the seizure of 11,000 copies of 280 publications pursuant to warrant issued *ex parte* by a magistrate who had not examined any of the publications but who had relied on the conclusory affidavit of a policeman was voided. Failure to scrutinize the materials and to particularize the items to be seized was deemed inadequate and it was further noted that police "were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." [2] A state procedure which was designed to comply with *Marcus* by the presentation of copies of books to be seized to the magistrate for his scrutiny prior to issuance of a warrant—seven of 59 books were reviewed—was nonetheless found inadequate by a plurality of the Court which concluded that "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [appellant] was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was . . . constitutionally deficient." [3] There has been much divergence in

rant who observe in "plain view" evidence of crime not set out in the warrant may seize it. *Coolidge* v. *New Hampshire,* 403, U.S. 443, 464–471 (1971).

[24] "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Kremen* v. *United States,* 353 U.S. 346 (1957); *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 356–358 (1931); *see United States* v. *Di Re,* 332 U.S. 581, 586–587 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. *Warden* v. *Hayden,* 387 U.S. 294, 310 (1967) (Mr. Justice Fortas concurring); *see, e.g., Preston* v. *United States,* 376 U.S. 364–367–368 (1964); *Agnello* v. *United States,* 296 U.S. 20, 30–31 (1925)." *Terry* v. *Ohio,* 392 U.S. 1, 18–19, (1968). *See also Andresen* v. *Maryland,* 427 U.S. 463, 470–482 (1976), and id., 484, 492–493 (Justice Brennan dissenting). In *Stanley* v. *Georgia,* 394 U.S. 557, 569 (1969), Justices Stewart, Brennan, and White would have based decision on the principle that a valid warrant for gambling paraphernalia did not authorize police upon discovering motion picture films in the course of the search to project the films to learn their contents.

[25] *Marcus* v. *Search Warrant,* 367 U.S. 717, 730–731 (1961); *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965).

[1] 367 U.S. 717 (1961). *See Kingsley Books* v. *Brown,* 354 U.S. 436 (1957).

[2] *Marcus* v. *Search Warrant,* 367 U.S. 717, 732 (1961).

[3] *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 210 (1964). Justice Brennan wrote the plurality opinion and was joined by Chief Justice Warren and Justices White

the decisions of the lower courts about the necessity for and the character of prior adversary hearings on the issue of obscenity.

Seizure of materials arguably protected by the First Amendment, as are books and films, is a form of prior restraint that requires observance strictly of the Fourth Amendment. Thus, the seizure of a film without a warrant issued by a neutral magistrate upon the conclusions of the police officer is invalid; seizure cannot be justified as incidental to arrest, inasmuch as the determination of obscenity may not be made by the officer himself.[4] However, no pre-seizure adversary hearing is required. In the case of a film, when it is seized in order to preserve it as evidence pursuant to a warrant issued after a determination of probable cause by a neutral magistrate, with an adversary hearing assured to provide a prompt judicial determination of the obscenity issue, the seizure is constitutionally permissible. Until there is a judicial determination of obscenity, the film may continue to be exhibited and if no other copy is available either a copy of it must be made from the seized film or the film itself must be returned.[5]

In *Stanford* v. *Texas*,[6] a seizure of more than 2,000 books, pamphlets, and other documents pursuant to a warrant which merely authorized the seizure of books, pamphlets, and other written instruments "concerning the Communist Party of Texas" was voided. "[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms." [7]

However, the First Amendment does not bar the issuance or execution of a warrant to search a newsroom to obtain photographs of demonstrators who had injured several policemen, although the Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedoms through limits on type, scope, and intrusiveness of the search.[8]

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and Goldberg. Justices Black and Douglas concurred on their view that the First Amendment precludes obscenity legislation, id, 213, and Justice Stewart concurred because he thought the books protected, although at least with regard to the books scrutinized by the magistrate he thought the procedure valid. Id., 214. Justices Harland and Clark dissented. ID., 215.

[4] *Roaden* v. *Kentucky*, 413 U.S. 496 (1973). *See also Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979); *Walter* v. *United States*, 447 U.S. 649 (1980).

[5] *Heller* v. *New York*, 413 U.S. 483 (1973).

[6] 379 U.S. 476 (1965).

[7] Id., 485–486. *See also Marcus* v. *Search Warrant*, 367 U.S. 717, 723 (1961).

[8] *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). *See* id., 566 (containing suggestion mentioned in text), and id., 566 (Justice Powell concurring) (more expressly

***Property Subject to Seizure.***—There has never been any doubt that search warrants could be issued for the seizure of contraband and the fruits and instrumentalities of crime.[9] But in *Gouled* v. *United States*,[10] a unanimous Court limited the classes of property subject to seizures to these three and refused to permit a seizure of "mere evidence," in this instance defendant's papers which were to be used as evidence against him at trial. The Court recognized that there was "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure,"[11] but their character as evidence rendered them immune. This immunity "was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals."[12] More evaded than followed, the "mere evidence" rule was overturned in 1967.[13] It is now settled that such evidentiary items as fingerprints,[14] blood,[15] fingernail and skin scrapings,[16] voice and handwriting exemplars,[17] conversations,[18] and other demonstrative evidence may be obtained

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adopting that position). In the Privacy Protection Act, P.L. 96-440, 94 Stat. 1879 (1980), 42 U.S.C. § 2000aa, Congress provided extensive protection against searches and seizures not only of the newsmedia and news people but as well of others engaged in disseminating to the public communications, unless there is probable cause to believe the person protecting the materials has committed or is committing the crime to which the materials relate.

[9] *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932). Of course, evidence seizable under warrant is subject to seizure without a warrant in circumstances in which warrantless searches are justified.

[10] 255 U.S. 298 (1921). *United States* v. *Lefkowitz*, 285 U.S. 452 (1932), applied the rule in a warrantless search of premises. The rule apparently never applied in case of a search of the person. *Cf. Schmerber* v. *California*, 384 U.S. 757 (1966).

[11] *Gouled* v. *United States*, 255 U.S. 298, 306 (1921).

[12] *Warden* v. *Hayden*, 387 U.S. 294, 303 (1967). *See Gouled* v. *United States*, 255 U.S. 298, 309 (1921). The holding was derived from dicta in *Boyd* v. *United States*, 116 U.S. 616, 624-629 (1886).

[13] *Warden* v. *Hayden*, 387 U.S. 294 (1967). Justice Douglas dissented, wishing to retain the rule, id., 312, and Justice Fortas with Chief Justice Warren concurred in the result while apparently wishing to retain the rule in warrant cases. Id., 310, 312.

[14] *Davis* v. *Mississippi*, 394 U.S. 721 (1969).

[15] *Schmerber* v. *California*, 384 U.S. 757 (1966).

[16] *Cupp* v. *Murphy*, 412 U.S. 291 (1973) (sustaining warrantless taking of scrapings from defendant's fingernails at the stationhouse, on the basis that it was a very limited intrusion and necessary to preserve evanescent evidence).

[17] *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973) (both sustaining a grand jury subpoenas to produce voice and handwriting exemplars; no reasonable expectation of privacy with respect to those items).

[18] *Berger* v. *New York*, 388 U.S. 41, 44 n. 2 (1967). See also id., 97 n. 4, 107-108 (Justices Harlan and White concurring), 67 (Justice Douglas).

through the warrant process or without a warrant in exigent circumstances.[19]

In *Warden* v. *Hayden*,[20] Justice Brennan for the Court cautioned that the items there seized were not " 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." This merging of Fourth and Fifth Amendment considerations derived from *Boyd* v. *United States*,[21] the first case in which the Supreme Court considered at length the meaning of the Fourth Amendment. *Boyd* was a quasi-criminal proceeding for the forfeiture of goods alleged to have been imported in violation of law and concerned a statute which authorized court orders to require defendants to produce any document which might "tend to prove any allegation made by the United States." [22] That there was a self-incrimination problem the entire Court was in agreement, but Justice Bradley for a majority of the Justices also utilized the Fourth Amendment.

While the statute did not authorize a search but instead compulsory production, the Justice concluded that the law was well within the restrictions of the search and seizure clause.[23] With this point established, the Justice relied on Lord Camden's opinion in *Entick* v. *Carrington* [24] for the proposition that seizure of items to be used as evidence only was impermissible. Justice Bradley announced that the "essence of the offence" committed by the Government against Boyd "is not the breaking of his doors, and the rummaging of his drawers," "but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extor-

[19] Another important result of *Warden* v. *Hayden* is that third parties not suspected of culpability in crime are subject to the issuance and execution of warrants for searches and seizures of evidence. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 553–560 (1978). Justice Stevens argued for a stiffer standard for issuance of warrants to nonsuspects, requiring in order to invade their privacy a showing that they would not comply with a less intrusive method, such as a subpoena. Id., 577 (dissenting).

[20] 387 U.S. 294, 302–303 (1967). Seizure of a diary was at issue in *Hill* v. *California*, 401 U.S. 797, 805 (1971), but it had not been raised in the state courts and was deemed waived.

[21] 116 U.S. 616 (1886).

[22] Act of June 22, 1874, § 5, 18 Stat. 187.

[23] *Boyd* v. *United States*, 116 U.S. 616, 622 (1886).

[24] Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).

tion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." [25]

While it may be doubtful that the equation of search warrants with subpoenas and other compulsory process ever really amounted to much of a limitation,[1] the present analysis of the Court dispenses with any theory of "convergence" of the two Amendments.[2] Thus, in *Andresen* v. *Maryland*,[3] police executed a warrant to search defendant's offices for specified documents pertaining to a fraudulent sale of land, and the Court sustained the admission of the papers discovered as evidence at his trial. The Fifth Amendment was inapplicable, the Court held, because there had been no compulsion of defendant to produce or to authenticate the documents.[4] As for the Fourth Amendment, inasmuch as the "business records" seized were evidence of criminal acts, they were properly seizable under the rule of *Warden* v. *Hayden*; the fact that they were "testimonial" in nature, records in the defendant's handwriting, was irrelevant.[5] Acknowledging that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers," the Court's response was to observe that while some "innocuous documents" would have to be examined to ascertain which papers were to be seized, authorities, just as with electronic "seizures" of conversations, "must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy." [6]

Although *Andresen* was concerned with business records, its discussion seemed equally applicable to "personal" papers, such as diaries and letters, as to which a much greater interest in privacy, which the Fourth Amendment protects, most certainly exists. The question of the propriety of seizure of such papers continues to be the subject of reservation in opinions,[7] but it is far from clear that

[25] *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

[1] E.g., *Oklahoma Press Pub Co.* v. *Walling*, 327 U.S. 186, 209–209 (1946).

[2] *Andresen* v. *Maryland*, 427 U.S. 463 (1976); *Fisher* v. *United States*, 425 U.S. 391, 405–414 (1976). *Fisher* states that "the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." Id., 408.

[3] 427 U.S. 463 (1976).

[4] Id., 470–477.

[5] Id., 478–484.

[6] Id., 482 n. 11. Minimization, as required under federal law, has not proved to be a significant limitation. *Scott* v. *United States*, 425 U.S. 917 (1976).

[7] E.g., *United States* v. *Miller*, 425 U.S. 435, 440, 444 (1976); *Fisher* v. *United States*, 425 U.S. 391, 401 (1976); *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 78–79 (1974) (Justice Powell concurring).

should the issue be presented the Court would accept any such exception.[8]

***Execution of Warrants.***—The manner of execution of warrants is generally governed by statute and rule, as to time of execution,[9] method of entry, and the like. It was a rule at common law that before an officer could break and enter he must give notice of his office, authority, and purpose and must in effect be refused admittance[10] and until recently this has been a statutory requirement in the federal system[11] and generally in the States. In *Ker* v. *California*,[12] the Court considered the rule of announcement as a constitutional requirement, although a majority there found circumstances justifying entry without announcement. Recent federal laws providing for the issuance of warrants authorizing in certain circumstances "no-knock" entries to execute warrants will no doubt present the Court with opportunities to explore the configurations of the rule of announcement.[13] A statute regulating the expiration of a warrant and issuance of another "should be liberally construed in favor of the individual."[14] Similarly, inasmuch as the existence of probable cause must be established by fresh facts, so the execution of the warrant should be done in timely fashion so as to ensure so far as possible the continued existence of probable cause.[15]

In executing a warrant for a search of premises and of named persons on the premises, police officers may not automatically

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[8] See Note, "Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments," 90 Harv. L. Rev. 945 (1977).

[9] Rule 41(c), Federal Rules of Criminal Procedure, provides, *inter alia*, that the warrant shall command its execution in the daytime, unless the magistrate "for reasonable cause shown" directs in the warrant that it be served at some other time. *See Jones* v. *United States*, 357 U.S. 493, 498–500 (1958); *Gooding* v. *United States*, 416 U.S. 430 (1974). The rule is more relaxed for narcotics cases. 21 U.S.C. § 879(a).

[10] *Semayne's Case*, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604).

[11] 18 U.S.C. § 3109. *See Miller* v. *United States*, 357 U.S. 301 (1958); *Wong Sun* v. United States, 371 U.S. 471 (1963).

[12] 374 U.S. 23 (1963). *Ker* was an arrest warrant case, but no reason appears for differentiating search warrants. Eight Justices agreed that federal standards should govern and that the rule of announcement was of constitutional stature, but they divided 4-to-4 whether entry in this case had been pursuant to a valid exception. Justice Harlan who had dissented from the federal standards issue joined the four finding a justifiable exception to carry the result.

[13] In narcotics cases, magistrates are authorized to issue "no-knock" warrants if they find there is probable cause to believe (1) the property sought may, and if notice is given, will be easily and quickly destroyed or (2) giving notice will endanger the life or safety of the executing officer or another person. 21 U.S.C. § 879(b). *See also* D.C. Code, § 23–591.

[14] *Sgro* v. *United States*, 287 U.S. 206 (1932).

[15] Ibid.

search someone else found on the premises.[16] If they can articulate some reasonable basis for fearing for their safety they may conduct a "patdown" of the person, but in order to search they must have probable cause particularized with respect to that person. However, in *Michigan* v. *Summers*,[17] the Court held that officers arriving to execute a warrant for the search of a house could detain, without being required to articulate any reasonable basis and necessarily therefore without probable cause, the owner or occupant of the house, whom they encountered on the front porch leaving the premises. Applying its intrusiveness test,[18] the Court determined that such a detention, which was "substantially less intrusive" than an arrest, was justified because of the law enforcement interests in minimizing the risk of harm to officers, facilitating entry and conduct of the search, and preventing flight in the event incriminating evidence is found.[19]

Although for purposes of execution, as for many other matters, there is little diffence between search warrants and arrest warrants, one notable difference is that the possession of a valid arrest warrant cannot authorize authorities to enter the home of a third party looking for the person named in the warrant; in order to do that, they need a search warrant signifying that a magistrate has determined that there is probable cause to believe the person named is on the premises.[20]

### Valid Searches and Seizures Without Warrants

While the Supreme Court stresses the importance of warrants and has repeatedly referred to searches without warrants as "exceptional," [1] it appears that the greater number of searches, as

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[16] *Ybarra* v. *Illinois*, 444 U.S. 85 (1979) (patron in a bar), relying on and reaffirming *United States* v. *Di Re*, 332 U.S. 581 (1948) (occupant of vehicle may not be searched merely because there are grounds to search the automobile).

[17] 452 U.S. 692 (1981).

[18] *Supra*, *pp.* 1163–1164. *See Michigan* v. *Summers*, 452 U.S. 692, 696–701 (1981).

[19] Id., 701–706. *Ybarra* was distinguished on the basis of its greater intrusiveness and the lack of sufficient connection with the premises. Id., 695 n. 4. By the time, Summers was searched, police had probable cause to do so. Id., 695. The warrant here was for contraband, id., 701, and a different rule possibly may apply with respect to warrants for other evidence.

[20] *Steagald* v. *United States*, 451 U.S. 204 (1981). An arrest warrant is a necessary and sufficient authority to enter a suspect's home to arrest him. *Payton* v. *New York*, 445 U.S. 573 (1980).

[1] E.g., *Johnson* v. *United States*, 333 U.S. 10, 14 (1948); *McDonald* v. *United States*, 335 U.S. 451, 453 (1948); *Camara* v. *Municipal Court*, 387 U.S. 523, 528–529 (1967); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352–353, 355 (1977).

well as the vast number of arrests, take place without warrants. The Reporters of the American Law Institute Project on a Model Code of Pre-Arraignment Procedure have noted "their conviction that, as a practical matter, searches without warrant and incidental to arrest have been up to this time, and may remain, of greater practical importance" than searches pursuant to warrants. "[T]he evidence on hand . . . compel the conclusion that searches under warrants have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling laws." [2] Nevertheless, "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions." [3] The exceptions are said to be "jealously and carefully drawn," [4] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." [5] The record is not all that clear and portrays a considerable amount of disagreement within the Court, but it does indicate an effort to categorize the exceptions into a generally circumscribed pattern.

***Detention Short of Arrest: Stop-and Frisk.***—Arrests are subject to the requirements of the Fourth Amendment, but the courts have followed the common law in upholding the right of police officers to take a person into custody without a warrant if they have probable cause to believe that the person to be arrested has committed a felony or has committed a misdemeanor in their presence.[6] The probable cause is, of course, the same standard required to be met in the issuance of an arrest warrant and must be satisfied as conditions stand prior to the policeman's stop, what is discovered thereafter not sufficing to establish retroactively reasonable cause.[7]

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[2] American Law Institute, *A Model Code of Pre-Arraignment Procedure*, Tent. Draft No. 3 (Philadelphia: 1970), xix.

[3] *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971), quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352-353, 358 (1977).

[4] *Jones* v. *United States*, 357 U.S. 493, 499 (1958).

[5] *McDonald* v. *United States*, 335 U.S. 451, 456 (1948). In general, with regard to exceptions to the warrant clause, conduct must be tested by the reasonableness standard enunciated by the first clause of the Amendment, *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968), and the Court's development of its privacy expectation tests, *supra*, *pp.* 1161-1163, substantially changed the content of that standard.

[6] *United States* v. *Watson*, 423 U.S. 411 (1976). *See supra*, *p.* 1164.

[7] *Henry* v. *United States*, 361 U.S. 98 (1959); *Johnson* v. *United States*, 333 U.S. 10, 16-17 (1948); *Sibron* v. *New York*, 392 U.S. 40, 62-63 (1968).

There are, however, instances when a policeman's suspicions will have been aroused by someone's conduct or manner, but there will be lacking grounds for placing such a person under arrest.[8] In *Terry* v. *Ohio,*[9] the Court almost unanimously approved an on-the-street investigation by a police officer which involved "patting down" the subject of the investigation for weapons.

The case arose when a police officer observed three individuals engaging in conduct which to him on the basis of many years of experience appeared to be the "casing" of a store for a likely armed robbery; upon approaching the men, identifying himself, and not receiving a prompt identification, the officer seized one of the men, patted the exterior of his clothes, and discovered a gun. Chief Justice Warren for the Court wrote that the Fourth Amendment was applicable to the situation, applicable "whenever a police officer accosts an individual and restrains his freedom to walk away." [10] Since the warrant clause is necessarily and practically of no application to the type of on-the-street encounter present in *Terry*, the Chief Justice continued, the question was whether the policeman's actions were reasonable. The test of reasonableness in this sort of situation is whether the police officer can point to "specific and articulable facts which, taken together with rational inferences from those facts," would lead a neutral magistrate on review to conclude that a man of reasonable caution would be warranted in believing that possible criminal behavior was at hand and that both an investigative stop and a "frisk" was required.[11] Inasmuch as the conduct witnessed by the policeman reasonably led him to believe that an armed robbery was in prospect, he was as reasonably led to believe that the men were armed and probably dangerous and that his safety required a "frisk." Because the object of the "frisk" is the discovery of dangerous weapons, "it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." [12]

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[8] "The police may not arrest upon mere suspicion but only on 'probable cause.' " *Mallory* v. *United States,* 354 U.S. 449, 454 (1957).

[9] 392 U.S. 1 (1968). Justice Douglas dissented., id., 35.

[10] Id., 16. *See* id., 16–20.

[11] Id., 20, 21, 22.

[12] Id., 23–27, 29. *See also Sibron* v. *New York,* 392 U.S. 40 (1968) (after policeman observed defendant speak with several known narcotics addicts, he approached him and placed his hand in defendant's pocket, thus discovering narcotics; impermissible, because he lacked reasonable basis for frisk and in any event his search exceeded permissible scope of weapons frisk); *Adams* v. *Williams,* 407 U.S. 143 (1972) (acting on tip that defendant was sitting in his car with narcotics and firearm, police approached, asked defendant to step out, and initiated frisk and discovered weapon when he merely rolled window down; justifiable); *Pennsylvania* v. *Mimms,*

*Terry* did not pass on a host of problems, including the grounds that could permissibly lead an officer to momentarily stop a person on the street or elsewhere and the right of the stopped individual to refuse to cooperate and the response of the police to that refusal. Since that decision, the standard for stops for investigative purposes has evolved into one of "reasonable suspicion of criminal activity." The test permits some stops and questioning without probable cause in order to allow police officers to explore the foundations of their suspicions.[13] The Court has divided as to and reached apparently inconsistent results on similar facts as to whether a police action was a stop or seizure subject to the Fourth Amendment [14] and whether if it was it was justified by a reasonable suspicion of criminal activity.[15] While it has not elaborated a set of rules governing the application of the tests, the Court has been restrictive with respect to those considerations which may cause officers to become suspicious.[16] Certainly, it has refused to permit extensive instrusions on individual privacy, in the absence of probable cause, such as transportation to the stationhouse in order to permit a more searching inquiry, such as the obtaining of fingerprints.[17]

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434 U.S. 106 (1977) (after validly stopping car, officer required defendant to get out of car, observed bulge under his jacket, and frisked him and seized weapon; while officer did not suspect driver of crime or have an articulable basis for safety fears, safety considerations justified his requiring driver to leave car).

[13] In *United States* v. *Cortez*, 449 U.S. 411 (1981), a unanimous Court attempted to capture the "elusive concept" of the basis for permitting a stop. Officers must have "articulable reasons" or "founded suspicions," derived from the totality of the circumstances. "Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id., 417–418. The inquiry is thus quite fact specific.

[14] *See United States* v. *Mendenhall*, 446 U.S. 544 (1980) (investigatory stop of disembarking airline passenger: two Justices thought there was no seizure, while three thought there was and it was justified by the officers' reasonable suspicion of criminal activity; four dissenters thought there had been a seizure unjustified by the facts known to the officers). Apparently, the entire Court concurs "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id., 554. *See* id., 560 n. 1 (Justice Powell concurring), 569–571 (Justice White dissenting), although other aspects of the dissent suggest that all police intrusions constitute seizures. *See also Brown* v. *Texas*, 443 U.S. 47, 50 (1979).

[15] *Reid* v. *Georgia*, 448 U.S. 438 (1980) (another airport stop).

[16] E.g., *Brown* v. *Texas*, 443 U.S. 47 (1979) (individual's presence in high crime area gave officer no articulable basis for suspicion with respect to him); *Delaware* v. *Prouse*, 440 U.S. 648 (1979) (reasonable suspicion that there is a license or registration violation necessary to authorize automobile stop; random stops impermissible); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975) (officers could not justify random automobile stop solely on basis of Mexican appearance of occupants). *But compare United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (halting vehicles at fixed checkpoints to question occupants as to citizenship and immigration status permissible, even if officers should act on basis of appearance of occupants).

[17] *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Dunaway* v. *New York*, 442 U.S. 200 (1979).

The necessity, therefore, is for a judicial articulation of the standards governing when seizures have occurred and the grounds for different degrees of seizures.

***Search Incident to Arrest.***—The common-law rule permitting searches of the person of an arrestee as an incident to the arrest has occasioned little controversy in the Court.[18] The dispute has centered around the scope of the search. Since it was the stated general rule that the scope of a warrantless search must be strictly tied to and justified by the circumstances which rendered its justification permissible, and since it was the rule that the justification of a search of the arrestee was to prevent destruction of evidence and to prevent access to a weapon,[19] it was argued to the court that a search of the person of the defendant arrested for a traffic offense, which discovered heroin in a crumpled cigarette package, was impermissible, inasmuch as there could have been no destructable evidence relating to the offense for which he was arrested and no weapon could have been concealed in the cigarette package. The Court held, rather, that the search need not be justified, because the initial permissible arrest left defendant with no significant expectation of privacy that the officers were bound to observe.[20]

However, the Justices have long found themselves embroiled in argument about the scope of the search incident to arrest as it concerns the area in which the person is arrested, most commonly either his premises or his vehicle. Certain early cases went both ways on the basis of some fine distinctions,[21] but in *Harris* v. *United States,*[22] the Court approved a search of a four-room apartment pursuant to an arrest under warrant for one crime and in which the search turned up evidence of another crime. A year later, in *Trupiano* v. *United States,*[23] a raid on a distillery resulted

[18] *Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Carroll* v. *United States,* 267 U.S. 132, 158 (1925); *Agnello* v. *United States,* 269 U.S. 20, 30 (1925).

[19] *Terry* v. *Ohio,* 392 U.S. 1, 19 (1968); *Chimel* v. *California,* 395 U.S. 752, 762, 763 (1969).

[20] *United States* v. *Robinson,* 414 U.S. 218, 235 (1973). *See also* id., 237–238 (Justice Powell concurring). *See also Gustafson* v. *Florida,* 414 U.S. 260 (1973) sustaining search following arrest of motorist for offense for which citation would normally have issued, leaving for another day the problem of pretextual arrests in order to obtain basis to search). If a search could be made on the spot at the time of the arrest it may be made later at the place of detention, again on the basis of diminished expectancy of privacy. *United States* v. *Edwards,* 415 U.S. 800 (1974).

[21] *Compare Marron* v. *United States,* 275 U.S. 192 (1927), *with Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931), and *United States* v. *Lefkowitz,* 285 U.S. 452 (1932).

[22] 331 U.S. 145 (1947).

[23] 334 U.S. 699 (1948)

in the arrest of a man found on the premises and a seizure of the equipment; the Court reversed the conviction because the officers had had time to obtain a search warrant and had not done so. "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest." [24] This decision was overruled in *United States* v. *Rabinowitz*,[25] in which officers arrested defendant in his one-room office pursuant to an arrest warrant and proceeded to search completely the room. The Court observed that the issue was not whether the officers had the time and opportunity to obtain a search warrant but whether the search incident to arrest was reasonable. Though *Rabinowitz* referred to searches of the area within the arrestee's "immediate control," [1] it provided no standard by which this area was to be determined and extensive searches were permitted under the rule.[2]

In *Chimel* v. *California*,[3] however, a narrower view was asserted, the primacy of warrants was again emphasized, and a standard by which the scope of searches pursuant to arrest could be ascertain was set out. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a

[24] Id., 708.

[25] 339 U.S. 56 (1950).

[1] Id., 64.

[2] *Cf. Chimel* v. *California*, 395 U.S. 752, 764–765 and n. 10 (1969). But in *Kremen* v. *United States*, 353 U.S. 346 (1957), the Court held that the seizure of the entire contents of a house and the removal of them to F.B.I. offices 200 miles away for examination, pursuant to an arrest under warrant of one of the persons found in the house, was unreasonable. In decisions contemporaneous to and subsequent to *Chimel*, applying pre-*Chimel* standards because that case was not retroactive, *Williams* v. *United States*, 401 U.S. 646 (1971), the Court has applied *Rabinowitz* somewhat restrictively. *See Von Cleef* v. *New Jersey*, 395 U.S. 814 (1969), which followed *Kremen; Shipley* v. *California*, 395 U.S. 818 (1969), and *Vale* v. *Louisiana*, 399 U.S. 30 (1970) (both involving arrests outside the house with subsequent searches of the house); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455–457 (1971). Substantially extensive searches were, however, approved in *Williams* v. *United States*, 401 U.S. 646 (1971), and *Hill* v. *California*, 401 U.S. 797 (1971).

[3] 395 U.S. 752 (1969).

drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

"There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." [4]

Although the viability of *Chimel* had been in doubt for some time as the Court refined and applied its analysis of reasonable and justifiable expectations of privacy,[5] it has in some but not all contexts survived the changed rationale. Thus, in *Mincey* v. *Arizona*,[6] it rejected a state effort to create a "homicide-scene" exception for a warrantless search of an entire apartment extending over four days. The occupant had been arrested and removed and it was true, the Court observed, that a person legally taken into custody has a lessened right of privacy in his person, but he does not have a lessened right of privacy in his entire house. And, in *United States* v. *Chadwick*,[7] emphasizing the reasonable expectation of privacy of one in his luggage or other baggage, the Court held that, once police have arrested and immobilized a suspect, validly seized bags are not subject to search without a warrant. However, still reaffirming *Chimel*, the Court in *New York* v. *Belton* [8] held that *Chimel* permitted police officers who had made a valid arrest of the occupant of a vehicle to make a contemporaneous search of the entire passenger compartment of the automobile, including containers found therein. Believing that a fairly simple rule understandable to authorities in the field was desirable, the Court ruled "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within, 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' " [9]

[4] Id., 762–763.

[5] *Supra*, *pp.* 1161–1164. *See*, e.g., *Coolidge* v. *New Hampshire*, 403 U.S. 443, 492, 493, 510 (1971), in which the four dissenters advocated the reasonableness argument rejected in *Chimel*.

[6] 437 U.S. 385 (1978). The expectancy distinction is at id., 391.

[7] 433 U.S. 1 (1977). Defendant and his luggage, a footlocker, had been removed to the police station where the search took place.

[8] 453 U.S. 454 (1981).

[9] Id., 460 (quoting *Chimel* v. *California*, 395 U.S. 752, 763 (1969)). In this particular instance, *Belton* had been removed from the automobile and handcuffed, but the

***Vehicular Searches.***—The initial decision is *Carroll* v. *United States*,[10] which permitted searches without warrants of vehicles if the officer undertaking the search has probable cause to believe that the vehicle contains things properly subject to seizure. The rationale of the *Carroll* Court was the probability that seizure will be impossible if time is taken to obtain a warrant, because of the mobility of the vehicle.[11] From this rationale flowed decisions that the vehicle must be stopped while moving or reasonably contemporaneous with movement, so that seizure of a parked automobile merely because it is movable is not within *Carroll*,[12] and that the search must be reasonably contemporaneous with the stop, so that it was not permissible to remove the vehicle to the stationhouse for a search at the convenience of the police without obtaining a warrant.[13]

However, the mobility rationale has now been supplemented with, has been replaced with in fact if not in theory, a reduced privacy rationale. Thus, "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." [14] " 'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.' " [15] The reduced expectancy conception has broadened police

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Court wished to create a general rule removed from the fact-specific nature of any one case. " 'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." Id., 460–461 n. 4.

[10] 267 U.S. 132 (1925). *Carroll* was a Prohibition-era liquor case, whereas a great number of modern automobile cases involve drugs.

[11] Id., 153. *See also Husty* v. *United States*, 282 U.S. 694 (1931); *Scher* v. *United States*, 305 U.S. 251 (1938); *Brinegar* v. *United States*, 338 U.S. 160 (1949). All of these cases involved contraband, but in *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the Court, without discussion, and over Justice Harlan's dissent, id., 55, 62, extended the rule to evidentiary searches.

[12] *Coolidge* v. *New Hampshire*, 403 U.S. 443, 458–464 (1971). This portion of the opinion had the adherence of a plurality only, Justice Harlan concurring on other grounds, and there being four dissenters. Id., 493, 504, 510, 523.

[13] *Preston* v. *United States*, 376 U.S. 364 (1964); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

[14] *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979).

[15] *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion), quoted in *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977). *See also United States* v. *Ortiz*, 422 U.S. 891, 896 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *South Dakota* v. *Opperman*, 428 U.S. 364, 367–368 (1976); *Robbins* v. *California*, 453 U.S. 420, 424–425 (1981); *United States* v. *Ross*, 456 U.S. 798, 807 n. 9 (1982).

powers to conduct automobile searches without warrants but they still must have probable cause to search a vehicle [16] and they must have some "articulable suspicion" of criminal activity in order to stop vehicles on the roads.[17] But, having probable cause, they can now remove cars to the stationhouse from the scene in order to conduct searches, without thereby being required to obtain warrants. "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." [18] On the question raised by police warrantless seizure of defendant's automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings, the Justices were evenly divided.[19] Because of the lessened expectation of privacy, inventory searches of automobiles, in order to protect public safety and the owner's property, are justifiable and any evidence of criminal activity discovered in the course of the inventories is admissible into court.[20]

It is not lawful for the police in undertaking a warrantless search of an automobile to extend the search to the passengers therein.[21] But because passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passengers and they could not object to its admission.[22] Luggage and other closed con-

[16] *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (roving patrols); *United States* v. *Ortiz*, 422 U.S. 891 (1975). *Cf. Colorado* v. *Bannister*, 449 U.S. 1 (1980).

[17] *Delaware* v. *Prouse*, 440 U.S. 648 (1979) (random stops of motorists to check driver's license and registration papers and safety features of cars); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975) (roving patrols in areas near international borders on look-out for illegal aliens). In *Prouse*, the Court cautioned that it was not precluding the States from developing methods for spot checks that involve less intrusion or that do not involve unconstrained exercise of discretion. Id., 440 U.S., 648.

[18] *Michigan* v. *Thomas*, 458 U.S. 259, 261 (1982). *See Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Texas* v. *White*, 423 U.S. 67 (1975); *United States* v. *Ross*, 456 U.S. 798, 807 n. 9 (1982).

[19] *Cardwell* v. *Lewis*, 417 U.S. 583 (1974). Justice Powell concurred on other grounds.

[20] *Cady* v. *Dombrowski*, 413 U.S. 433 (1973); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). *See also Cooper* v. *California*, 386 U.S. 58 (1967); *United States* v. *Harris*, 390 U.S. 234 (1968).

[21] *United States* v. *Di Re*, 332 U.S. 581 (1948). While *Di Re* is now an old case, it appears still to control. *See Ybarra* v. *Illinois*, 444 U.S. 85, 94-96 (1979).

[22] *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

tainers as to which there is an expectation of privacy may not be subjected to warrantless searches just because they are found in automobiles,[23] but if the police have probable cause to search the automobile, rather than just probable cause to search the containers, such containers found in the interior of the car may be searched without warrants.[24]

***Consent Searches.***—Fourth Amendment rights, like other constitutional rights, may be waived and one may consent to search of his person or premises by officers who have not complied with the Amendment.[25] The Court, however, has insisted that the burden is on the prosecution to prove the voluntariness of the consent [1] and awareness of the right of choice.[2] Reviewing courts must determine on the basis of the totality of all the circumstances whether consent has been freely given or has been coerced. Actual knowledge of the right to refuse consent is not essential to the issue of voluntariness, and therefore police are not required to acquaint a person with his rights, as through a Fourth Amendment version of *Miranda* warnings.[3] But consent will not be regarded as voluntary when the officer asserts his official status and claim of right and the occupant yields to these factors rather than makes his own determination to admit officers.[4] When consent is obtained through the deception of an undercover officer or an informer gaining admission without, of course, advising a suspect who he is, the Court has held that the suspect has simply assumed the risk that an invitee would betray him and evidence obtained through the deception is admissible.[5]

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[23] *United States* v. *Chadwick*, 433 U.S. 1 (1977); *Arkansas* v. *Sanders*, 442 U.S. 753 (1979).

[24] *United States* v. *Ross*, 456 U.S. 798 (1982) (affirming the result in *Sanders* but limiting its breadth).

[25] *Amos* v. *United States*, 255 U.S. 313 (1921); *Zap* v. *United States*, 328 U.S. 624 (1946); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

[1] *Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

[2] *Johnson* v. *United States*, 333 U.S. 10, 13 (1948).

[3] *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

[4] *Amos* v. *United States*, 255 U.S. 313 (1921); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

[5] *On Lee* v. *United States*, 343 U.S. 747 (1952); *Lopez* v. *United States*, 373 U.S. 427 (1963); *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Lewis* v. *United States*, 385 U.S. 206 (1966); *United States* v. *White*, 401 U.S. 745 (1971). *Cf. Osborn* v. *United States*, 385 U.S. 323 (1966) (prior judicial approval obtained before wired informer sent into defendant's presence). Problems may be encountered by police, however, in special circumstances. *See Messiah* v. *United States*, 377 U.S. 201 (1964); *United States* v. *Henry*, 447 U.S. 264 (1980).

Difficulty has been experienced in determining the validity, as to a suspect, of consent to search given by a third party. The test is that third party consent is sufficient if that party possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.[6]

***Border Searches.***—"That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration." [7] Asserted by the First Congress,[8] the search by government in these circumstances requires no warrant, no probable cause, not even the showing of some degree of suspicion that accompanies even investigatory stops.[9] However, inland stoppings and searches, in areas away from the borders are a different matter altogether. Thus, in *Almeida-Sanchez* v. *United States,*[10] the Court held that a warrantless stop and search of defendant's automobile on a highway some 20 miles from the border by a roving patrol lacking probable cause to believe that the vehicle contained illegal aliens violated the Fourth Amendment. While agreeing that a fixed checkpoint at which traffic moving away from border areas could be stopped probably gave motorists less cause for alarm than did roving patrols, the Court nonetheless held that the invasion of privacy entailed in a search was just as intrusive and must be justified by a showing of probable cause or consent.[11] However, when motorists

[6] *United States* v. *Matlock*, 415 U.S. 164 (1974) (valid consent by woman with whom defendant was living and sharing the bedroom searched). *See also Chapman* v. *United States*, 365 U.S. 610 (1961) (landlord); *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel desk clerk); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968); *Frazier* v. *Culp*, 394 U.S. 731 (1969) (co-tenant).

[7] *United States* v. *Ramsey*, 431 U.S. 606, 616 (1977) (sustaining search of incoming mail).

[8] Act of July 31, 1789, 1 Stat. 43. *See* 19 U.S.C. §§ 507, 1581, 1582.

[9] *Carroll* v. *United States*, 267 U.S. 132, 154 (1925); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973).

[10] 413 U.S. 266 (1973) Justices White, Blackmun, Rehnquist, and Chief Justice Burger would have found the search reasonable upon the congressional determination that searches by such roving patrols were the only effective means to police border smuggling. Id., 285. Justice Powell, concurring, argued in favor of a general, administrative warrant authority not tied to particular vehicles, much like the type of warrant suggested for noncriminal administrative inspections of homes and commercial establishments for health and safety purposes, id., 275, but the Court has not yet had occasion to pass on a specific case. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 547 n. 2, 562 n. 15 (1976).

[11] *United States* v. *Ortiz*, 422 U.S. 891 (1975).

are briefly stopped, not for purposes of a search but in order that officers may inquire into their residence status, either by asking a few questions or by checking papers, different results are achieved, so long as the stops are not truly random. Roving patrols, because the interference with Fourth Amendment rights are "modest" and the law enforcement interests served are significant, may stop vehicles for purposes of a brief inquiry, provided they are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that an automobile contains illegal aliens.[12] At fixed checkpoints, officers may halt vehicles briefly in order to question occupants, even in the absence of any individual suspicion that the particular vehicle contains illegal aliens.[13]

***"Open Fields."***—In *Hester* v. *United States*,[14] the Court held that the Fourth Amendment did not protect "open fields" and that, therefore, police searches in those areas, i.e., pastures, wooded areas, open water, vacant lots, et cetera, need not comply with the requirements of warrants and probable cause. Whether this exception survives fully after *Katz* v. *United States* [15] and its announcement that the Amendment protects "people not places" has not been resolved yet by the Court, although a privacy analysis would probably lead in most cases to the same result, with the possible exception of areas which the owner has gone to some lengths, as by fencing and posting, to keep intruders out.

***"Plain View."***—Somewhat similar in rationale is the rule that objects falling in the "plain view" of an officer who has a right to be in the position to have that view are subject to seizure without a warrant [16] or that if the officer needs a warrant or probable cause

[12] *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). Stopping of defendant's car, however, solely because the officers observed the Mexican appearance of the occupants was unjustified. Id., 886. *See also United States* v. *Cortez*, 449 U.S. 411 (1981).

[13] *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). The Court deemed the intrusion on Fourth Amendment interests to be quite limited, even if officers acted on the basis of the appearance of the occupants, whereas the elimination of the practice would deny to the Government its only practicable way to apprehend smuggled aliens and to deter the practice.

[14] 265 U.S. 57 (1924). *See also Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U.S. 86 (1974).

[15] 389 U.S. 347, 353, (1967). *Cf. Cady* v. *Dombrowski*, 413 U.S. 433, 450 (1973) (citing *Hester* approvingly).

[16] *Washington* v. *Chrisman*, 455 U.S. 1 (1982) (officer lawfully in dorm room may seize marijuana seeds and pipe in open view); *United States* v. *Santana*, 427 U.S. 38 (1976) ("plain view" justification for officers to enter home to arrest after observing defendant standing in open doorway); *Harris* v. *United States*, 390 U.S. 234 (1968) (officer who opened door of impounded automobile and saw evidence in plain view properly seized it); *Ker* v. *California*, 374 U.S. 23 (1963) (officers entered

to search and seize his lawful observation will provide grounds therefor.[17]

**Electronic Surveillance and the Fourth Amendment**

***The Olmstead Case.***—With the invention of the microphone, the telephone, and the dictograph recorder, it became possible for one to "eavesdrop" with much greater secrecy and expediency. Inevitably, the use of electronic devices in law enforcement was challenged before the Court and in 1928 there came before the Justices for review the convictions of several members of an organized bootlegging ring, the convictions having been obtained for the most part on the basis of evidence gained through taps on telephone wires which were illegal under state law. On a five-to-four vote, the Court held that wiretapping was not within the confines of the Fourth Amendment.[1] Chief Justice Taft, writing the opinion of the Court, relied on two lines of argument for the conclusion. First, inasmuch as the Amendment was designed to protect one's property interest in his premises, there was no search so long as there was no physical trespass on premises owned by or under the control of defendants or any of them. Second, all the evidence obtained had been secured by hearing and that only and the interception of a conversation could not qualify as a seizure, for the Amendment referred only to the seizure of tangible items. Furthermore, the violation of the state law did not render the evidence excludible, since the exclusionary rule operated only on evidence seized in violation of the Constitution, not of a statute.[2]

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premises without warrant to make arrest because of exigent circumstances seized evidence in plain sight). *Cf. Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-473 (1971), and id., 510 (Justice White dissenting).

[17] *Steele* v. *United States*, 267 U.S. 498 (1925) (officers observed contraband in view through open doorway; had probable cause to procure warrant). *Compare Taylor* v. *United States*, 286 U.S. 1 (1932) (officers observed contraband in plain view in garage, warrantless entry to seize was unconstitutional).

[1] *Olmstead* v. *United States*, 277 U.S. 438 (1928).

[2] Among the dissenters were Justice Holmes, who characterized "illegal" wiretapping as "dirty business," id., 470, and Justice Brandeis, who contributed to his opinion the famous peroration about government as "the potent, the omnipresent, teacher" which "breeds contempt for law" among the people by its example. Id., 485. More relevant here was his lengthy argument rejecting the premises of the majority, an argument which is now the law of the land. (1) "To protect [the right to be left alone], every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Id., 478. (2) "There is, in essence, no difference between the sealed letter and the private telephone message. . . . The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject . . . may be overheard." Id., 475-476.

***Federal Communications Act.***—Six year after the decision in the *Olmstead* case, Congress enacted the Federal Communications Act and included in § 605 of the Act a broadly worded proscription on which the Court seized to place some limitation upon governmental wiretapping.[3] Thus, in *Nardone* v. *United States*,[4] the Court held that wiretapping by federal officers could violate § 605 if the officers both intercepted and divulged the contents of the conversation they overheard and that testimony in court would constitute a form of prohibited divulgence. Such evidence was therefore excluded, although wiretapping was not illegal under the Court's interpretation if the information was not used outside the governmental agency. Because § 605 applied to intrastate as well as interstate transmissions,[5] there was no question about the applicability of the ban to state police officers, but the Court declined to apply either the statute or the due process clause to require the exclusion of such evidence from state criminal trials.[6] State efforts to legalize wiretapping pursuant to court orders were held by the Court to be precluded by the fact that Congress in § 605 had intended to occupy the field completely to the exclusion of the States.[7]

***Nontelephonic Electronic Surveillance.***—The trespass rationale of *Olmstead* was utilized in cases dealing with "bugging" of premises rather than with tapping of telephones. Thus, in *Goldman* v. *United States*,[8] the Court found no Fourth Amendment violation

[3] 48 Stat. 1103 (1934), providing, *inter alia*, that " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, purport, effect, or meaning of such intercepted communication to any person." Nothing in the legislative history indicated what Congress had in mind in including this language. The section, which appeared at 47 U.S.C. § 605, was rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803, so that the "regulation of the interception or wire or oral communications in the future is to be governed by" the provisions of Title III. S. Rept. No. 1097, 90th Congress, 2d sess. (1968), 107–108.

[4] 302 U.S. 379 (1937). Derivative evidence, that is, evidence discovered as a result of information obtained through a wiretap, was similarly inadmissible, *Nardone* v. *United States*, 308 U.S. 338 (1939), although the testimony of witnesses might be obtained through the exploitation of wiretap information. *Goldstein* v. *United States*, 316 U.S. 114 (1942). Eavesdropping on a conversation on an extension telephone with the consent of one of the parties did not violate the statute. *Rathbun* v. *United States*, 355 U.S. 107 (1957).

[5] *Weiss* v. *United States*, 308 U.S. 321 (1939).

[6] *Schwartz* v. *Texas*, 344 U.S. 199 (1952). At this time, evidence obtained in violation of the Fourth Amendment could be admitted in state courts as well. *Wolf* v. *Colorado*, 338 U.S. 25 (1949). Although *Wolf* was overruled by *Mapp* v. *Ohio*, 367 U.S. 643 (1961), it was some seven years later and after wiretapping itself had been made subject to the Fourth Amendment that *Schwartz* was overruled in *Lee* v. *Florida*, 392 U.S. 378 (1968).

[7] *Benanti* v. *United States*, 355 U.S. 96 (1957).

[8] 316 U.S. 129 (1942).

when a listening device was placed against a party wall so that conversations were overheard on the other side. But when officers drove a "spike mike" into a party wall until it came into contact with a heating duct and thus broadcast defendant's conversations, the Court determined that the trespass brought the case within the Amendment.[9] In so holding, the Court, without alluding to the matter, overruled in effect the second rationale of *Olmstead*, the premise that conversations could not be seized.

***The Berger and Katz Cases.***—In *Berger* v. *New York*,[10] the Court confirmed the obsolesence of the alternative holding in *Olmstead* that conversations could not be seized in the Fourth Amendment sense.[11] *Berger* held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of "reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded." For the five-Justice majority, Justice Clark discerned several constitutional defects in the law. "First, . . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described.

"The purpose of the probable-cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded . . . .' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized . . . . Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided.

[9] *Silverman* v. *United States*, 365 U.S. 505 (1961). *See also Clinton* v. *Virginia*, 377 U.S. 158 (1964) (physical trespass found with regard to amplifying device stuck in a partition wall with a thumb tack).

[10] 388 U.S. 41 (1967).

[11] Id., 50–53.

During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits . . . extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is 'in the public interest.' . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized . . . . Finally, the statute's precedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." [12]

Both Justices Black and White in dissent accused the *Berger* majority of so construing the Fourth Amendment that no wiretapping-eavesdropping statute could pass constitutional scrutiny,[13] but in *Katz* v. *United States*,[14] the Court in an opinion by one of the *Berger* dissenters, Justice Stewart, modified some of its language and pointed to Court approval of some type of statutorily-authorized electronic surveillance. Just as *Berger* had confirmed that one rationale of the *Olmstead* decision, the inapplicability of "seizure" to conversations, was no longer valid, *Katz* disposed of the other rationale. In the latter case, officers had affixed a listening device to the outside wall of a telephone booth regularly used by Katz and activated it each time he entered; since there has been no physical trespass into the booth, the lower courts held the Fourth Amendment not relevant. The Court disagreed, saying that "once it is rec-

[12] Id., 58–60. Justice Stewart concurred because he thought that the affidavits in this case had not been sufficient to show probable cause but he thought the statute constitutional in compliance with the Fourth Amendment. Id., 68. Justice Black dissented, arguing that the Fourth Amendment was not applicable to electronic eavesdropping but that in any event the "search" authorized by the statute was reasonable. Id., 70. Justice Harlan dissented, arguing that the statute with its judicial gloss was in compliance with the Fourth Amendment. Id. 89. Justice White thought both the statute and its application in this case were constitutional. Id., 107.

[13] Id., 71, 113.

[14] 389 U.S. 347 (1967).

ognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." [15] Because the surveillance of Katz's telephone calls had not been authorized by a magistrate, it was invalid; however, the Court thought that "it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." [16] The notice requirement, which had loomed in *Berger* as an obstacle to successful electronic surveillance, was summarily disposed of.[17] Finally, Justice Stewart observed that it was unlikely that electronic surveillance would ever come under any of the established exceptions so that it could be conducted without prior judicial approval.[18]

Following *Katz*, Congress enacted in 1968 a comprehensive statute authorizing federal officers and permitting state officers pursuant to state legislation complying with the federal law to seek

[15] Id., 353. "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." Ibid.

[16] Id., 354. The "narrowly circumscribed" nature of the surveillance was made clear by the Court in the immediately preceding passage. "[The Government agents] did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself." Ibid. For similar emphasis upon precision and narrow circumscription, *see Osborn* v. *United States*, 385 U.S. 323, 329–330 (1966).

[17] "A conventional warrant ordinarily serves to notify the suspect of an intended search . . . . In omitting any requirement of advance notice, the federal court . . . simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." 389 U.S., 355 n. 16.

[18] Id., 357–358. Justice Black dissented, feeling that the Fourth Amendment applied only to searches for and seizures of tangible things and not conversations. Id., 364.

warrants for electronic surveillance to investigate violations of prescribed classes or criminal legislation.[19] The Court has not yet had occasion to pass on the federal statute and to determine whether its procedures and authorizations comport with the standards sketched in *Osborn*, *Berger*, and *Katz* or whether those standards are somewhat more flexible than they appear to be on the faces of the opinions.[20]

***Warrantless "National Security" Electronic Surveillance.***—In *Katz* v. *United States*,[21] Justice White sought to preserve for a future case the possibility that in "national security cases" electronic surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval. The Executive Branch then asserted the power to wiretap and to "bug" in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of "inherent" presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a "reasonable" search and seizure and therefore valid under the Fourth Amendment. Unanimously, the Court held that at least in cases of domestic subversive investigations compliance with the warrant provisions of the Fourth Amendment was required.[22] Whether or not a search was reasona-

[19] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, 18 U.S.C. §§ 2510-2520.

[20] The Court has interpreted the statute several times without reaching the constitutional questions. *United States* v. *Kahn*, 415 U.S. 143 (1974); *United States* v. *Giordano*, 416 U.S. 505 (1974); *United States* v. *Chavez*, 416 U.S. 562 (1974); *United States* v. *Donovan*, 429 U.S. 413 (1977); *Scott* v. *United States*, 436 U.S. 128 (1978); *Dalia* v. *United States*, 441 U.S. 238 (1979). See also *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *United States* v. *Caceres*, 440 U.S. 741 (1979). *Dalia supra*, did pass on one constitutional issue, whether the Fourth Amendment mandated specific warrant authorization for a surreptitious entry to install an authorized "bug." *And see Smith* v. *Maryland*, 442 U.S. 735 (1979) (no reasonable expectation of privacy in numbers dialed on one's telephone, so Fourth Amendment does not require a warrant to install "pen register" to record those numbers).

[21] 389 U.S. 347, 363-364 (1967) (concurring opinion). Justices Douglas and Brennan rejected the suggestion. Id., 359-360 (concurring opinion). When it enacted its 1968 electronic surveillance statute, Congress alluded to the problem in ambiguous fashion, 18 U.S.C. § 2511(3), which the Court subsequently interpreted as having expressed no congressional position at all. *United States* v. *United States District Court*, 407 U.S. 297, 302-308 (1972).

[22] *United States* v. *United States District Court*, 407 U.S. 297 (1972); Chief Justice Burger concurred in the result and Justice White concurred on the ground that the 1968 law required a warrant in this case and therefore did not reach the constitutional issue. Id., 340. Justice Rehnquist did not participate. Justice Powell carefully noted that the case required "no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." Id., 308.

ble, wrote Justice Powell for the Court, was a question which derived much of its answer from the warrant clause; except in a few narrowly circumscribed classes of situations, only those searches conducted pursuant to warrants were reasonable. The Government's duty to preserve the national security did not override the gurarantee that before government could invade the privacy of its citizens it must present to a neutral magistrate evidence sufficient to support issuance of a warrant authorizing that invasion of privacy.[23] This protection was even more needed in "national security cases" than in cases of "ordinary" crime, the Justice continued, inasmuch as the tendency of government so often is to regard opponents of its policies as a threat and hence to tread in areas protected by the First Amendment as well as by the Fourth.[24] Rejected also were arguments that the same Fourth Amendment requirements should not apply to the gathering of general intelligence information as to searches for specific evidence of specific crimes[25] and arguments that courts could not appreciate the intricacies of investigations in the area of national security nor preserve the secrecy which is required.

The question of the scope of the President's constitutional powers, if any, remains judicially unsettled.[26] Congress has acted,

[23] The case contains a clear suggestion that the Court would approve a congressional provision for a different standard of probable cause in national security cases. Id., 323. "We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crimes specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some future crisis or emergency. . . .

". . . Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen right deserving protection . . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases; . . . ."

[24] Id., 313-324.

[25] Id., 320.

[26] *See United States* v. *Butenko*, 494 F.2d 593 (C.A. 3), *cert. den.*, 419 U.S. 881 (1974); *Zweibon* v. *Mitchell*, 516 F.2d 594 (C.A.D.C. 1975), *cert. den.*, 425 U.S. 944 (1976), *appeal after remand* 565 F.2d 742 (C.A.D.C. 1977), *on remand*, 444 F. Supp. 1296 (D.C.D.C. 1978), *aff'd. in part, rev'd. in part*, 606 F.2d 1172 (C.A.D.C. 1979), *cert. den.*, 453 U.S. 912 (1981); *Smith* v. *Nixon*, 606 F.2d 1183 (C.A.D.C. 1979), *cert. den.*, 453 U.S. 912 (1981); *United States* v. *Truong Dinh Hung*, 629 F.2d 908 (C.A. 4, 1980), *after remand*, 667 F.2d 1105 (C.A. 4, 1981); *Halkin* v. *Helms*, 690 F.2d 977 (C.A.D.C. 1982).

however, providing for a special court to hear requests for warrants for electronic surveillance in foreign intelligence situations, and permitting the President to authorize warrantless surveillance to acquire foreign intelligence information provided that the communications to be monitored are exclusively between or among foreign powers and there is no substantial likelihood any "United States person" will be overheard.[27]

**Enforcing the Fourth Amendment: The Exclusionary Rule**

A right to be free from unreasonable searches and seizures is declared by the Fourth Amendment, but how one is to translate into concrete terms the guarantee is not specified. Several possible methods of enforcement have been suggested over time; however, the Supreme Court has settled, not without dissent, on only one as an effective means to make real the right.

***Alternatives to the Exclusionary Rule.***—Theoretically, there are several alternatives to the exclusionary rule. An illegal search and seizure may be criminally actionable and officers undertaking one thus subject to prosecution, but the examples when officers are criminally prosecuted for overzealous law enforcement are extremely rare.[1] A policeman who makes an illegal search and seizure is subject to internal departmental discipline which may be backed up in the few jurisdictions which have adopted them by the oversight of and participation of police review boards, but again the examples of disciplinary actions are exceedingly rare.[2] Persons who have been illegally arrested or who have had their privacy invaded will usually have a tort action available under state statutory or common law.

Moreover, police officers acting under color of state law who violate a person's Fourth Amendment rights are subject to a suit for damages and other remedies[3] under a civil rights statute in

[27] Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1797, 50 U.S.C. §§ 1801-1811, *See United States* v. *Belfield*, 692 F.2d 141 (C.A.D.C. 1982) (upholding constitutionality of disclosure restrictions in Act).

[1] Edwards, "Criminal Liability for Unreasonable Searches and Seizures," 41 Va. L. Rev. 621 (1955).

[2] Goldstein, "Police Policy Formulation: A Proposal for Improving Police Performance," 65 Mich. L. Rev. 1123 (1967).

[3] If there are continuing and recurrent violations, federal injunctive relief would be available. *Cf. Lankford* v. *Gelston*, 364 F.2d 197 (C.A. 4, 1966); *Wheeler* v. *Goodman*, 298 F. Supp. 935 (preliminary injunction), 306 F. Supp. 58 (permanent injunction) (D.C.W.D.N.C. 1969), *vacated and remanded for reconsideration on jurisdictional grounds*, 401 U.S. 987 (1971).

federal courts.[4] While federal officers and others acting under color of federal law are not subject jurisdictionally to this statute, the Supreme Court has recently held that a right to damages for violation of Fourth Amendment rights arises by implication out of the guarantees secured and that this right is enforceable in federal courts.[5] While a damage remedy might be made more effectual,[6] a number of legal and practical problems stand in the way.[7] Police officers have available to them the usual common-law defenses, most important of which is the claim of good faith which would relieve them of accountability while it would not excuse a Fourth Amendment violation itself.[8] On the practical side, persons subjected to illegal arrests and searches and seizures are more often than not generally disreputable persons whom juries would be generally unsympathetic toward, or they are indigent and unable to bring suit, or they fall into both classes. The result, therefore, is that the Court has emphasized exclusion of evidence seized in subsequent criminal trials as the only effective enforcement method, even though this method only touches upon examples of illegal arrests and searches and seizures which eventuate in finding of something criminally relevant which is followed by a criminal prosecution.

***Development of the Exclusionary Rule.***—Exclusion of evidence as a remedy for Fourth Amendment violations found its beginning in *Boyd* v. *United States*,[9] which, as was noted above, involved not a search and seizure but a compulsory production of business papers which the Court likened to a search and seizure. Further, the Court analogized the Fifth Amendment's self-incrimination provision to the Fourth Amendment's protections to derive a rule which required exclusion of the compelled evidence because the defendant had been compelled to incriminate himself by producing

[4] 42 U.S.C. § 1983 (1964). *See Monroe* v. *Pape*, 365 U.S. 167 (1961). In some circumstances, the officer's liability may be attributed to the municipality. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978).

[5] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The possibility had been hinted at in *Bell* v. *Hood*, 327 U.S. 678 (1946).

[6] *See*, e.g., Chief Justice Burger's dissent in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411, 422-424 (1971), which suggests suit against the Government in a special tribunal and the abolition of the exclusionary rule.

[7] Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493 (1955).

[8] This is the rule in actions under 42 U.S.C. § 1983, *Pierson* v. *Ray*, 386 U.S. 547 (1967), and on remand in *Bivens* the Court of Appeals promulgated the same rule to govern trial of the action. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (C.A. 2, 1972).

[9] 116 U.S. 616 (1886).

it.[10] The *Boyd* case was closely limited to its facts and an exclusionary rule based on Fourth Amendment violations was rejected by the Court a few years later, with the Justices adhering to the common-law rule that evidence was admissible however acquired.[11]

Nevertheless, ten years later the common-law view was itself rejected and an exclusionary rule propounded.[12] Weeks had been convicted on the basis of evidence seized from his home in the course of two warrantless searches; some of the evidence consisted of private papers like those sought to be compelled in the *Boyd* case. Unanimously, the Court held that the evidence should have been excluded by the trial court. The Fourth Amendment, Justice Day said, placed on the courts as well as on law enforcement officers restraints on the exercise of power compatible with its guarantees. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[13] The ruling is ambiguously based but seems to have had as its foundation an assumption that admission of illegally-seized evidence would itself violate the Amendment. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and

[10] "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." Id., 633. It was this utilization of the Fifth Amendment's clearly required exclusionary rule, rather than one implied from the Fourth, on which Justice Black relied and absent a Fifth Amendment self-incrimination violation he did not apply such a rule. *Mapp* v. *Ohio*, 367 U.S. 643, 661 (1961) (concurring opinion); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 493, 496-500 (1971) (dissenting opinion). The theory of a "convergence" of the two Amendments has now been disavowed by the Court. *Supra*, pp. 1178-1179.

[11] *Adams* v. *New York*, 192 U.S. 585 (1904). Since the case arose from a state court and concerned a search by state officers, it could have been decided simply by holding that the Fourth Amendment was inapplicable. *See National Safe Deposit Co.* v. *Stead*, 232 U.S. 58, 71 (1914).

[12] *Weeks* v. *United States*, 232 U.S. 383 (1914).

[13] Id., 392.

seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeaver and suffering which have resulted in their embodiment in the fundamental law of the land." [14]

Because the Fourth Amendment did not restrict the actions of state officers,[15] there was no question about the application of an exclusionary rule in state courts [16] as a mandate of federal consitutional policy.[17] But in *Wolf* v. *Colorado*,[18] a unanimous Court held that freedom from unreasonable searches and seizures was such a fundamental right as to be protected against state violations by the due process clause of the Fourteenth Amendment; [19] however, the Court held that the right thus guaranteed commanded no exclusionary rule be applied in the state courts as it was applied in the federal courts, since there were other means to observe and enforce the right. "Granting that in practice the exclusion of evidence may

[14] Id., 393.

[15] *Smith* v. *Maryland*, 18 How. (59 U.S.) 71, 76 (1855); *National Safe Deposit Co.* v. *Stead*, 232 U.S. 58, 71 (1914). *See supra, p.* 950.

[16] The history of the exclusionary rule in the state courts was surveyed by Justice Frankfurter in *Wolf* v. *Colorado*, 338 U.S. 25, 29, 33–38 (1949). The matter was canvassed again in *Elkins* v. *United States*, 364 U.S. 206, 224–232 (1960).

[17] During the period in which the Constitution did not impose any restrictions on state searches and seizures, the Court permitted the introduction in evidence in federal courts of items seized by state officers which had they been seized by federal officers would have been inadmissible, *Weeks* v. *United States*, 232 U.S. 383, 398 (1914), so long as no federal officer participated in the search, *Byars* v. *United States*, 273 U.S. 28 (1927), or the search was not made on behalf of federal law enforcement purposes. *Gambino* v. *United States*, 275 U.S. 310 (1927). This rule became known as the "silver platter doctrine" after the phrase coined by Justice Frankfurter in *Lustig* v. *United States*, 338 U.S. 74, 78–79 (1949); "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." In *Elkins* v. *United States*, 364 U.S. 206 (1960), the doctrine was discarded by a five-to-four majority which held that inasmuch as *Wolf* v. *Colorado*, 338 U.S. 25 (1949), had made state searches and seizures subject to federal constitutional restrictions through the Fourteenth Amendment's due process clause the "silver platter doctrine" was no longer constitutionally viable. During this same period, since state courts were free to admit any evidence no matter how obtained, evidence illegally seized by federal officers could be used in state courts, *Wilson* v. *Schnettler*, 365 U.S. 381 (1961), although the Supreme Court ruled out such a course if the evidence had first been offered in a federal trial and had been suppressed. *Rea* v. *United States*, 350 U.S. 214 (1956).

[18] 338 U.S. 25 (1949).

[19] "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." Id., 27–28.

be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." [20]

It developed, however, that the Court had not absolutely vested in the States total discretion in regard to the admissibility of evidence, as the Court proceeded under the due process clause to evaluate the methods by which the evidence had been obtained. Thus, in *Rochin* v. *California,*[21] evidence of narcotics possession had been obtained by forcible administration of an emetic to defendant at a hospital after officers had been unsuccessful in preventing him from swallowing certain capsules. The evidence, said Justice Frankfurter for the Court, should have been excluded because the police methods were too objectionable. "This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities. They are methods too close to the rack and screw." [22] The *Rochin* standard was limited in *Irvine* v. *California,*[23] in which defendant was convicted of bookmaking activities on the basis of evidence secured by police who repeatedly broke into his house and concealed electronic gear to broadcast every conversation in the house. Justice Jackson's plurality opinion asserted that *Rochin* had been occasioned by the element of brutality there and that while the police conduct in *Irvine* was blatantly legal the admissibility of the evidence was governed by *Wolf* which should be consistently applied for purposes of guidance to state courts. The Justice also entertained considerable doubts about the efficacy of the exclusionary rule.[24] *Rochin*

[20] Id., 31. Justices Douglas, Murphy, and Rutledge dissented with regard to the issue of the exclusionary rule and Justice Black concurred.

[21] 342 U.S. 165 (1952). The police had initially entered defendant's house without a warrant. Justices Black and Douglas concurred in the result on self-incrimination grounds.

[22] Id., 172

[23] 347 U.S. 128 (1954).

[24] Id., 134–138. Justice Clark, concurring, announced his intention to vote to apply the exclusionary rule to the States when the votes were available. Id., 138. Justices Black and Douglas dissented on self-incrimination grounds, id., 139, and Justice Douglas continued to urge the application of the exclusionary rule to the States. Id., 149. Justices Frankfurter and Burton dissented on due process grounds, arguing the relevance of *Rochin*. Id., 142.

emerged as the standard, however, in a later case in which the Court sustained the admissibility of the results of a blood test administered while defendant was unconscious in a hospital following a traffic accident, the Court observing the routine nature of the test and the minimal intrusion into bodily privacy.[25]

Then, in *Mapp* v. *Ohio*,[1] the Court held that the exclusionary rule should and did apply to the States. It was "logically and constitutionally necessary," wrote Justice Clark for the majority, "that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right" to be secure from unreasonable searches and seizures. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." [2] Further, the Court then held that since illegally-seized evidence was to be excluded from both federal and state courts, the standards by which the question of legality was to be determined should be the same, regardless whether the court in which the evidence was offered was state or federal.[3]

***The Foundations of the Exclusionary Rule.***—Important to determination of such questions as the application of the exclusionary rule to the States and the ability of Congress to abolish or to limit it is the fixing of the constitutional source and the basis of the rule. For some time, it was not clear whether the exclusionary rule was derived from the Fourth Amendment, from some union of the Fourth and Fifth Amendments, or from the Court's supervisory power over the lower federal courts. It will be recalled that in *Boyd* [4] the Court fused the search and seizure clause with the provision of the Fifth Amendment protecting against compelled self-incrimination to reach its results. *Weeks* v. *United States*,[5] though

[25] *Breithaupt* v. *Abram*, 352 U.S. 432 (1957). Chief Justice Warren and Justices Black and Douglas dissented. Though a due process case, the results of the case have been reaffirmed directly in a Fourth Amendment case. *Schmerber* v. *California*, 384 U.S. 757 (1966).

[1] 367 U.S. 643 (1961).

[2] Id., 655–656. Justice Black concurred, doubting that the Fourth Amendment itself compelled adoption of an exclusionary rule but relying on the Fifth Amendment for authority. Id., 661. Justice Stewart would not have reached the issue but would have reversed on other grounds, id., 672, while Justices Harlan, Frankfurter, and Whittaker dissented, preferring to adhere to *Wolf*. Id., 672. Justice Harlan advocated the overruling of *Mapp* down to the conclusion of his service on the Court, *Coolidge v. New Hampshire*, 403 U.S. 443 490 (1971) (concurring opinion).

[3] *Ker* v. *California*, 374 U.S. 23 (1963).

[4] *Boyd* v. *United States*, 116 U.S. 616 (1886).

[5] 232 U.S. 383 (1914). Defendant's room had been searched and papers seized by officers acting without a warrant. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Id., 393.

the Fifth Amendment was mentioned, seemed to be clearly based on the Fourth Amendment. Nevertheless, in opinions following *Weeks* the Court clearly identified the basis for the exclusionary rule as the self-incrimination clause of the Fifth Amendment.[6] Then in *Mapp* v. *Ohio*,[7] the Court tied the rule strictly to the Fourth Amendment, finding exclusion of evidence seized in violation of the Amendment to be the "most important constitutional privilege" of the right to be free from unreasonable searches and seizures, finding that the rule was "an essential part of the right of privacy" protected by the Amendment.

"This Court has ever since [*Weeks* was decided in 1914] required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and *constitutionally required*—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.' " [8] It was a necessary step in the application of the rule to the States to find that the rule was of constitutional origin rather than a result of an exercise of the Court's supervisory power over the lower federal courts, inasmuch as the latter could not constitutionally be extended to the state courts.[9] In fact, Justice Frankfurter seemed to find the exclusion-

[6] E.g., *Gouled* v. *United States*, 255 U.S. 298, 306, 307 (1921); *Amos* v. *United States*, 255 U.S. 313, 316 (1921); *Agnello* v. *United States*, 269 U.S. 20, 33–34 (1925); *McGuire* v. *United States*, 273 U.S. 95, 99 (1927). In *Olmstead* v. *United States*, 277 U.S. 438, 462 (1928), Chief Justice Taft ascribed the rule both to the Fourth and the Fifth Amendments, while in dissent Justices Holmes and Brandeis took the view that the Fifth Amendment was violated by the admission of evidence seized in violation of the Fourth. Id., 469, 478–479. Justice Black was the only modern proponent of this view. *Mapp* v. *Ohio*, 367 U.S. 643, 661 (1961) (concurring opinion); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 493, 496–500 (1971) (dissenting opinion). *See*, however, Justice Clark's plurality opinion in *Ker* v. *California*, 374 U.S. 23, 30 (1963), in which he brought up the self-incrimination clause as a supplementary source of the rule, which he had discarded in *Mapp* v. *Ohio*, *supra*.

[7] 367 U.S. 643, 656 (1961). *Wolf* v. *Colorado*, 338 U.S. 25, 28 (1949), ascribed the rule to the Fourth Amendment exclusively also.

[8] *Mapp* v. *Ohio*, 367 U.S. 643, 648 (1961) (emphasis supplied).

[9] An example of an exclusionary rule not based on constitutional grounds may be found in *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), in which the Court enforced a requirement that arrestees be promptly presented to a magistrate by holding that incriminating admissions obtained during the period beyond a reasonable time for presentation would be inadmissible. The rule was not extended to the States, *cf. Culombe* v. *Connecticut*, 367 U.S. 568, 598–602 (1961), but the Court's resort to the self-incrimination clause in reviewing confessions made such application irrelevant in most cases in any event. For an example of a transmutation of a supervisory rule into a constitutional rule, *see McCarthy* v. *United States*, 394 U.S. 459 (1969), and *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

ary rule to be based on the Court's supervisory powers in *Wolf* v. *Colorado*[10] in declining to extend the rule to the States. That the rule is of constitutional origin *Mapp* establishes but this does not necessarily establish that it is immune to legislative statutory revision.

Suggestions appear in a number of cases, including *Weeks*, to the effect that admission of illegally-seized evidence is itself unconstitutional.[11] These were often combined with a rationale of the rule which emphasize "judicial integrity" as a reason to reject the proffer of such evidence.[12] Yet the Court permitted such evidence to be introduced into trial courts, when the defendant lacked "standing" to object to the search an seizure which produced the evidence[13] or when the search took place before the announcement of the decision extending the exclusionary rule to the States.[14] At these times, the Court turned to the "basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[15] "*Mapp* had as its prime

[10] *Weeks* "was not derived from the explicit requirements of the Fourth Amendment; . . . The decision was a matter of judicial implication." 338 U.S. 25, 28 (1949). Justice Black was more explicit. "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Id., 39–40. He continued to adhere to the supervisory power basis in strictly search-and-seizure cases, *Berger* v. *New York*, 388 U.S. 41, 76 (1967) (dissenting), except where self-incrimination values were present. *Mapp* v. *Ohio*, 367 U.S. 643, 661 (1961) (concurring). And *see* id., 678 (Justice Harlan dissenting); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960) (Justice Stewart for the Court).

[11] "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution . . ." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914). In *Mapp* v. *Ohio*, 367 U.S. 643, 655, 657 (1961), Justice Clark maintained that 'the Fourth Amendment include[s] the exclusion of the evidence seized in violation of its provisions" and that it, and the Fifth Amendment with regard to confessions "assures . . . that no man is to be convicted on unconstitutional evidence." In *Terry* v. *Ohio*, 392 U.S. 1, 12, 13 (1968), Chief Justice Warren wrote: "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . . A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence . . . ."

[12] *Elkins* v. *United States*, 364 U.S. 206, 222–223 (1960); *Mapp* v. *Ohio*, 367 U.S. 643, 660 (1961). *See McNabb* v. *United States*, 318 U.S. 332, 339–340 (1943).

[13] *Infra*, *pp.* 1210–1212.

[14] *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

[15] *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." [16]

***The Critics of the Exclusionary Rule.***—For as long as we have had the exclusionary rule, critics have attacked it, challenged its premises, disputed its morality.[17] On the present Court, there are at least five Justices who have stated a desire either to abolish it or to sharply curtail its operation.[18] To this end, numerous recent opinions reject all doctrinal bases for the rule, save the purpose of deterring police violations of the Fourth Amendment.[19] At the same time, these opinions enunciate strong doubts about the efficacy of the rule as a deterrent, and oppose public interest values in effective law enforcement and public safety to the purported benefit justifying retention and application of the rule.[20] Thus, the

[16] *Linkletter* v. *Walker*, 381 U.S. 618, 636–637 (1965). The Court advanced other reasons for its decision as well. Id., 636–640.

[17] Among the early critics were Judge Cardozo, *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (criminal will go free "because the constable has blundered"); and Dean Wigmore. 8 J. Wigmore, *A Treatise on the Anglo-American System of Evidence* (Boston: 3d ed. 1940), §§ 2183–2184. For extensive discussion of criticism and support, with citation to the literature, see 1 W. LaFave, *Search and Seizure—A Treatise on the Fourth Amendment* (St. Paul: 1978 & ann. supps.), § 1.2.

[18] E.g., *Stone* v. *Powell*, 428 U.S. 465, 496 (1976) (Chief Justice Burger: rule ought to be discarded now, rather than wait for a replacement as he argued earlier); id., 536 (Justice White: modify rule to admit evidence seized, though illegally, in good faith by officers), *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 261 (1973) (Justice Powell); *Brown* v. *Illinois*, 422 U.S. 590, 609 (1975) (Justice Powell); *Robbins* v. *California*, 453 U.S. 420, 437 (1981) (Justice Rehnquist); *California* v. *Minjares*, 443 (1971) (Justice Blackmun joining Justice Black's dissent that "the Fourth Amendment supports no exclusionary rule").

[19] E.g., *United States* v. *Janis*, 428 U.S. 433, 446 (1976) (deterrence is the "prime purpose" of the rule, "if not the sole one."); *United States* v. *Calandra*, 414 U.S. 338, 347–348; (1974) *United States* v. *Peltier*, 422 U.S. 531, 536–539 (1975); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *Rakas* v. *Illinois*, 439 U.S. 128, 134 n. 3, 137–138 (1978); *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 n. 3 (1979). Thus, admission of the fruits of an unlawful search or seizure "work[s] no new Fourth Amendment wrong," the wrong being "fully accomplished by the unlawful search or seizure itself," *United States* v. *Calandara*, *supra*, 354, and the exclusionary rule does not "cure the invasion of the defendant's rights which he has already suffered." *Stone* v. *Powell*, *supra*, 540 (Justice White dissenting). "Judicial integrity" is not infringed by the mere admission of evidence seized wrongfully. "[T]he courts must not commit or encourage violations of the Constitution," and the integrity issue is answered by whether exclusion would deter violations by others. *United States* v. *Janis*, *supra*, 458 n. 35; *United States* v. *Calandra*, *supra*, 347, 354; *United States* v. *Peltier*, *supra*, 538; *Michigan* v. *Tucker*, 417 U.S. 433, 450 n. 25 (1974).

[20] *United States* v. *Janis*, 428 U.S. 433, 448–454 (1976), contains a lengthy review of the literature on the deterrent effect of the rule and doubts about that effect. *See also Stone* v. *Powell*, 428 U.S. 465, 492 n. 32 (1976).

Court has emphasized that the costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations have been technical or in good faith, are high and may well "generat[e] disrespect for the law and administration of justice," [21] as well as free guilty defendants.[22] Utilization of the rule has been substantially curbed. Defendants who themselves were not subjected to illegal searches and seizures may not object to the introduction against themselves of evidence illegally obtained from co-conspirators or codefendants,[23] and even a defendant whose rights have been infringed may find the evidence coming in, not as proof of guilt, but to impeach his testimony.[24] Defendants who have been convicted after trials in which they were given a full and fair opportunity to raise claims of Fourth Amendment violations may not subsequently raise those claims on federal *habeas corpus* because of the costs overweighing the minimal deterrent effect.[25] Evidence obtained through a wrongful search and seizure may sometimes be used in the criminal trial, if the prosecution can show a sufficient attenuation of the link between police misconduct and obtaining of the evidence.[1] If an arrest or a search which was valid at the time it was effectuated becomes bad through the subsequent invalidation of the statute under which the arrest or search was made, evidence obtained thereby is nonetheless admissible.[2] A grand jury

[21] Id., 490, 491.

[22] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Chief Justice Burger dissenting).

[23] E.g., *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *United States* v. *Salvucci*, 448 U.S. 83 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980). In *United States* v. *Payner*, 447 U.S. 727 (1980), the Court held it impermissible for a federal court to exercise its supervisory power to police the administration of justice in the federal system to suppress otherwise admissible evidence on the ground that federal agents had flagrantly violated the Fourth Amendment rights of third parties in order to obtain evidence to use against others when the agents knew that the defendant would be unable to challenge their conduct under the Fourth Amendment.

[24] *United States* v. *Havens*, 446 U.S. 620 (1980); *Walder* v. *United States*, 347 U.S. 62 (1954). *Cf. Agnello* v. *United States*, 269 U.S. 20 (1925) (now vitiated by *Havens*).

[25] *Stone* v. *Powell*, 428 U.S. 465 (1976).

[1] *Wong Sun* v. *United States*, 371 U.S. 471, 487–488 (1963); *Alderman* v. *United States*, 394 U.S. 165, 180–185 (1969); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Taylor* v. *Alabama*, 457 U.S. 687 (1982). *United States* v. *Ceccolini*, 435 U.S. 268 (1978), refused to exclude the testimony of a witness discovered through an illegal search. Because a witness was freely willing to testify and therefore more likely to come forward, the application of the exclusionary rule was not to be tested by the standard applied to exclusion of inanimate objects. Deterrence would be little served and relevant and material evidence would be lost to the prosecution.

[2] *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979) (statute creating substantive criminal offense). Statutes that authorize unconstitutional searches and seizures but which have not yet been voided at the time of the search or seizure may not create this effect, however, *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979); *Ybarra* v. *Illinois*, 444 U.S. 85 (1979).

witness was not permitted to refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure,[3] and federal tax authorities were permitted to use in a civil proceeding evidence found to have been unconstitutionally seized from defendant by state authorities.[4] In short, the Court has come a long way from the day when it could say that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." [5] The more severe curtailment of the rule would be adoption of some form of "good faith" exception, under which illegally seized evidence would still be admissable if the officers acted in good faith reliance on a warrant that proved bad or in the good faith belief that they had grounds to act in the absence of a warrant.[6] Dissatisfaction with the rule seems to be pervasive enough with a sufficient number of Justices to see the accomplishment of that revision.

***Operation of the Rule: Standing.***—The Court for a long period followed a rule of "standing" by which it determined whether a party was the appropriate person to move to suppress allegedly illegal evidence. Akin to Article III justiciability principles, which emphasize that one may ordinarily contest only those government actions that harm him, the standing principle in Fourth Amendment cases "require[d] of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." [7] The Court re-

[3] *United States* v. *Calandra*, 414 U.S. 338 (1974).

[4] *United States* v. *Janis*, 428 U.S. 433 (1976).

[5] *Silverthorne Lumber Co.* v. *United States* 251 U.S. 385, 392 (1920). Government officers had illegally seized papers and documents and copied them; trial court ordered the return of the originals but permitted retention of the copies and the issuance of subpoenas for the original on the basis of the copies. This was held invalid. Much of the *Silverthorne* holding and dicta have now been vitiated. E.g., *United States* v. *Havens*, 446 U.S. 620 (1980); *United States* v. *Calandra*, 414 U.S. 338 (1974).

[6] *See Stone* v. *Powell*, 428 U.S. 465, 536 (1976) (Justice White dissenting). In applying the rule and permitting exceptions, the Court has often stressed the good faith of officers. E.g., *United States* v. *Janis*, 428 U.S. 433, 447, 458 n. 35 (1976); *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979). One court of appeals has adopted one form of a good-faith exception to the rule. *United States* v. *Williams*, 622 F.2d 830 (C.A. 5, 1980) (*en banc*), *cert. den.*, 449 U.S. 1127 (1981).

[7] *Jones* v. *United States*, 362 U.S. 257, 261 (1960). That is, the movant must show that he was "a victim of search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of search or seizure directed at someone else." Ibid. *See Alderman* v. *United States*, 394 U.S. 165, 174 (1969).

cently has departed from the concept of "standing" to telescope the inquiry into one inquiry rather than two. Finding that "standing" served no useful analytical purpose, the Court has held that the issue of exclusion is to be determined solely upon a resolution of the substantive question whether the claimant's Fourth Amendment rights have been violated. "We can think of no decided cases of this Court that would have come out differently had we concluded . . . that the type of standing requirement . . . reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same." [8] One must therefore show that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed by protect." [9]

The *Katz* reasonable expectation of privacy rationale has now displaced property-ownership concepts which previously might have supported either standing to suppress or the establishment of an interest that has been invaded. Thus, it is no longer sufficient to allege possession or ownership of seized goods to establish the interest, if a justifiable expectation of privacy of the defendant was not violated in the seizure.[10] Also, it is no longer sufficient that one merely be lawfully on the premises in order to be able to object to an illegal search; rather, one must show some legitimate interest in the premises that the search invaded.[11] The same illegal search

[8] *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978).

[9] Id., 140.

[10] Previously, when ownership or possession was the issue, such as a charge of possessing contraband, the Court accorded "automatic standing" to one on the basis, first, that to require him to assert ownership or possession at the suppression hearing would be to cause him to incriminate himself with testimony that could later be used against him, and, second, that the government could not simultaneously assert that defendant was in possession of the items and deny that it had invaded his interests. *Jones* v. *United States*, 362 U.S. 257, 261–265 (1960). *See also United States* v. *Jeffers*, 342 U.S. 48 (1951). But in *Simmons* v. *United States*, 390 U.S. 377 (1968), the Court held inadmissible at the subsequent trial admissions made in suppression hearings. When it then held that possession alone was insufficient to give a defendant the interest to move to suppress, because he must show that the search itself invaded his interest, the second consideration was mooted as well, and thus the "automatic standing" rule was overturned. *United States* v. *Salvucci*, 448 U.S. 83 (1980) (stolen checks found in illegal search of apartment of the mother in defendant, in which he had no interest; defendant could not move to suppress on the basis of the illegal search); *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980) (drugs belonging to defendant discovered in illegal search of friend's purse, in which he had no privacy interest; admission of ownership insufficient to enable him to move to suppress).

[11] *Rakas* v. *Illinois*, 439 U.S. 128 (1978) (passengers in automobile had no privacy interest in interior of the car; could not object to illegal search). *Jones* v. *United*

might, therefore, invade the rights of one person and not of another.[12] Again, the effect of the application of the privacy rationale has been to narrow considerably the number of people who can complain of an unconstitutional search.

*States*, 362 U.S. 257 (1960), had established rule that anyone legitimately on the premises could object, the rationale was discarded but the result in *Jones* was maintained because he was there with permission, he had his own key, his luggage was there, he had the right to exclude and therefore a legitimate expectation of privacy. The result similarly of *United States* v. *Jeffers*, 342 U.S. 48 (1951) (hotel room rented by defendant's aunts to which he had a key and permission to store things); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968) (defendant shared office with several others, though he had no reasonable expectation of absolute privacy, he could reasonably expect to be intruded on only by other occupants and not by police), was maintained.

[12] E.g., *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980) (fearing imminent police search, defendant deposited drugs in companion's purse where they were discovered in course of illegal search; defendant had no legitimate expectation of privacy in her purse, so that *his* Fourth Amendment rights were not violated, although hers were).

# FIFTH AMENDMENT

## RIGHTS OF PERSONS

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## FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### INDICTMENT BY GRAND JURY

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II.[1] The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.[2] Included from the first in Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on

[1] Morse, "A Survey of the Grand Jury System," 10 Ore. L. Rev. 101 (1931).

[2] 1 B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 162, 166. The provision read: "That in all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offence . . . ."

their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." [3]

The prescribed constitutional function of grand juries in federal courts [4] is to return criminal indictments, but the juries serve a considerably broader series of purposes as well. Principal among these is the investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally. Operating in secret, under the direction but not control of a prosecutor, unbound by a number of evidentiary and constitutional restrictions, such juries may examine witnesses in the absence of their counsel and without informing them of the object of the investigation or the place of the witnesses in it.[5] The exclusionary rule is inapplicable

[3] *Costello* v. *United States*, 350 U.S. 359, 362 (1956). "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges. . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." *United States* v. *Mandujano*, 425 U.S. 564, 571, (1976) (plurality opinion). *See* id., 589–591 (Justice Brennan concurring).

[4] This provision applies only in federal courts and is not applicable to the States, either as an element of due process or as a command of the Fourteenth Amendment imposing the command directly. *Hurtado* v. *California*, 110 U.S. 516 (1884); *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937); *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972).

[5] Witnesses are not entitled to have counsel present in the room. FRCP, Rule 6(d). The validity of this restriction was asserted in dictum in *In re Groban*, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. Id., 346–347 (Justice Black, distinguishing grand juries from the investigative entity before the Court). The decision in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), deeming the preliminary hearing a "critical stage of the prosecution" at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See* id., 25 (Chief Justice Burger dissenting). In *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion), Chief Justice Burger wrote: "Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel

in grand jury proceedings with the result that a witness called before a grand jury may be questioned on the basis of knowledge obtained through the use of illegally-seized evidence.[6] In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, while free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional consideration.[7] A wit-

could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." By emphasizing the point of institution of criminal proceedings, relevant to the right of counsel at line-ups and the like, the Chief Justice not only reasserted the absence of a right to counsel in the room but also, despite his having referred to it, cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult, out of the room, with counsel at all, and, further, raised the implication that a witness or putative defendant unable to afford counsel would have any right to appointed counsel. Concurring, Justice Brennan argued that it was essential and constitutionally required for the protection of one's constitutional rights that he have access to counsel, appointed if necessary, accepting the likelihood, without agreeing, that consultation outside the room would be adequate to preserve a witness' rights, Id., 602-609 (with Justice Marshall). Justices Stewart and Blackmun reserved judgment. Id., 609. The dispute appears ripe for revisiting.

[6] *United States* v. *Calandra*, 414 U.S. 338 (1975). The Court has interpreted a provision of federal wiretap law, 18 U.S.C. § 2515, to prohibit utilization of unlawful wiretap information as a basis for questioning witnesses before grand juries. *Gelbard* v. *United States*, 408 U.S. 41 (1972).

[7] "Of course, the grand jury's subpoena is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. . . . Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid . . . the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. . . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena duces tecum will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment.' *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." Id., 414 U.S., 346. *See also United States* v. *Dionisio*, 410 U.S. 1, 11-12 (1973). Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. *Branzburg* v. *Hayes*, 408 U.S. 665, 707-708 (1972). Protection of Fourth Amendment interests is as extensive before the grand jury as before any investigative officers. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) (now highly qualified as to its scope, *supra*, p. 1210); *Hale* v. *Henkel*, 201 U.S. 43, 76-77 (1920), but not more so either. *United States* v. *Dionisio*, 410 U.S. 1 (1973) (subpoena to give voice exemplars); *United States* v. *Mara*, 410 U.S. 19 (1973) (handwriting exemplars). The Fifth Amendment's self-incrimination clause must be respected. *Blau* v. *United States*, 340 U.S. 159 (1950); *Hoffman* v. *United States*, 341 U.S. 479 (1951). On common-law privileges, *see Blau* v. *United States*, 340 U.S. 332 (1951) (husband-wife privilege); *Alexander* v. *United States*, 138 U.S. 353 (1891) (attorney-client privilege). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), *with Dennis* v. *United States*, 384 U.S. 855 (1966). *See* FRCP Rule 6(e) (secrecy requirements and exceptions).

ness called before a grand jury is not entitled to be informed that he may be indicted for the offense under inquiry [8] and the commission of perjury by a witness before the grand jury is punishable, irrespective of the nature of the warning given him when he appears and regardless of the fact that he may be a putative defendant already when he is called.[9]

Of greater significance were two cases in which the Court held the Fourth Amendment to be inapplicable to grand jury subpoenas requiring named parties to give voice exemplars and handwriting samples to the grand jury for identification purposes.[10] According to the Court, the issue turned upon a two-tiered analysis—"whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable 'seizure' within the meaning of the Fourth Amendment." [11] First, a subpoena to appear was held not to be a seizure, because it entailed significantly less social and personal affront to one than did an arrest or an investigative stop and because every citizen has an obligation, which may be onerous at times, to appear and give whatever aid he may to a grand jury.[12] Second, the directive to make a voice recording or to produce handwriting samples did not bring the Fourth Amendment into play because no one has any expectation of privacy in the characteristics of either his voice or his handwriting.[13] Inasmuch as the Fourth Amend-

[8] *United States* v. *Washington*, 431 U.S. 181 (1977). Because defendant when he appeared before the grand jury was warned of his rights to decline to answer questions on the basis of self-incrimination, the decision was framed in terms of those warnings, but the Court twice noted that it had not decided, and was not deciding, "whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses. . . ." Id., 186, 190.

[9] *United States* v. *Mandujano*, 425 U.S. 564 (1976); *United States* v. *Wong*, 431 U.S. 174 (1977). Mandujano had been told of his right to assert the privilege against self-incrimination, of the consequences of perjury, and of his right to counsel, but not to have counsel with him in the jury room. Chief Justice Burger and Justices White, Powell, and Rehnquist took the position that no *Miranda* warning was required because there was no police custodial interrogation and that in any event commission of perjury was not excusable on the basis of lack of any warning. Justices Brennan, Marshall, Stewart, and Blackmun agreed that whatever rights a grand jury witness had, perjury was punishable and not to be excused. Id., 584, 609. Wong was assumed on appeal not to have understood the warnings given her and the opinion proceeds on the premise that absence of warnings altogether does not preclude a perjury prosecution.

[10] *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973).

[11] Id., 9.

[12] Id., 9–13.

[13] Id., 13–15. The privacy rationale proceeds from *Katz* v. *United States*, 389 U.S. 347 (1967).

ment was inapplicable, there was no necessity for the government to make a preliminary showing of the reasonableness of the grand jury requests.

Besides indictments, grand juries may issue as well reports which may indicate nonindictable misbehavior, mis- or malfeasance of public officers, or other objectionable conduct.[14] Despite the vast power of grand juries, there is little in the way of judicial or legislative response designed to impose some supervisory restrictions on them.[15]

Within the meaning of this article a crime is made "infamous" by the quality of the punishment which may be imposed.[16] "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another." [17] Imprisonment in a state prison or penitentiary, with or without hard labor,[18] or imprisonment at hard labor in the workhouse of the District of Columbia,[19] falls within this category. The pivotal question is whether the offense is one for which the court is authorized to award such punishment; the sentence actually imposed is immaterial. When an accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.[20] Thus, an act which authorizes imprisonment at hard labor for one year, as well as deportation, of Chinese aliens found to be unlawfully within the United States, creates an offense which can be tried only upon indictment.[21] Counterfeiting,[22] fraudulent alter-

[14] The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 281 (1919). On the reports function of the grand jury, *see In re Grand Jury January, 1969*, 315 F. Supp. 662 (D.C.D. Md. 1970), and *Report of the January 1970 Grand jury* (Black Panther Shooting) (U.S.D.C.N.D. Ill., released May 15, 1970). Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. § 333.

[15] Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§ 1861-1868. Racial discrimination in selection of juries is constitutionally proscribed in both state and federal courts. *Infra*, *pp.* 1746-1748.

[16] *Ex parte Wilson*, 114 U.S. 417 (1885).

[17] Id., 427.

[18] *Mackin* v. *United States*, 117 U.S. 348, 352 (1886).

[19] *United States* v. *Moreland*, 258 U.S. 433 (1922).

[20] *Ex parte Wilson*, 114 U.S. 417, 426 (1885).

[21] *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896).

[22] *Ex parte Wilson*, 114 U.S. 417 (1885).

ation of poll books,[23] fraudulent voting,[24] and embezzlement,[25] have been declared to be infamous crimes. It is immaterial how Congress has classified the offense.[1] An act punishable by a fine of not more than $1,000 or imprisonment for not more than six months is a misdemeanor, which can be tried without indictment, even though the punishment exceeds that specified in the statutory definition of "petty offenses." [2]

A person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument.[3] A change in the indictment deprives the court of the power to try the accused.[4] There being no constitutional requirement that an indictment be presented by a grand jury in a body, an indictment delivered by the foreman in the absence of other grand jurors is valid.[5] If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; it is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury.[6]

The words "when in actual service in time of war or public danger" apply to the militia only. All persons in the regular armed forces are subject to court martial rather than indictment or trial by jury at all times,[7] except that the Court, in order to preserve to the fullest extent possible such guarantees as indictment by grand juries, has held that offenses which are not "service connected" may not be punished under military law but the alleged offenders must be subject to the civil courts in the jurisdiction where the acts took place.[8] The exception of "cases arising in the land or naval

[23] *Mackin* v. *United States*, 117 U.S. 348 (1886).
[24] *Parkinson* v. *United States*, 121 U.S. 281 (1887).
[25] *United States* v. *DeWalt*, 128 U.S. 393 (1888).
[1] *Ex parte Wilson*, 114 U.S. 417, 426 (1885).
[2] *Duke* v. *United States*, 301 U.S. 492 (1937).
[3] *See Stirone* v. *United States*, 361 U.S. 212 (1960), wherein a variation between pleading and proof was held to deprive petitioner of his right to be tried only upon charges presented in the indictment.
[4] *Ex parte Bain*, 121 U.S. 1, 12 (1887).
[5] *Breese* v. *United States*, 226 U.S. 1 (1912).
[6] *Costello* v. *United States*, 350 U.S. 359 (1956); *Lawn* v. *United States*, 355 U.S. 339 (1958); *United States* v. *Blue*, 384 U.S. 251 (1966). *Cf. Gelbard* v. *United States*, 408 U.S. 41 (1972).
[7] *Johnson* v. *Sayre*, 158 U.S. 109, 114 (1895), *See also Lee* v. *Madigan*, 358 U.S. 228, 232–235, 241 (1959).
[8] *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Relford* v. *Commandant*, 401 U.S. 355 (1971). *Supra*, *pp.* 344–345. Similarly, courts-martial of civilian dependents and discharged servicemen have been barred. Ibid.

forces" was not aimed at trials of offenses against the laws of war. Its objective was to authorize trial by court martial of the members of the armed forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in civil courts. Either citizen or alien enemy belligerents may be tried by a military commission for offenses against the laws of war.[9]

## DOUBLE JEOPARDY

### Development and Scope

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." [1] The concept of double jeopardy goes far back in history, but its development was uneven and its meaning has varied. The English development, under the influence of Coke and Blackstone, came gradually to mean that upon one's trial he could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.[2] In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction and the elevation of the rule to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches.[3] Madison's version of the guarantee as introduced in the House

[9] *Ex parte Quirin*, 317 U.S. 1, 43, 44 (1942).

[1] *Green* v. *United States*, 355 U.S. 184, 187–188 (1957). The passage is often approvingly quoted by the Court. E.g., *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978); *United States* v. *DiFrancesco*, 449 U.S. 117, 127–128 (1980). For a comprehensive effort to assess the purposes of application of the clause, see Westen & Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup. Ct. Rev. 81.

[2] M. Friedland, *Double Jeopardy* (London: 1969), part 1; *Crist* v. *Bretz*, 437 U.S. 28, 32–36 (1978), and id., 40 (Justice Powell dissenting); *United States* v. *Wilson*, 420 U.S. 332, 340 (1975).

[3] J. Sigler, *Double Jeopardy—The Development of a Legal and Social Policy* (Ithaca: 1969), 21–27. The first bill of rights which expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Art. I, Sec. XCI,

of Representatives read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." [4] Opposition in the House proceeded on the proposition that the language could be construed to prohibit a second trial after a successful appeal by a defendant and would therefore either constitute a hazard to the public by freeing the guilty or, more likely, result in a detriment to defendants because appellate courts would be loath to reverse convictions if no new trial could follow, but a motion to strike "or trial" from the clause failed.[5] As approved by the Senate, however, and accepted by the House for referral to the States, the present language of the clause was inserted.[6]

Throughout most of its history, this clause was binding only against the Federal Government. In *Palko v. Connecticut*,[7] the Court rejected an argument that the Fourteenth Amendment incorporated all the provisions of the first eight Amendments as limitations on the States and enunicated the due process theory under which most of those Amendments do now apply to the States. Some guarantees in the Bill of Rights, Justice Cardozo wrote, were so funadmental that they are "of the very essence of the scheme of ordered liberty" and "neither liberty nor justice would exist if they were sacrificed." But the double jeopardy clause, like many other procedural rights of defendants, was not so fundamental; it could be absent and fair trials could still be had. Of course, a defendant's due process rights, absent double jeopardy consideration *per se*, might be violated if the State "creat[ed] a hardship so acute and shocking as to be unendurable," but that was not the case in *Palko*.[8] In *Benton* v. *Maryland*,[9] however, the Court concluded

in 4 F. Thorpe, *The Federal and State Constitution*, H. Doc. No. 357, 59th Congress, 2d sess. (Washington : 1909), 2455. A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790 which had language almost identical to the present Fifth Amendment provision. 5 id., 3100.

[4] 1 *Annals of Congress* 434 (June 8, 1789).

[5] Id., 753.

[6] 2 B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 1149, 1165. In *Crist* v. *Bretz*, 437 U.S. 28, 40 (1978) (dissenting), Justice Powell attributed the broadening of the "rubric" of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict to inadvertence, a question the majority passed over as "of academic interest only." Id., 34 n. 10.

[7] 302 U.S. 319 (1937).

[8] Id., 325, 326, 328. The Court considered a number of cases on due process grounds, which would have been double jeopardy cases had they arisen in federal court, applying the *Palko* standards. E.g., *Brock* v. *North Carolina*, 344 U.S. 424 (1953); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Hoag* v. *New Jersey*, 356 U.S. 464 (1958).

[9] 395 U.S. 784, 794-795 (1969).

"that the double jeopardy prohibition . . . represents a fundamental ideal in our constitutional heritage. . . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments." Therefore, the double jeopardy limitation now applies to both federal and state governments and state rules on double jeopardy, with regard to such matters as when jeopardy attaches, must be considered in the light of federal standards.[10]

In a federal system, it may be that different units of government will have different interests to serve in the definition of crimes and the enforcement of their laws, and where the different units have overlapping jurisdictions a person may engage in conduct which will violate the laws of more than one unit.[11] Although the Court had long accepted in dictum the principle that prosecution of one for the same conduct by two governments would not constitute double jeopardy,[12] it was not until *United States* v. *Lanza* [13] that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territiory . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." [14] The "dual sovereignty" doctrine is tied into not only the existence of two sets of laws often serving different federal-state purposes and the now overruled principle that the double jeopardy clause restricts only the national government and not the States,[15] but it also reflects practical considerations that undesirable consequences could follow an overruling of the doctrine. Thus, a State might preempt federal authority by first prosecuting and providing for a lenient sentence (as compared to the possible federal sentence) or acquitting defendants who had the sympathy of state authorities as against federal law

[10] *Crist* v. *Bretz*, 437 U.S. 28, 37–38 (1978). *But see* id., 40 (Justices Powell and Rehnquist and Chief Justice Burger dissenting) (standard governing States should be more relaxed).

[11] The problem was recognized as early as *Houston* v. *Moore*, 5 Wheat. (18 U.S.) 1 (1820), and the rationale of the doctrine was confirmed within thirty years. *Fox* v. *Ohio*, 5 How. (46 U.S.) 410 (1847); *United States* v. *Marigold*, 9 How. (50 U.S.) 560 (1850); *Moore* v. *Illinois*, 14 How. (55 U.S.) 13 (1852).

[12] Ibid. *And see* cases cited in *Bartkus* v. Illinois, 359 U.S. 121, 132 n. 19 (1959), and *Abbate* v. *United States*, 359 U.S. 187, 192–193 (1959).

[13] 260 U.S. 377 (1922).

[14] Id., 382. *See also Hebert* v. *Louisiana*, 272 U.S. 312 (1924); *Screws* v. *United States*, 325 U.S. 91, 108 (1945); *Jerome* v. *United States*, 318 U.S. 101 (1943).

[15] *Benton* v. *Marland*, 395 U.S. 784 (1969), extended the clause to the States.

enforcement.[16] The application of the clause to the States has therefore worked no change in the "dual sovereign" doctrine.[17] Of course, when in fact two different units of the government are subject to the same sovereign, the double jeopardy clause does bar separate prosecutions by them for the same offense.[18]

The clause speaks of being put in "jeopardy of life or limb," which as derived from the common law, generally referred to the possibiliity of capital punishment upon conviction, but it is now settled that the clause protects with regard "to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute."[19]

Because one prime purpose of the clause is the protection against the burden of multiple trials, a defendant who raises and loses a double jeopardy claim during pretrial or trial may immediately appeal the ruling, a rare exception to the general rule with respect to appeals from nonfinal orders.[20]

[16] Reaffirmation of the doctrine against double jeopardy claims as to the Federal Government and against due process claims as to the States occurred in *Abbate* v. *United States*, 359 U.S. 187 (1959), and *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), both cases containing extensive discussion and policy analyses. The Justice Department follows a policy of generally not duplicating a state prosecution brought and carried out in good faith, *see Petite* v. *United States*, 361 U.S. 529, 531 (1960); *Rinaldi* v. *United States*, 434 U.S. 22 (1977), and several provisions of federal law forbid a federal prosecution following a state prosecution. E.g., 18 U.S.C. §§ 659, 660, 1992, 2117. The Brown Commission recommended a general statute to this effect, preserving discretion in federal authorities to proceed upon certification by the Attorney General that a United States interest would be unduly harmed if there were no federal prosecution. National Commission on Reform of Federal Criminal Laws, *Final Report* (Washington: 1971), §707.

[17] *United States* v. *Wheeler*, 435 U.S. 313 (1978) (dual sovereignty doctrine permits proceedings against an Indian for statutory rape following his plea of guilty in a tribal court to contributing to the delinquency of a minor, both charges involving the same conduct; tribal law stemmed from the retained sovereignty of the tribe and did not flow from the Federal Government).

[18] *Grafton* v. *United States*, 206 U.S. 333 (1907) (trial by military court-martial precluded subsequent trial in territorial court); *Waller* v. *Florida*, 397 U.S. 387 (1970) (trial by municipal court precluded trial for same offense by state court). It was assumed in an early case that refusal to answer questions before one House of Congress could be punished as a contempt by that body and by prosecution by the United States under a misdemeanor statute, *In re Chapman*, 166 U.S. 661, 672 (1897), but there had been no dual proceedings in that case and it seems highly unlikely that the case would now be followed. *Cf. Colombo* v. *New York*, 405 U.S. 9 (1972).

[19] *Ex parte Lange*, 18 Wall. (85 U.S.) 163, 169 (1874). It has no application in noncriminal proceedings. *Helvering* v. *Mitchell*, 303 U.S. 391 (1938); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (forfeiture proceedings; one must ask whether the proceedings are remedial or punitive). The clause applies in juvenile court proceedings which are formally civil. *Breed* v. *Jones*, 421 U.S. 519 (1975).

[20] *Abney* v. *United States*, 431 U.S. 651 (1977).

An uncommonly large number of cases raising double jeopardy claims have been decided by the Court in recent years.[21] Instead of the clarity that often emerges from intense consideration of a particular issue, however, double jeopardy doctrine has descended into a state of "confusion," with the Court acknowledging that its decisions "can hardly be characterized as models of consistency and clarity." [22] In large part, the re-evaluation of doctrine and principle has not resulted in the development of clear and consistent guidelines because of the differing emphases of the Justices upon the purposes of the clause and the consequent shifting coalition of majorities based on highly technical distinctions and individualistic fact patterns. Thus, of the sitting Justices, three believe that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant's right to go to the first jury picked had early in our jurisprudence become confused with the double jeopardy clause; while they accept the present understanding, they do so as part of the Court's superintending of the federal courts and not because the understanding is part and parcel of the clause, and in so doing, of course, they are likely to find more prosecutorial discretion in the trial process.[23] Three Justices believe that the clause not only protects the integrity of final judgments but, more important, that it protects the accused against the strain and burden of multiple trials, which would also enhance the ability of government to convict.[24] Two Justices

[21] *See United States* v. *DiFrancesco*, 449 U.S. 117, 126-127 (1980) (citing cases).

[22] *Burks* v. *United States*, 437 U.S. 1, 9, 15 (1978). One result is instability in the law. Thus, *Burks* overruled, to the extent inconsistent, four cases decided between 1950 and 1960, and *United States* v. *Scott*, 437 U.S. 82 (1978), overruled a case decided just three years earlier. *United States* v. *Jenkins*, 420 U.S. 358 (1975).

[23] *See Crist* v. *Bretz*, 734 U.S. 28, 40 (1978) (dissenting opinion). Justices Powell and Rehnquist and Chief Justice Burger argued that with the double jeopardy clause so interpreted the due process clause could be relied on to prevent prosecutorial abuse during the trial designed to abort the trial and obtain a second one. Id., 50. All three have joined, indeed, in some instances, have authored, opinions adverting to the role of the double jeopardy clause in protecting against such prosecutorial abuse. E.g., *United States* v. *Scott*, 437 U.S 82, 92-94 (1978); *Oregon* v. *Kennedy*, 456 U.S. 667 (1982) (but narrowing scope of concept).

[24] *United States* v. *Scott*, 437 U.S. 82, 101 (1978) (dissenting opinion) (Justices Brennan, White, Marshall, and Stevens). Justice Stevens is not included in the group of three because of his opinion for the Court in *Arizona* v. *Washington*, 434 U.S. 497 (1976); *see* id., 519 (Justices Marshall and Brennan dissenting), although the opinion does acknowledge "the valued right" of the defendant to have his trial completed in the one process before the one tribunal. Id., 503-504, 507-509, 514, 516. His concurrence in *Oregon* v. *Kennedy*, 456 U.S 667, 681 (1982), also much more broadly construes the degree of protection against prosecutorial abuse than does the opinion of the Court. He also joined *Crist* v. *Bretz*, 437 U.S. 26 (1978).

fall somewhere between the other two groups and although they endorse both roles for the clause, it appears they engage in some form of balancing of defendants' rights with society's rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment not hinged on the defendant's culpability.[25] Thus, the basic area of disagreement, though far from the only one, centers on the trial from the attachment of jeopardy to the final judgment.

**Reprosecution Following Mistrial**

The common law generally required that the previous trial must have ended in a judgment, of conviction or acquittal, but the constitutional rule is that jeopardy attaches much earlier, in jury trials when the jury is sworn and in trials before a judge without a jury when the first evidence is presented.[1] Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a second trial, even if the termination was erroneous, is barred.[2]

[25] Thus, Justice Blackmun has enunciated positions recognizing a broad right of defendants much like the position of the latter three Justices, id., 38 (concurring), and he joined Justice Stevens' concurrence in *Oregon* v. *Kennedy*, 456 U.S. 667, 681 (1982), but he also joined the opinions in *United States* v. *Scott*, 437 U.S. 82 (1978), and *Arizona* v. *Washington*, 434 U.S. 497 (1978) (Justice Blackmun concurring only in the result). Justice O'Connor's position is unclear, but she did join the opinion of the Court in *Oregon* v. *Kennedy*, *supra*.

[1] The rule traces back to *United States* v. *Perez*, 9 Wheat. (22 U.S.) 579 (1824)). *See also Kepner* v. *United States*, 195 U.S. 100 (1904); *Downum* v. *United States*, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In *Crist* v. *Bretz*, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was "at the core" of the clause and it therefore binds the States. *But see* id., 40 (Justice Powell dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, *Collins* v. *Loisel*, 262 U.S. 426 (1923), by an indictment which is quashed, *Taylor* v. *United States*, 207 U.S. 120, 127 (1907), nor by arraignment and pleading to the indictment. *Bassing* v. *Cady*, 208 U.S. 386, 391–392 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. E.g., *Ludwig* v. *Massachusetts*, 427 U.S. 618, 630–632 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial *de novo* and thus set aside the first conviction); *Swisher* v. *Brady*, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge which he may confirm, modify, or remand).

[2] *Cf. United States* v. *Jorn*, 400 U.S. 470 (1971); *Downum* v. *United States*, 372 U.S. 734 (1963). "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona* v. *Washington*, 434 U.S. 497, 503–505 (1978).

The reasons the Court has given for fixing the attachment of jeopardy at a point prior to judgment and thus making some terminations of trials before judgment final insofar as the defendant is concerned is that a defendant has a "valued right to have his trial completed by a particular tribunal." [3] The reason the defendant's right is so "valued" is that he has a legitimate interest in completing the trial "once and for all" and "conclud[ing] his confrontation with society," [4] so as to be spared the expense and ordeal of repeated trials, the anxiety and insecurity of having to live with the possibility of conviction, and the possibility that the prosecution may strengthen its case with each try as it learns more of the evidence and of the nature of the defense.[5] These reasons both inform the determination when jeopardy attaches—not at some earlier point, not at some later point—and the evaluation of the permissibility of retrial depending upon the reason for its premature termination.

A mistrial may be the result of "manifest necessity," [6] such as where, for example, the jury cannot reach a verdict [7] or circumstances plainly prevent the continuation of the trial.[8] Difficult has been the answer, however, when the doctrine of "manifest necessity" has been called upon to justify a second trial following a mistrial granted by the trial judge because of some event within the prosecutor's control or because of prosecutorial misconduct or because of error or abuse of discretion by the judge himself. There must ordinarily be a balancing of the defendant's right in having the trial completed against the public interest in fair trials designed to end in just judgments.[9] Thus, when, after jeopardy attached, it was discovered that the indictment was incurably defective, which would have caused the reversal on appeal of any conviction, the trial judge granted, over defendant's objection, the prosecution's motion for a mistrial; holding that retrial was not barred under these circumstances, the Court observed that a trial judge "properly exercises his discretion" in cases in which an impartial verdict cannot be reached or in which a verdict on conviction

[3] *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

[4] *United States* v. *Jorn*, 400 U.S. 470, 486 (1971) (plurality opinion).

[5] *Arizona* v. *Washington*, 434 U.S. 497, 503–505 (1978); *Crist* v. *Bretz*, 437 U.S. 28, 35–36 (1978). *See* Westen & Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup. Ct. Rev. 81, 86–97.

[6] *United States* v. *Perez*, 9 Wheat. (22 U.S.) 579, 580 (1824).

[7] Ibid; *Logan* v. *United States*, 144 U.S. 263 (1892).

[8] *Simmons* v. *United States*, 142 U.S. 148 (1891) (juror's impartiality became questionable during trial); *Thompson* v. *United States*, 155 U.S. 271 (1884) (discovery during trial that one of the jurors had served on the grand jury which indicted defendant and was therefore disqualified); *Wade* v. *Hunter*, 336 U.S. 684 (1949) (court-martial discharged because enemy advancing on site).

[9] *Illinois* v. *Somerville*, 410 U.S. 458, 463 (1973).

would have to be reversed on appeal because of an obvious error. "If an error could make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." [10] On the other hand, when, after jeopardy attached, a prosecutor successfully moved for a mistrial because a key witness had inadvertently not been served and could not be found, the Court held a retrial barred, because the prosecutor knew prior to the selection and swearing of the jury that the witness was unavailable.[11] Although this case appeared to establish the principle that an error of the prosecutor or of the judge leading to a mistrial could not constitute a "manifest necessity" for terminating the trial, *Somerville* distinguished and limited *Downum* to situations in which the error lends itself to prosecutorial manipulation, in being the sort of instance which the prosecutor could use to abort a trial that was not proceeding successfully and to obtain a new trial in which his advantage would be increased.[12]

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In *Arizona* v. *Washington,*[13] defense counsel made prejudicial comments about the prosecutor's past conduct in his opening statement and the prosecutor moved for a mistrial, which was granted over defendant's objections. Granting that in a strict, literal sense, mistrial was not "necessary" because the trial judge could have given limiting instructions to the jury, the Court held that the highest degree of respect should be given to the trial judge's evaluation of the likelihood of the impairment of the impartiality of one or more jurors. As long as support for a mistrial order can be found in the trial record, no specific statement of "manifest necessity" need be made by the trial judge.[14]

[10] Id., 464.

[11] *Downum* v. *United States,* 372 U.S. 734 (1963).

[12] *Illinois* v. *Somerville,* 410 U.S. 458, 464–465, 468–469 (1973).

[13] 434 U.S. 497 (1978).

[14] "Manifest necessity" characterizes the burden the prosecutor must shoulder in justifying retrial. Id., 505–506. But "necessity" cannot be interpreted literally; it means rather a "high degree" of necessity, and some instances, such as hung juries, are easily viewed as of their "high degree." Id., 506–507. In a situation like that presented in this case, great deference must be paid to the trial judge's decision because he was in the best position to determine the extent of the possible bias, having observed the jury's response, and to respond by the course he deems best suited to deal with it. Id., 510–514. Here, "the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. [H]e exercised 'sound discretion'. . . ." Id., 516.

Emphasis upon the trial judge's discretion has an impact upon the cases in which it is the judge's error, in granting *sua sponte* a mistrial or granting the prosecutor's motion. The cases are in doctrinal disarray. Thus, in *Gori* v. *United States*,[15] the Court permitted retrial of the defendant when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor's line of questioning was intended to expose the defendant's criminal record, which would have constituted prejudicial error. Although the Court thought the judge's action was an abuse of discretion, it approved retrial on the conclusion that the judge's decision had been taken for defendant's benefit. This rationale was disapproved in the next case, in which the trial judge discharged the jury erroneously and in abuse of his discretion, because he disbelieved the prosecutor's assurance that certain witnesses had been properly apprised of their constitutional rights.[16] Refusing to permit retrial, the Court observed that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." [17] The later cases appear to accept *Jorn* as an example of a case where the trial judge "acts irrationally or irresponsibly," but if he acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant's interest in concluding the matter before the one jury, then he is entitled to deference, which perhaps rehabilitates the result if not the reasoning in *Gori* and maintains the result and much of the reasoning of *Jorn*.[18]

Of course, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error." [19] "Such a motion by the defendant is deemed to be a delib-

[15] 367 U.S. 364 (1961). *See also United States* v. *Tateo*, 377 U.S. 463 (1964) (reprosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).

[16] *United States* v. *Jorn*, 400 U.S. 470, 483 (1971).

[17] Id., 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the Government's appeal.

[18] *Arizona* v. *Washington*, 434 U.S. 497, 514, 515–516 (1978). *See also Illinois* v. *Somerville*, 410 U.S. 458, 462, 465–466, 469–471 (1973) (discussing *Gori* and *Jorn*.)

[19] *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion).

erate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." [20] In *United States* v. *Dinitz*,[21] the trial judge had excluded defendant's principal attorney for misbehavior and then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistance defense counsel. Holding that he could be retried after he chose a mistrial, the Court held that, while the exclusion might have been in error, it was not done in bad faith to goad defendant into requesting a mistrial or to prejudice his prospects for acquittal. Defendant's choice, even in situations where all his choices are hard ones, to terminate the trial and go on to a new trial should be respected and a new trial not barred. To hold otherwise would necessitate requiring the defendant to shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal which if successful would lead to a new trial, and the public interest and defendant's interests were not thereby served.

But the Court has also reserved the possiblity that the defendant's motion might have been necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred. It was unclear what prosecutorial or judicial misconduct would constitute such overreaching,[22] but in *Oregon* v. *Kennedy*,[23] the Court adopted a narrow "intent" test, so that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Therefore, ordinarily, a defendant who moves for or acquieses in a mistrial is bound by his decision and may be required to stand for retrial.

[20] *United States* v. *Scott*, 437 U.S. 82, 93 (1978).

[21] 424 U.S. 600 (1976). *See also Lee* v. *United States*, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing defendant by his timing brought about foreclosure of opportunity to stay before the same trial).

[22] *Compare United States* v. *Dinitz*, 424 U.S. 600, 611 (1976), *with United States* v. *Tateo*, 377 U.S. 463, 468 n. 3 (1964).

[23] 456 U.S. 667, 676 (1982). The Court thought a broader standard requiring an evaluation of whether acts of the prosecutor or the judge prejudiced the defendant would be unmanageable and would be counterproductive because courts would be loath to grant motions for mistrials knowing that reprosecution would be barred. Id., 676-677. Defendant had moved for mistrial after the prosecutor had asked a key witness a particular prejudicial question. Four Justices concurred, noting that the question did not constitute overreaching or harassment and objecting both to the Court reaching the broader issue and narrowing the exception. Id., 681.

**Reprosecution Following Acquittal**

That a defendant may not be retried following an acquittal is "the most fundamental rule in the history of double jeopardy jurisprudence." [1] "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.' " [2] While in other areas of the double jeopardy doctrine, consideration is given to the public's interest in being able to proceed to an error-free conclusion of a criminal trial to the ends of public safety, no such balancing of interest is permitted with respect to acquittals, "no matter how erroneous," no matter even if they were "egregiously erroneous." [3]

The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner* v. *United States,*[4] which arose under a Philippines system in which as part of its appeals system the appellate court could make an independent review of the record, set aside the trial judge's decision, and enter a judgment of conviction.[5] Previously, under the due process clause, there was no barrier to state provision for prosecutor appeals from acquittals.[6] But there are in-

[1] *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

[2] *United States* v. *Scott*, 437 U.S. 82, 91 (1978) (quoting *Green* v. *United States*, 355 U.S. 184, 188 (1957)). For the conceptually-related problem of trial for a "separate" offense arising out of the same "transaction," *see infra, pp.* 1241–1242.

[3] *Burks* v. *United States*, 437 U.S. 1, 16 (1978); *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962). For evaluation of those interests of the defendant that might support the absolute rule of finality and rejection of all save the right of the jury to acquit against the evidence and the trial judge's ability to temper legislative rules with leniency, see Westen & Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup. Ct. Rev. 81, 122–137.

[4] 195 U.S. 100 (1904). The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. E.g., *United States* v. *Wilson*, 420 U.S. 332, 346 n. 15 (1975); *United States* v. *DiFrancesco*, 449 U.S. 117, 113 n. 13 (1980).

[5] In dissent, Justice Holmes, joined by three other Justices, propounded a theory of "continuing jeopardy," so that until the case was finally concluded one way or another, through judgment of conviction or acquittal and final appeal, there was no second jeopardy no matter how many times a defendant was tried. Id., 134. The Court has numerous times rejected any concept of "continuing jeopardy." E.g., *Green* v. *United States*, 355 U.S. 184, 192 (1957); *United States* v. *Wilson*, 420 U.S. 332, 351–353 (1975); *Breed* v. *Jones*, 421 U.S. 519, 533–535 (1975).

[6] *Palko* v. *Connecticut*, 302 U.S. 319 (1937). *Palko* is no longer viable. *Cf. Greene* v. *Massey*, 437 U.S. 19 (1978).

stances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rulings,[7] but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the double jeopardy clause prohibits further prosecution.[8] In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

***Acquittal by Jury.***—Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, either through appeal of the verdict or institution of a new prosecution, place the defendant on trial again. Thus, the Court early held that, when the results of a trial are set aside because the first indictment was invalid or for some reason the trial's results were voidable, a judgment of acquittal must nevertheless remain undisturbed.[9]

***Acquittal by the Trial Judge.***—Similarly, when a trial judge acquits a defendant, that action concludes the matter.[10] There is no

[7] The Criminal Appeals Act of 1907, 34 Stat. 1246, was "a failure . . ., a most unruly child that has not improved with age." *United States* v. *Sisson*, 399 U.S. 267, 307 (1970). *See also United States* v. *Oppenheimer*, 242 U.S. 85 (1916); *Fong Foo* v. *United States*, 369 U.S. 141 (1962).

[8] Title III of the Omnibus Crime Control Act, P.L. 91-644, 84 Stat. 1890, 18 U.S.C. § 3731. Congress intended to remove all statutory barriers to governmental appeal and to allow appeals whenever the Constitution would permit, so that interpretation of the statutory language is at the same time constitutional interpretation. *United States* v. *Wilson*, 420 U.S. 332, 337 (1974). *See Sanabria* v. *United States*, 437 U.S. 54, 69 n. 23 (1978), and id., 78 (Justice Stevens concurring).

[9] In *United States* v. *Ball*, 163 U.S. 662 (1896), three defendants were placed on trial, Ball was acquitted and the other two were convicted, the two appealed and obtained a reversal on the ground that the indictment had been defective, and all three were again tried and all three were convicted. Ball's conviction was set aside as violating the clause, inasmuch as the trial court's action was not void but only voidable and Ball had taken no steps to void it while the Government could not take such action. Similarly, in *Benton* v. *Maryland*, 395 U.S. 784 (1969), defendant was convicted of burglary but acquitted of larceny; the conviction was set aside on his appeal because the jury had been unconstitutionally chosen. He was again tried and convicted of both burglary and larceny, but the larceny conviction was held to violate the double jeopardy clause. On the doctrine of "constructive acquittals" by conviction of a lesser included offense, *see infra*, p. 1236.

[10] *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 570–572 (1977); *Sanabria* v. *United States* 437 U.S. 54, 63–65 (1978); *Finch* v. *United States*, 433 U.S. 676 (1977)

possibility of retrial for the same offense.[11] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or was a dismissal or some other action which the prosecution may be able to appeal. The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." [12] Thus, after the jury deadlocked and was discharged, the trial judge granted defendant's motion for a judgment of acquittal under the appropriate federal rule which was explicitly based on the judgment that the Government had not proved facts constituting the offense. An appeal by the Government was held barred because the judge's action was in fact an acquittal premised on his view of the evidence.[13] Even if, as happened in *Sanabria* v. *United States,*[14] the trial judge erroneously excludes evidence and then acquits on the basis that the evidence remaining is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.

Some limited exceptions do exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the due process clause is the prevention of successive trials and not of prosecution appeals *per se,* it is apparently the case that if the trial judge permits the case to go to the jury, which convicts, and he thereafter enters a judgment of acquittal, even one founded upon his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the jury's verdict and judgment thereon.[15] Second, if the trial judge enters or grants a motion of acquit-

[11] In *Fong Foo* v. *United States* 369 U.S. 141 (1962), the Court acknowledged that the trial judge's action in acquitting was "based upon an egregiously erroneous foundation," but it was nonetheless final and could not be reviewed. Id., 143.

[12] *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977).

[13] Id., 570–576. *See also United States* v. *Scott,* 437 U.S. 82, 87–92 (1978).

[14] 437 U.S. 54 (1978). With respect to the double jeopardy applications of an appellate court's reversal for insufficient evidence, *see infra, p.* 1237.

[15] In *United States* v. *Wilson* 420 U.S. 332 (1975), following a jury verdict to convict, the trial judge granted defendant's motion to dismiss on the ground of prejudicial delay, not a judgment of acquittal; the Court permitted a government appeal because reversal would have resulted in reinstatement of the jury's verdict, not in a retrial. In *United States* v. *Jenkins,* 420 U.S. 358, 365 (1975), the Court assumed, on the basis of *Wilson,* that a trial judge's acquittal of a defendant following a jury conviction could be appealed by the government because, again, if the judge's decision were set aside there would be no further proceedings at trial. In overruling *Jenkins* in *United States* v. *Scott,* 437 U.S. 82 (1978), the court noted the assumption and itself assumed that a judgment of acquittal bars appeal only when a second trial would be necessitated by reversal. Id., 91 n. 7.

tal, even one based on the conclusion the evidence is insufficient to convict, the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.[16]

***Trial Court Rulings Terminating Trial Before Verdict.***—If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily defendant is subject to retrial; [17] if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that defendant has proved a requisite defense such as insanity or entrapment, defendant is not subject to retrial.[18] However, it may be that the trial judge will grant a motion to dismiss that is not a mistrial and is not an acquittal but is instead a termination of the trial in defendant's favor based on some decision not relating to his factual guilt or innocence, such as prejudicial preindictment delay.[19] The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course which was not open to federal prosecutors until enactment of the 1971 law.[20] That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. It is unclear, in the first place, in many instances whether a judge's ruling is a mistrial, a dismissal, or an acquittal.[21] In the second place, because the Justices have among themselves such differing views about the policies underlying the double jeopardy clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the stat-

[16] *Serfass* v. *United States*, 420 U.S. 377 (1975) (after request for jury trial but before attachment of jeopardy judge dismissed indictment because of evidentiary insufficiency; appeal allowed); *United States* v. *Sanford*, 429 U.S. 14 (1976) (judge granted mistrial after jury deadlock, then four months later dismissed indictment for insufficient evidence; appeal allowed, because granting mistrial had returned case to pretrial status, just like *Serfass*).

[17] *Supra*, *pp.* 1226–1230.

[18] *Supra*, *pp.* 1232–1233.

[19] *United States* v. *Wilson*, 420 U.S. 332 (1975) (preindictment delay); *United States* v. *Jenkins*, 420 U.S. 358 (1975) (determination of law based on facts adduced at trial; ambiguous whether judge's action was acquittal or dismissal); *United States* v. *Scott*, 437 U.S. 82 (1987) (preindictment delay).

[20] *Supra*, *pp.* 1231–1232. *See United States* v. *Scott*, 437 U.S. 82, 84–86 (1978); *United States* v. *Sisson*, 399 U.S. 267, 291–296 (1970).

[21] *Cf. Lee* v. *United States*, 432 U.S. 23 (1977).

ute;[22] if further proceedings, such as continuation of the trial or some further factfinding, was necessary, appeal was not permitted.[23] Now, but by a close division of the Court, the detemining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant's favor, whether, that is, the court made some determination related to defendant's factual guilt or innocence.[24] Such dismissals relating to guilt or innocence are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

**Reprosecution Following Conviction**

A basic purpose of the double jeopardy clause is to protect a defendant "against a second prosecution for the same offense after conviction." [1] It is "settled" that "no man can be twice lawfully punished for the same offense." [2] Of course, the defendant's interest in finality which informs much of double jeopardy jurisprudence is quite attenuated in this kind of situation and he will most likely appeal, whereas the prosecution will ordinarily be content

[22] *United States* v. *Wilson*, 420 U.S. 332 (1975) (after jury guilty verdict, trial judge dismissed indictment on grounds of preindictment delay; appeal permissible because upon reversal all trial judge had to do was enter judgment on the jury's verdict).

[23] *United States* v. *Jenkins*, 420, U.S. 358 (1975) (in bench trial, after presentation of evidence judge dismissed indictment; appeal impermissible because if dismissal was reversed there would have to be further proceedings in trial court devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings).

[24] *United States* v. *Scott*, 7 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determinations of guilt or innocence, but like a mistrial permits further proceedings that would go to factual resolution of issue of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant's interest in having the trial concluded in one proceeding against the government's right to one complete opportunity to convict those who have violated the law. Defendant chose to move to terminate the proceedings and having made a voluntary choice he is bound to the consequences, including the obligation to continue in further proceedings. Id., 95-101. The four dissenters would have followed *Jenkins* and accused the Court of having adopted too restrictive a definition of acquittal. Their view is that the rule against retrials after acquittal does not, as the Court believed, "safeguard determination of innocence; rather, it is that a retrial following a final judgment for the accused necessarily threatens intolerable interference with the constitutional policy against multiple trials." Id., 101, 104 (Justices Brennan, White, Marshall, and Stevens). They would, therefore, treat dismissals as functional equivalents of acquittals, whenever further proceedings would be required after reversals.

[1] *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

[2] *Ex parte Lange*, 18 Wall. (85 U.S.) 163 (1873). For the conceptually-related problem of trial for a "separate" offense arising out of the same transaction, *see infra*, *pp.* 1241-1242.

with its judgment.[3] The situation involving reprosecution ordinarily arises, therefore, only in the context of successful defense appeals and controversies over punishment.

***Reprosecution After Reversal on Defendant's Appeal.***—Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, the assumption being made in the first case on the subject that by appealing a defendant has "waived" his objection to further prosecution by challenging the original conviction.[4] Although it has characterized the "waiver" theory as "totally unsound and indefensible," [5] the Court has been hesitant in formulating a new theory in maintaining the practice.[6]

An exception to full application of the retrial rule exists, however, when defendant on trial for an offense is convicted of a lesser offense and succeeds in having that conviction set aside. Thus, in *Green* v. *United States,*[7] defendant had been placed on trial for first degree murder but convicted of second degree murder; the Court held that, following reversal of that conviction, he could not be tried again for first degree murder, although he certainly could be for second degree murder, on the theory that the first verdict was an implicit acquittal of the first degree murder charge.[8] Even

[3] A prosecutor dissatisfied with the punishment imposed upon the first conviction might seek another trial in order to obtain a greater sentence. *Cf. Ciucci* v. *Illinois,* 356 U.S. 571 (1958) (under due process clause, double jeopardy clause not then applying to States).

[4] *United States* v. *Ball,* 163 U.S. 662 (1896). The English rule precluded a new trial in these circumstances and on circuit Justice Story adopted that view. *United States* v. *Gilbert,* 25 Fed. Cas. 1287 (No. 15,204) (C.C.D.Mass. 1834). The history is briefly surveyed in Justice Frankfurter's dissent in *Green* v. *United States,* 355 U.S. 184, 200–205 (1957).

[5] *Green* v. *United States,* 355 U.S. 184, 197 (1957). The more recent cases continue to reject a "waiver" theory. E.g., *United States* v. *Dinitz,* 424 U.S. 600, 609 n. 11 (1976); *United States* v. *Scott,* 437 U.S. 82, 99 (1978).

[6] Justice Holmes in dissent in *Kepner* v. *United States,* 195 U.S. 100, 134 (1904), rejected the "waiver" theory and propounded a theory of "continuing jeopardy," which also continues to be rejected. *See supra, p.* 1231 n. 5. In some cases, a concept of "election" by the defendant has been suggested, *United States* v. *Scott,* 437 U.S. 82, 93 (1978); *Jeffers* v. *United States,* 432 U.S. 137, 152–154 (1977), but it is not clear how this formulation might differentiate itself from "waiver." Chief Justice Burger has suggested that "probably a more satisfactory explanation" for permissibility of retrial in this situation "lies in analysis of the respective interests involved," *Breed* v. *Jones,* 421 U.S. 519, 533–535 (1975), and a determination that on balance the interests of both prosecution and defense are well served by the rule. *See United States* v. *Tateo,* 377 U.S. 463, 466 (1964); *Tibbs* v. *Florida,* 457 U.S. 31, 39–40 (1982).

[7] 355 U.S. 184 (1957).

[8] The decision necessarily overruled *Trono* v. *United States,* 199 U.S. 521 (1905), although the Court purported to distinguish the decision. *Green* v. *United States,* 355 U.S. 184, 194–197 (1957). *See also Brantley* v. *Georgia,* 217 U.S. 284 (1910) (no due process violation where defendant convicted of higher offense on second trial).

though the Court thought the jury's action in the first trial was clearly erroneous, its implicit acquittal was required by the double jeopardy clause to be respected.[9]

Still another exception arises out of appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks* v. *United States*,[10] the appellate court set aside defendant's conviction on the basis that the prosecution had failed to rebut defendant's proof as to insanity. In directing that defendant could not be retried, the Court observed that if the trial court "had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. . . . [I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient."[11] The policy underlying the clause of not allowing the prosecution to make repeated efforts to convict forecloses giving the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. On the other hand, where a reviewing court reverses a jury conviction because of its disagreement on the weight of the evidence, retrial is permitted, because the appellate court's decision was not that acquittal was the only proper course, thus meriting the deference accorded acquittals, and it will protect defendants' ability to seek appellate reversals on evidentiary grounds other than insufficiency.[12]

***Sentence Increases.***—The double jeopardy clause protects against imposition of multiple punishment for the same offense.[13]

[9] *See also Price* v. *Georgia*, 398 U.S. 323 (1970). Defendant was tried for murder and was convicted of involuntary manslaughter. He obtained a reversal, was again tried for murder, and again convicted of involuntary manslaughter. Acknowledging that after reversal, Price could have been tried for involuntary manslaughter, the Court nonetheless reversed the second conviction because he had been subjected to the hazard of twice being tried for murder, in violation of the double jeopardy clause, and the effect on the jury of the murder charge being pressed could have prejudiced him to the extent of the second conviction.

[10] 437 U.S. 1 (1978).

[11] Id., 10–11. *See also Greene* v. *Massey*, 437 U.S. 19 (1978) (remanding for determination whether appellate majority had reversed for insufficient evidence or whether some of the majority had based decision on trial error); *Hudson* v. *Louisiana*, 450 U.S. 40 (1981) (*Burks* applies where appellate court finds some but insufficient evidence adduced, not only where it finds no evidence).

[12] *Tibbs* v. *Florida*, 457 U.S. 31 (1982). The decision was 5-to-4, the dissent arguing that weight and insufficiency determinations should be given identical double jeopardy clause treatment. Id., 47 (Justices White, Brennan, Marshall, and Blackmun).

[13] *Ex parte Lange*, 18 Wall. (85 U.S.) 163, 173 (1874); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). For the application of the principle in cases in which the same conduct has violated more than one criminal statute, *see infra*, *pp.* 1240–1241.

The application of the principle leads, however, to a number of complexities. In a simple case, it was held that where a court inadvertently imposed both a fine and imprisonment for a crime for which the law authorized one or the other but not both, it could not, after the fine had been paid and defendant entered on his short term of confinement, recall defendant and change its judgment by sentencing him to a year's imprisonment.[14] But the Court has held that the imposition of a sentence does not from the moment of imposition have the finality which a judgment of acquittal has. Thus, it has long been recognized that in the same term of court and before the defendant has begun serving the sentence the court may recall him and increase his sentence.[15] Moreover, a defendant who is retried after he is successful in overturning his first conviction is not protected by the double jeopardy clause against receiving upon his second conviction a sentence greater than that he had first received.[16] An exception exists with respect to capital punishment, inasmuch as the Court has held that government may not again seek the death penalty on retrial when on the first trial the jury had declined to impose a death sentence.[17]

Applying and modifying these principles, the Court narrowly approved the constitutionality of a congressional provision for sentencing of "dangerous special offenders," which authorized prosecution appeals of sentences with which it was dissatisfied and permitted the appellate court to affirm the sentence given or to reduce or increase it.[18] The Court held the provision did not offend the

[14] *Ex parte Lange*, 18 Wall. (85 U.S.) 163 (1874).

[15] *Bozza* v. *United States*, 330 U.S. 160 (1947). *See also Pollard* v. *United States*, 352 U.S. 354, 359–360 (1957 (imposition of prison sentence two years after court imposed an invalid sentence of probation approved). Dicta in some cases had cast doubt on the constitutionality of the practice. *United States* v. *Benz*, 282 U.S. 304, 307 (1931). *United States* v. *DiFrancesco*, 449 U.S. 117, 133–136, 138–139 (1980), removes any doubt and the Court there reserved decision with respect to the limitation of the service of sentence having begun. Id., 134.

[16] *North Carolina* v. *Pearce*, 395 U.S. 711, 719–721 (1969). *See also Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23–24 (1973). The principle of implicit acquittal of an offense drawn from *Green* v. *United States*, 355 U.S. 184 (1957), does not similarly apply to create an implicit acquittal of a higher sentence. *Pearce* does hold that a defendant must be credited with the time served against his new sentence. *Supra*, 395 U.S., 717–719.

[17] *Bullington* v. *Missouri*, 451 U.S. 430 (1981). Four Justices dissented. Id., 447 (Justices Powell, White, Rehnquist, and Chief Justice Burger). The Court disapproved *Stroud* v. *United States* 251 U.S. 15 (1919), although formally distinguishing it.

[18] *United States* v. *DiFrancesco*, 449 U.S. 117 (1980). Four Justices dissented. Id., 143, 152 (Justices Brennan, White, Marshall, and Stevens).

double jeopardy clause. Sentences had never carried the finality that attached to acquittal and its precedents indicated to the Court that imposition of a sentence less than what a convicted defendant received was in no sense an "acquittal" of the higher sentence. Appeal resulted in no further trial or other proceedings to which a defendant might be subjected, only the imposition of a new sentence. An increase in a sentence would not constitute multiple punishment, the Court continued, inasmuch as it would be within the allowable sentence and the defendant could have no legitimate expectation of finality in the sentence as first given because the statutory scheme alerted him to the possibility of increase.

**"For the Same Offence"**

As difficult sometimes as determining when a defendant has been in jeopardy is determining whether he was placed in jeopardy for the same offense. As noted previously, the same conduct may violate the laws of two different sovereigns and a defendant may be proceeded against by both because each may have different interests to serve.[1] The same conduct may transgress two or more different statutes, because laws reach lesser and greater parts of one item of conduct, or may violate the same statute more than once, as when one robs several people in a group at the same time.

***Legislative Discretion as to Multiple Sentences.***—It frequently happens that one activity of a criminal nature will violate one or more laws or that one or more violations may be charged.[2] Although the question is not totally free of doubt, it appears that the double jeopardy clause does not limit the legislative power to split a single transaction into separate crimes so as to give the prosecution a choice of charges, which may be tried in one proceeding, so as to make multiple punishments possible for essentially one transaction.[3] The clause does, however, create a rule of construction, a

[1] *Supra, pp.* 1223-1224.

[2] There are essentially two kinds of situations here. There are "double-description" cases in which criminal law contains more than one statute for conduct arising out of a single transaction. E.g., *Gore* v. *United States*, 357 U.S. 386, 392-393 (1958) (one sale of narcotics constituted three counts of (1) sale of drugs not in pursuance of a written order, (2) sale of drugs not in the original stamped package, and (3) sale of drugs with knowledge that they had been unlawfully imported). And there are "unit-of-prosecution" cases in which the same conduct may violate the same statute more than once. E.g., *Bell* v. *United States*, 349 U.S. 81 (1955) (defendant transported two women across state lines for an immoral purpose in one trip in same car; indicted of two counts of violating Mann Act). See Westen & Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup. Ct. Rev. 81, 111-122.

[3] *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981) (defendants convicted on separate counts of conspiracy to import marijuana and conspiracy to distribute marijuana, both charges relating to the same marijuana.) The concurrence objected

presumption against the judiciary imposing multiple punishments for the same transaction unless Congress has "spoken in language that is clear and definite" [4] to pronounce its intent that multiple punishments indeed be imposed. The commonly used test in determining whether Congress would have wanted to punish as separate offenses conduct occurring in the same transaction, absent otherwise clearly expressed intent, is the "same evidence" rule. The rule "is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." [5] Thus, in *Gore* v. *United States,*[6] the Court held that defendant's one act of selling narcotics had violated three distinct criminal statutes, each of which required proof of a fact not required of the others, and prosecuting him on all three counts in the same proceeding was permissible.[7] On the other hand, in *Whalen* v. *United States,*[8] the Court determined that a defendant could not be separately punished for rape and for killing the same victim in the perpetration of the rape, because it is not the case that each statute requires proof of a fact that the other does not, and no indication ex-

that the clause did preclude multiple punishments for separate statutory offenses that did not each require proof of a fact that the other(s) did not. Id., 344. Inasmuch as the case involved separate offenses which met this test, *Albernaz* strictly speaking is not a square holding and previous dicta is otherwise, but *Albernaz* is well-considered dicta in view of the positions of at least four of its Justices who have objected to the dicta in other cases suggesting a constitutional restraint by the clause. *Whalen* v. *United States,* 445 U.S. 684, 695, 696, 699 (1980) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger).

[4] *United States* v. *Universal C.I.T. Corp.,* 344 U.S. 218, 221-222 (1952).

[5] *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932). This case itself was not a double jeopardy case, but it derived the rule from *Gavieres* v. *United States,* 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also Carter* v. *McClaughry,* 183 U.S. 365 (1902); *Morgan* v. *Devine,* 237 U.S. 632 (1915); *Albrecht* v. *United States,* 273 U.S. 1 (1927); *Pinkerton* v. *United States,* 328 U.S. 640 (1946); *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946); *United States* v. *Michener,* 331 U.S. 789 (1947); *Pereira* v. *United States,* 347 U.S. 1 (1954); *Callanan* v. *United States,* 364 U.S. 587 (1961).

[6] 357 U.S. 386 (1958).

[7] *See also Albernaz* v. *United States,* 450 U.S. 333 (1981); *Iannelli* v. *United States,* 420 U.S. 770 (1975) (defendant convicted on two counts, one of the substantive defense, one of conspiracy to commit the substantive defense raised variation of *Blockburger* test, Wharton's Rule requiring that one may not be punished for conspiracy to commit a crime when the nature of the crime necessitates participation of two or more persons for its commission; Court recognized Wharton's Rule as a double-jeopardy inspired presumption of legislative intent and that intent in this case was "clear and unmistakeable" that Congress wanted both offenses punished separately).

[8] 445 U.S. 684 (1980).

isted in the statutes and the legislative history that Congress wanted the separate offenses punished.[9]

***Successive Prosecutions for "the Same Offense."***—In *Brown* v. *Ohio*,[10] the Court, apparently for the first time, applied the same evidence test to bar successive prosecutions for different statutory offenses involving the same conduct in state court. Defendant had been convicted of "joyriding," of operating a motor vehicle without the owner's consent, and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court observed that each offense required the same proof and for double jeopardy purposes met the *Blockburger* test. The second conviction was overturned.[11] But, in *Illinois* v. *Vitale*,[12] the Court held that a prior conviction of failing to reduce speed to avoid an accident did not preclude a second trial for involuntary manslaughter, inasmuch as failing to reduce speed was not a necessary element of the statutory offense of manslaughter, unless the prosecution in the second trial had to prove failing to reduce speed to establish this particular offense. Now that *Albernaz* has held that *Blockburger* is no barrier to the legislature's provision for multiple punishments for different elements of the same offense if it clearly evinces in intent to do so,[13] it appears that *Brown* is to be limited to successive prosecutions and does not apply to multiple punishments or it may be that *Brown* is more severely affected.[14]

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[9] *See also Jeffers* v. *United States*, 432 U.S. 137 (1977) (no indication in legislative history Congress intended defendant to be prosecuted both of conspiring to distribute drugs and of distributing drugs in concert with five or more persons); *Simpson* v. *United States*, 435 U.S. 6 (1978) (defendant improperly prosecuted both for committing bank robbery with a firearm and for using a firearm to commit a felony); *Bell* v. *United States*, 349 U.S. 81 (1955) (simultaneous transportation of two women across state lines for immoral purposes one violation of Mann Act rather than two).

[10] 432 U.S. 161 (1977). *Cf. In re Nielson*, 131 U.S. 176 (1889) (defendant Mormon prosecuted for violating a statute prohibiting males from cohabiting with more than one woman; following conviction, he was prosecuted for adultery under another statute for the same conduct; second prosecution held impermissible, but the second prosecution had to prove additional fact, that he was married to another woman).

[11] *See also Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (defendant convicted of felony murder on conduct of participating in a store robbery with another person who shot a store clerk; defendant then tried and convicted of robbing the store, and Supreme Court reversed; store robbery lesser-included crime in offense of felony murder).

[12] 447 U.S. 410 (1980).

[13] *Albernaz* v. *United States*, 450 U.S. 333 (1981).

[14] The Court did suggest that if the legislature had provided that joyriding is a separate offense for each day the vehicle is operated without owner's consent, so that the two indictments each specifying a different date on which the offense occurred would have required different proof, the result might have been different, but this, of course, met the *Blockburger* problem. *Brown* v. *Ohio*, 432 U.S. 161, 169 n.

***The "Same Transaction" Problem.***—Another way in which the same conduct may give rise to multiple offenses, in a way that would satisfy the *Blockburger* test, is when a defendant engages in conduct which because it victimizes two or more individuals is a separate offense as to each of them. Thus, in *Hoag* v. *New Jersey*,[15] before the double jeopardy clause was applied to the States, the Court found no due process problem in successive trials arising out of a tavern hold-up in which five customers were robbed. *Ashe* v. *Swenson*,[16] however, presented the Court with the *Hoag* fact situation directly under the double jeopardy clause. Defendant had been acquitted at a trial of robbing one player in a poker game; no defense testimony was offered and no contest was made respecting the facts that a robbery had taken place nor that each of the players had lost money. A second trial was held on a charge of having robbed a second of the seven poker players and on the basis of stronger identification testimony defendant was convicted. Reversing the conviction, the Court held that the doctrine of collateral estoppel[17] was a constitutional rule made applicable to the States through the double jeopardy clause. Because the only basis upon which the jury could have acquitted defendant at his first trial was to have found that he was not present at the robbery, that he was not one of the robbers, the State could not relitigate that issue and with that issue settled, there could be no conviction.[18] Several Justices would have gone further and required a compulsory joinder of all charges against a defendant growing out of a single criminal act, occurrence, episode, or transaction, except where a crime is not discovered until prosecution arising from the same transaction has begun or where the same jurisdiction does not have cognizance of

8 (1977). The Court also suggested that an exception might be permitted where the State is unable to proceed on the more serious charge at the outset because the facts necessary to sustain that charge had not occurred or had not been discovered. Id., 169 n. 7. *See also Jeffers* v. *United States*, 432 U.S. 137, 150–154 (1977) (plurality opinion) (exception where defendant elects separate trials).

[15] 356 U.S. 464 (1958). *See also Ciucci* v. *Illinois*, 356 U.S. 571 (1958).

[16] 397 U.S. 436 (1970).

[17] " 'Collateral estoppel' is an awkward phrase . . . [which] means simply that when an issue of ultimate fact has once been determined by a final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id., 443. First developed in civil litigation, the doctrine was applied in a criminal case in *United States* v. *Oppenheimer*, 242 U.S. 85 (1916). *See also Sealfon* v. *United States*, 332 U.S. 575 (1948).

[18] *Ashe* v. *Swenson*, 397 U.S. 436, 466 (1970). *See also Harris* v. *Washington*, 404 U.S. 55 (1971); *Turner* v. *Arkansas*, 407 U.S. 366 (1972).

all the crimes.[19] This test has not been accepted by the Court but neither has it ever been expressly rejected.[20]

## SELF-INCRIMINATION

### Development and Scope

Source of this clause was the maxim "*nemo tenetur prodere*—or *accusareseipsum*," that "no man is bound to accuse himself." The maxim is but one aspect of two different systems of law enforcement which competed in England for acceptance; the accusatorial, which predated the reign of Henry II but which was expanded and extended by him, and essentially a system in which first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of others and of defendant in the early years, while the inquisitional, which developed in the ecclesiastical courts, compelled the alleged wrongdoer to affirm his culpability through the use of the oath *ex officio*. Under it, an official, by virtue of his office (*ex officio*), had the power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all things he would be questioned about, without advising the person whether or not he was accused or of what or of the nature of the questions before the administration of the oath.[1]

The use of this oath in Star Chamber proceedings, especially to root out political heresies, combined with the opposition to the ecclesiastical oath *ex officio* led over a long period of time to the general acceptance of the principle that one could not be required to accuse himself on oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or under oath in a court of common law.[2] The precedents in the colonies are few in number

[19] *Ashe* v. *Swenson*, 397 U.S. 436, 448 (1970) (Justices Brennan, Douglas, and Marshall concurring). Justices Brennan and Marshall adhere to their position, *Brown* v. *Ohio*, 432 U.S. 161, 170 (1977) (concurring); *Thompson* v. *Oklahoma*, 429 U.S. 1053 (1977) (dissenting from denial of *certiorari*).

[20] *See Brown* v. *Ohio*, 432 U.S. 161, 166 n. 6 (1977). It was rejected by Chief Justice Burger in *Ashe* v. *Swenson*, 397 U.S. 436, 468 (1970) (dissenting), by him and Justice Blackmun in *Harris* v. *Washington*, 404 U.S. 55, 57 (1971) (dissenting), and, perhaps, by Justice Rehnquist in *Turner* v. *Arkansas*, 407 U.S. 366, 368 (1972) (dissenting).

[1] Maguire, "Attack of the Common Lawyers on the Oath *Ex Officio* as Administered in the Ecclesiastical Courts in England," in C. Wittke (ed.), *Essays in History and Political Theory in Honor of Charles Howard McIlwain* (Cambridge: 1936), 199.

[2] The traditional historical account is 8 J. Wigmore, *A Treatise on the Anglo-American System of Evidence* (Boston: J. McNaughton rev. 1961), § 2250, but more

but following the Revolution six of them had embodied the privilege against self-incrimination in their constitutions[3] and the privilege was one of those recommended for inclusion in a federal bill of rights by several state ratifying conventions.[4] Madison's version of the clause read "nor shall be compelled to be a witness against himself," [5] but upon consideration by the House an amendment was agreed to insert "in any criminal case" in the provision.[6]

The historical studies cited demonstrate that in England and the colonies the privilege was narrower than the interpretation now prevailing, a common situation reflecting the gradual expansion, or occasional contracting, of constitutional guarantees based on the judicial application of the policies underlying the guarantees in the context of new factual patterns and practices. The difficulty is that the Court has generally failed to articulate the policy objectives underlying the privilege, usually citing a "complex of values" when it has attempted to state the interests served by it.[7] Commonly mentioned in numerous cases was the assertion that the privilege was designed to protect the innocent and to further the search for truth.[8] It appears now, however, that the Court has re-

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recent historical studies have indicated that Dean Wigmore was too grudging of the privilege. L. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York: 1968); Morgan, "The Privilege Against Self-Incrimination," 34 Minn. L. Rev 1 (1949).

[3] 3 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d sess. (Washington: 1909), 1891 (Massachusetts); 4 id., 2455 (New Hampshire); 5 id., 2787 (North Carolina), 3038 (Pennsylvania); 6 id., 3741 (Vermont); 7 id., 3813 (Virginia).

[4] Amendments were recommended by an "Address" of a minority of the Pennsylvania convention after they had been voted down as a part of the ratification action, 2 B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 628, 658, 664, and then the ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally took this step.

[5] 1 *Annals of Congress* 434 (June 8, 1789).

[6] Id., 753 (August 17, 1789).

[7] "It reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, . . .'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' . . ., our distrust of self-deprecatory statement; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent,'" *Murphy* v. *Waterfront Comm.*, 378 U.S. 52, 55 (1954). A dozen justifications have been suggested for the privilege. 8 J. Wigmore, *A Treatise on the Anglo-American System of Evidence* (Boston: J. McNaughton rev. 1961), § 2251.

[8] E.g. *Twining* v. *New Jersey*, 211 U.S. 78, 91 (1908); *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956); *Quinn* v. *United States*, 349 U.S. 155, 162–163 (1955).

jected both of these as inapplicable principles and has settled upon the principle that the clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion.[9] In order to protect these interests and to preserve these values, the privilege "is not to be interpreted literally." Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts." [10]

"The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." [11] Thus, a judge who would deny a claim of the privilege must be " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." [12] Thus, the witness must have reasonable cause to appre-

[9] "[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' . . .

"The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone." *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 415, 416 (1966); *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966); *Schmerber* v. *California*, 384 U.S. 757, 760–765 (1966). *See also California* v. *Byers*, 402 U.S. 424, 448–458 (1971) (Justice Harlan concurring). For a critical modern view of the privilege, *see* Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 U. Cin. L. Rev. 671 (1968).

[10] *Ullmann* v. *United States*, 350 U.S. 422, 438–439 (1956).

[11] *Hoffman* v. *United States*, 341 U.S. 479, 486–487 (1951). *See also Emspak* v. *United States*, 349 U.S. 190 (1955); *Blau* v. *United States*, 340 U.S. 159 (1950); *Blau* v. *United States*, 340 U.S. 332 (1951).

[12] Id., 341 U.S., 488, quoting *Temple* v. *Commonwealth*, 75 Va. 892, 898 (1881). For an appliction of these principles, *see Malloy* v. *Hogan*, 378 U.S. 1, 11–14 (1964).

hend danger from an answer, but he may not be the sole judge of the validity of his claim. While the trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory, he must determine whether there is a reasonable apprehension of incrimination by considering the circumstances of the case, his knowledge of matters surrounding the inquiry, and the nature of the evidence which is demanded from the witness.[13] One must explicitly claim his privilege or he will be deemed to have waived it and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.[14]

A witness [15] has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to uncover other evidence against him.[16] The Court in recent

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and id., 33 (Justices White and Stewart dissenting). Where government is seeking to enforce an essentially noncriminal statutory scheme through compulsory disclosure, some Justices would apparently relax the *Hoffman* principles. *Cf. California* v. *Byers*, 402 U.S. 424 (1971) (plurality opinion).

[13] *Hoffman* v. *United States*, 341 U.S. 479 (1951); *Mason* v. *United States*, 244 U.S. 362 (1917).

[14] *Rogers* v. *United States*, 340 U.S. 367 (1951); *United States* v. *Monia*, 317 U.S. 424 (1943). The "waiver" concept here as in other recent cases has been pronounced "analytically [un]sound," with the Court preferring to reserve the term "waiver" "for the process by which one affirmatively renounces the protection of the privilege." *Garner* v. *United States*, 424 U.S. 648, 654, n. 9 (1976). Thus, the Court has settled upon the concept of "compulsion" as applied to "cases where disclosures are required in the face of claim of privilege." Ibid. "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not 'compelled' him to incriminate himself." Id., 654. Similarly, the Court has enunciated the concept of "voluntariness" to be applied in situations where it is claimed that a particular factor denied the individual a "free choice to admit, to deny, or to refuse to answer." Id., 654 n. 9, 656–665.

[15] The privilege against self-incrimination is a personal one and cannot be utilized by or on behalf of any organization, such as a corporation. Thus, a corporation cannot object on self-incrimination grounds to a subpoena of its records and books or to the compelled testimony of those corporate agents who have been given personal immunity from criminal prosecution. *United States* v. *White*, 322 U.S. 694, 701 (1944); *Baltimore & O.R.R.* v. *ICC*, 221 U.S. 612, 622 (1911); *Hale* v. *Henkel*, 201 U.S. 43, 69–70, 74–75 (1906). Neither may a corporate official with custody of corporate documents which incriminate him personally resist their compelled production on the assertion of his personal privilege. *United States* v. *White*, *supra*, 699–700; *Wilson* v. *United States*, 221 U.S. 361, 384–385 (1911). *Cf. George Campbell Painting Corp.* v. *Reid*, 392 U.S. 286 (1968).

[16] Thus, not only may a defendant or a witness in a criminal trial, including a juvenile proceeding, *In re Gault*, 387 U.S. 1, 42–57 (1967), claim the privilege but so may a party or a witness in a civil court proceeding, *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924), a potential defendant or any other witness before a grant jury, *Reina* v. *United States*, 364 U.S. 507 (1960); *Counselman* v. *Hitchock*, 142 U.S. 547, 563 (1892), or a witness before a legislative inquiry, *Watkins* v. *United States*, 354 U.S.

years has applied it as well to situations, such as police interrogation of suspects, in which there is no *legal* compulsion to speak.[17] What the privilege protects against is compulsion of "testimonial" disclosures; requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood does not compel him to incriminate himself within the meaning to the clause,[18] although compelling him to produce private papers may.[19]

The protection is against "compulsory" incrimination and traditionally the Court has treated within the clause only those compulsions which arise from legally enforcible obligations, culminating in imprisonment for refusal to testify or to produce documents.[20] But the compulsion need not be, of course, imprisonment, it could as well be termination of public employment [21] or disbar-

178, 195–196 (1957); *Quinn* v. *United States*, 349 U.S. 155 (1955); *Emspak* v. *United States*, 349 U.S. 190 (1955), or before an administrative body. *In re Groban*, 352 U.S. 330, 333, 336–337, 345–346 (1957); *ICC* v. *Brimson*, 154 U.S. 447, 478–480 (1894).

[17] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[18] *Schmerber* v. *California*, 384 U.S. 757, 764 (1966); *United States* v. *Wade*, 388 U.S. 218, 221–223 (1967); *Holt* v. *United States*, 218 U.S. 245, 252 (1910). In *California* v. *Byers*, 402 U.S. 424 (1971), four Justices believed that requiring any person involved in a traffic accident to stop and give his name and address did not involve testimonial compulsion and therefore the privilege was inapplicable, id., 431–434 (Chief Justice Burger and Justices Stewart, White, and Blackmun), but Justice Harlan, id., 434 (concurring), and Justices Black, Douglas, Brennan, and Marshall, id., 459, 464 (dissenting), disagreed.

[19] *Fisher* v. *United States*, 425 U.S. 391 (1976), however, holds that however incriminating the contents of certain papers prepared by accountants from the taxpayer's own papers, might be, compelling him to produce the documents by subpoena would not involve testimonial self-incrimination and would not be barred by the privilege. "[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." Id., 408 (emphasis by Court). Even if the documents contained the writing of the person being compelled to produce them, that would be insufficient to trigger the privilege, unless the government had compelled him to write in the first place. Id., 410 n. 11. Only if by complying with the subpoena would the person be making a communication that was both "testimonial" and "incriminating," such as by conceding the existence of the papers or indicating that these are the papers sought, would he have a valid claim of privilege and even there one would have to evaluate the facts and circumstances of the particular case to reach a determination. Id., 410. Seizure of business records in the handwriting of the defendant under a search warrant is therefore even further removed from the protection of the privilege. *Andresen* v. *Maryland*, 427 U.S. 463 (1976).

[20] E.g., *Marchetti* v. *United States*, 390 U.S. 39 (1968) (criminal penalties attached to failure to register and make incriminating admissions); *Malloy* v. *Hogan*, 378 U.S. 1 (1964) (contempt citation on refusal to testify).

[21] *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Assn.* v. *Comr. of Sanitation*, 392 U.S. 280 (1968). *See also Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with

ment of a lawyer [22] as a legal consequence of a refusal to make incriminating admissions. Recent decisions of the Court, however, have extended the concept of coercion without developing a clear doctrinal explanation to identify the differences between those situations in which impermissible coercion has been found and those in which such coercion as existed was found to be permissible. As a general rule, it may be said that all these cases involve the ordering of some feature of a trial so that a defendant is forced to a choice between or among rights and one choice may be to risk or to submit to self-incriminating disclosures by his actions. It has long been the rule that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination [23] and that such a defendant may be impeached by proof of prior convictions.[24] But in *Griffin* v. *California*,[25] the Court refused to permit prosecutorial or judicial comment to the jury upon a defendant's refusal to take the stand in his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and "[i]t cuts down on the privilege by making its assertion costly."

Neither may a prosecutor impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial.[1] But where the defendant took

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the State if at any time they refused to waive immunity and answer questions respecting their transactions with the State. The State can require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant the privilege against self-incrimination. *See also Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

[22] *Spevack* v. *Klein*, 385 U.S. 511 (1967).

[23] *Brown* v. *Walker*, 161 U.S. 591, 597–598 (1896); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314–316 (1900); *Brown* v. *United States*, 356 U.S. 148 (1958).

[24] *Spenser* v. *Texas*, 385 U.S. 554, 561 (1967); *cf. Michelson* v. *United States*, 335 U.S. 469 (1948).

[25] 380 U.S. 609, 614 (1965). The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. *See Wilson* v. *United States*, 149 U.S. 60 (1893). In *Carter* v. *Kentucky*, 450 U.S. 288 (1981), the Court held that the self-incrimination clause required a State, upon defendant's request, to give a cautionary instruction to the jurors that they must disregard defendant's failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. *Bruno* v. *United States*, 308 U.S. 287 (1939). In *Lakeside* v. *Oregon*, 435 U.S. 333 (1978), the Court held that a court may give such an instruction, even over defendant's objection.

[1] *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Postarrest silence, the Court stated, is inherently ambiguous and to permit use of the silence would be unfair since the *Miranda* warning told him he could be silent. The same result had earlier been achieved under the Court's supervisory power over federal trials in *United States* v. *Hale*, 422 U.S. 171 (1975).

the stand and testified, the Court permitted the impeachment use of his prearrest silence when that silence had in no way been officially encouraged, through a *Miranda* warning or otherwise.[2]

Further, the Court held inadmissible at the subsequent trial defendant's testimony at a hearing to suppress evidence wrongfully seized, since use of the testimony would put defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures,[3] and it proscribed the introduction at a second trial of defendant's testimony at the first trial given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect "fruit of the poisonous tree" which was "coerced" from defendant through the use of the confession.[4] Most potentially far-reaching was a holding that invalidated the penalty structure of a statute under which defendants could escape a possible death sentence by entering a guilty plea because it "needlessly encourage[d]" waivers of defendant's Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.[5]

While this "needless encouragement" test assessed the nature of the choice required to be made by defendants against the strength of the governmental interest in its system which required the choice, the Court soon devolved another test stressing the voluntariness of the choice; that is, while guilty pleas may be encouraged by any number of circumstances in the criminal process, by, for example, permitting a defendant to avoid the risk of a more severe penalty by pleading guilty, a guilty plea entered by a defendant who understands correctly the consequences of the plea is voluntary unless coerced or obtained under false pretenses and there is no impermissible coercion where defendant has the effective assistance of counsel.[6] Justice Harlan for the Court formulated

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[2] *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). *Cf. Baxter* v. *Palmigiano*, 425 U.S. 308 (1976) (prison disciplinary hearing may draw adverse inferences from inmate's assertion of privilege so long as this was not the sole basis of decision against him).

[3] *Simmons* v. *United States*, 390 U.S. 377 (1968). The rationale of the case was subsequently limited to Fourth Amendment grounds in *McGautha* v. *California*, 402 U.S. 183, 210–213 (1971).

[4] *Harrison* v. *United States*, 392 U.S. 219 (1968).

[5] *Jackson* v. *United States*, 390 U.S. 570, 583 (1968).

[6] *Parker* v. *North Carolina*, 397 U.S. 790 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970). Parker and Brady entered guilty pleas to avoid the death penalty when it became clear that the prosecution had solid evidence of their guilt; Richardson pled guilty because of his fear that an allegedly coerced confession would be introduced into evidence.

still another test in holding that putting a defendant in a capital case, in which the jury in one process decides guilt and sentence, to a choice between remaining silent on guilt or admitting guilt and being able to put on evidence designed to mitigate the possible sentence was not invalid under the self-incrimination clause. The pressure to take the stand in response to the sentencing issue, said the Court was not so great as to impair the policies underlying the self-incrimination clause, which, in this instance, the Court saw as proscription of coercion and of cruelty in putting defendant to an undeniably "hard" choice.[7] Similarly, it has been held that requiring a defendant to give notice to the prosecution before trial of his intention to rely on an alibi defense and to give the names and addresses of witnesses who will support it does not violate the clause.[8] Neither does it violate a defendant's self-incrimination privilege to create a presumption upon the establishment of certain basic facts which the jury may utilize to infer defendant's guilt unless he rebuts the presumption.[9]

The obligation to testify is not relieved by this clause, if, despite the incriminating nature of the answers, a prosecution is pre-

[7] *McGautha* v. *California*, 402 U.S. 183, 210–220 (1971). When the Court subsequently required bifurcated trials in capital cases, it was on the basis of the Eighth Amendment and represented no withdrawal from the position described here. *Infra*, *pp.* 1402–1403. *Cf. Corbitt* v. *New Jersey*, 439 U.S. 212 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978).

[8] *Williams* v. *Florida*, 399 U.S. 78, 80–86 (1970). The compulsion of choice, Justice White argued for the Court, proceeded from the strength of the State's case and not from the disclosure requirement. That is, the rule did not affect whether or not defendant chose to make an alibi defense and to call witnesses, it merely required him to accelerate the timing. It appears, however, that in *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), the Court utilized the "needless encouragement" test in striking down a state rule requiring defendant to testify before any other defense witness or to forfeit the right to testify at all. In the Court's view, this impermissibly burdened defendant's choice whether to testify or not.

Another prosecution discovery effort was approved in *United States* v. *Nobles*, 422 U.S. 233 (1975), in which a defense investigator's notes of interviews with prosecution witnesses were ordered disclosed to the prosecutor for use in cross-examination of the investigator. The Court discerned no compulsion upon defendant to incriminate himself.

[9] "The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." *Yee Hem* v. *United States*, 268 U.S. 178, 185 (1925), quoted with approval in *Turner* v. *United States*, 396 U.S. 398, 418 n. 35 (1970). Justices Black and Douglas dissented on self-incrimination grounds. Id., 425. *And see United States* v. *Gainey*, 380 U.S. 63, 71, 74 (1965) (dissenting opinions). For due process limitations on such presumptions, *see infra*, *pp.* 1600–1604, 1661–1663.

cluded [10] nor if the result of the answer is harm to reputation or exposure to infamy or disgrace.[11] The clause would not prevent a public employer from discharging an employee who, in an investigation specifically and narrowly directed at the performance of the employee's official duties, refuses to cooperate and to provide the employer with the desired information on grounds of self-incrimination.[12] But the degree to which a public employer is permitted to discharge an employee who has claimed his privilege before another investigating agency is unclear.[13]

Finally, the rules established by the clause and the judicial interpretations are applicable against the States to the same degree as to the Federal Government,[14] and neither sovereign can compel discriminatory admissions which would incriminate one in the other jurisdiction.[15]

[10] By tender of immunity, *infra, pp.* 1251–1255 or by pardon. *Brown* v. *Walker*, 161 U.S. 591, 598–599 (1896). The effect of a mere tender of pardon by the President remains uncertain. *Cf. Burdick* v. *United States*, 236 U.S. 79 (1915); *Biddle* v. *Perovich*, 274 U.S. 480 (1927).

[11] *Brown* v. *Walker*, 161 U.S. 591, 605–606 (1896); *Ullmann* v. *United States*, 350 U.S. 422, 430–431 (1956). Minorities in both cases had contended for a broader rule. *Brown* v. *Walker*, *supra*, 631 (Justice Field dissenting); *Ullmann* v. *United States*, *supra*, 454 (Justice Douglas dissenting).

[12] *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). Testimony compelled under such circumstances is, even in the absence of statutory immunity, barred from use in a subsequent criminal trial by force of the Fifth Amendment itself. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). However, unlike public employees, persons subject to professional licensing by government appear to be able to assert their privilege and retain their licenses. *Cf. Spevack* v. *Klein*, 385 U.S. 511 (1967) (lawyer may not be disbarred solely because he refused to testify at a disciplinary proceeding on self-incrimination grounds), approved in *Gardner* v. *Broderick*, *supra* 277–278. Justices Harlan, Clark, Stewart, and White dissented generally. 385 U.S. 500, 520, 530.

[13] *See Slochower* v. *Board of Education*, 350 U.S. 551 (1956), limited by *Lerner* v. *Casey*, 357 U.S. 468 (1958), and *Nelson* v. *County of Los Angeles*, 362 U.S. 1 (1960), which were in turn apparently limited by *Garrity* and *Gardner*.

[14] *Malloy* v. *Hogan*, 378 U.S. 1 (1964), overruling *Twining* v. *New Jersey*, 211 U.S. 78 (1908), and *Adamson* v. *California*, 332 U.S. 46 (1947).

[15] *Murphy* v. *Waterfront Comm.*, 378 U.S. 52 (1964), overruling *United States* v. *Murdock*, 284 U.S. 141 (1931) (Federal Government could compel a witness to give testimony which might incriminate him under state law), *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958) (State may compel a witness to give testimony which might incriminate him under federal law), and *Feldman* v. *United States*, 322 U.S. 487 (1944) (testimony compelled by a State may be introduced into evidence in the federal courts). *Murphy* held that a State could compel testimony under a grant of immunity but that since the State could not extend the immunity to federal courts the Supreme Court would not permit the introduction of evidence into federal courts which had been compelled by a State or which had been discovered because of state compelled testimony. The result was apparently a constitutionally compelled one arising from the Fifth Amendment itself, 378 U.S., 75–80, rather than one taken pursuant to the Court's supervisory power as Justice Harlan would have preferred. Id., 80 (concurring). Congress has power to confer immunity in state courts as well as in federal in order to elicit information, *Adams* v. *Maryland*, 347 U.S. 179 (1954), but whether

**The Power To Compel Testimony and Disclosure**

***Immunity.***—"Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible [with the values of the self-incrimination clause]. Rather they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." [1] Apparently the first immunity statute was enacted by Parliament in 1710 [2] and it was widely copied in the colonies. The first federal immunity statute was enacted in 1857 and immunized from prosecution any person who testified before a congressional committee with regard to the subject matter of the testimony.[3]

Revised in 1862 so as merely to prevent the use of the testimony at a subsequent prosecution of any witness before a congressional committee,[4] the statute was soon rendered unenforceable by the ruling in *Counselman* v. *Hitchcock* [5] in which an analogous limited immunity statute was held unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. *Counselman* was ambiguous with regard to its grounds because it identified two faults in the statute: it did not proscribe "derivative" evidence [6] and it only prohibited future use of the compelled testimony.[7] The latter language accentuated a division between adher-

Congress must do so or whether the immunity would be conferred simply through the act of compelling the testimony *Murphy* did not say.

Whether testimony could be compelled by either the Federal Government or a State that could incriminate a witness in a foreign jurisdiction is unsettled, *see Zicarelli* v. *New Jersey State Comm. of Investigation*, 406 U.S. 472, 480, 481 (1972) (reserving question), but an affirmative answer seems unlikely. *Cf. Murphy*, *supra*, 378 U.S., 58–63, 77.

[1] *Kastigar* v. *United States*, 406 U.S. 441, 445–446 (1972). It has been held that the Fifth Amendment itself precludes the use as criminal evidence of compelled admissions, *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), but this case and dicta in others is unreconciled with the cases that find that one may "waive" though inadvertently the privilege and be required to testify and incriminate oneself. *Rogers* v. *United States*, 340 U.S. 367 (1951).

[2] 9 Anne, c. 14. §§ 3–4 (1710). *See Kastigar* v. *United States*, 406 U.S. 441, 445 n. 13 (1972).

[3] 11 Stat. 155 (1857).

[4] 12 Stat. 333 (1862).

[5] 142 U.S. 547 (1892). The statute struck down was 15 Stat. 37 (1868).

[6] *Counselman* v. *Hitchcock*, 142 U.S. 547, 564 (1892). *And see* id., 586.

[7] Id., 585–586.

ents of "transactional" immunity and of "use" immunity which has continued to the present.[8] In any event, following *Counselman*, Congress enacted a statute which conferred transactional immunity as the price for being able to compel testimony [9] and the Court sustained this law in a five-to-four decision.[10]

"The 1893 statute has become part of our constitutional fabric and has been included 'in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.'" [11] So spoke Justice Frankfurter in 1956, broadly reaffirming *Brown v. Walker* and upholding the constitutionality of a federal immunity statute.[12] Because all but one of the immunity acts passed after *Brown v. Walker* were transactional immunity statutes,[13] the question of the constitutional sufficiency of use immunity did not arise, although dicta in cases dealing with immunity continued to assert the necessity of the former type of grant.[14] But be-

[8] "Transactional" immunity means that once a witness has been compelled to testify about an offense he may never be prosecuted for that offense, no matter how much independent evidence might come to light, while "use" immunity means that no testimony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person were subsequently prosecuted on independent evidence for the offense.

[9] 27 Stat. 443 (1893).

[10] *Brown* v. *Walker*, 161 U.S. 591 (1896). The majority reasoned that one was excused from testifying only if there could be legal detriment flowing from his act of testifying. If a statute of limitations had run of if a pardon had been issued with regard to a particular offense, a witness could not claim the privilege and refuse to testify, no matter how much other detriment, such as loss of reputation, would attach to his admissions. Therefore, since the statute acted as a pardon or amnesty and relieved the witness of all legal detriment, he must testify. The four dissenters contended essentially that the privilege protected against being compelled to incriminate oneself regardless of any subsequent prosecutorial effort, id., 610, and that a witness was protected against infamy and disparagement as much as prosecution. Id., 628.

[11] *Ullmann* v. *United States*, 350 U.S. 422, 438 (1956), quoting *Shapiro* v. *United States*, 335 U.S. 1, 6 (1948).

[12] "[The] sole concern [of the privilege] is . . . with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts. . . .' . . . Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases." Id., 438–439. The internal quotation is from *Boyd* v. *United States*, 116 U.S. 616, 634 (1886).

[13] *Kastigar* v. *United States*, 406 U.S. 441, 457–458 (1972); *Piccirillo* v. *New York*, 400 U.S. 548, 571 (1971) (Justice Brennan dissenting). The exception was an immunity provision of the bankruptcy laws, 30 Stat. 548 (1898), 11 U.S.C. § 25(a)(10), repealed by 84 Stat. 931 (1970). The right of a bankrupt to insist on his privilege against self-incrimination as against this statute was recognized in *McCarthy* v. *Arndstein*, 266 U.S. 34, 42 (1924), "because the present statute fails to afford complete immunity from a prosecution." The statute also failed to prohibit the use of derivative evidence. *Arndstein* v. *McCarthy*, 254 U.S. 71 (1920).

[14] E.g., *Hale* v. *Henkel*, 201 U.S. 43, 67 (1906); *United States* v. *Monia*, 317 U.S. 424, 425, 428 (1943); *Smith* v. *United States*, 337 U.S. 137, 141, 146 (1949); *United States* v. *Murdock*, 284 U.S. 141 149 (1931); *Adams* v. *Maryland*, 347 U.S. 179, 182 (1954). In *Ullmann* v. *United States*, 350 U.S. 422, 436–437 (1956), Justice Frankfurt-

ginning in 1964 when it applied the self-incrimination clause to the States, the Court was faced with the problem which arose because a State could grant immunity either from prosecution or from use of evidence only in its own courts and not in the courts of another State or of the United States.[15] On the other hand, to foreclose the States from compelling testimony because they could not immunize a witness in a subsequent "foreign" prosecution would severely limit state law enforcement efforts. Therefore, the Court emphasized the "use" restriction rationale of *Counselman* and announced that as a "constitutional rule, a state witness could not be compelled to incriminate himself under federal law unless federal authorities were precluded from using either his testimony or evidence derived from it" and thus formulated a use restriction to that effect.[16] Then, while refusing to adopt the course because of statutory interpretation reasons, the Court indicated that use restriction in a federal regulatory scheme requiring the reporting of incriminating information was "in principle an attractive and apparently practical resolution of the difficult problem before us," citing *Murphy* with apparent approval.[17]

Congress thereupon enacted a statute replacing all prior immunity statutes and adopting a use-immunity restriction only.[18] Soon tested, this statute was sustained in *Kastigar* v. *United States*.[19] "[P]rotection coextensive with the privilege is the degree of protection which the Constitution requires," wrote Justice Powell for the Court, "and is all that the Constitution requires. . . ."[20] "Transactional immunity, which accords full im-

er described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence.

[15] *Malloy* v. *Hogan*, 378 U.S. 1 (1964), extended the clause to the States. That Congress could immunize a federal witness from state prosecution and, of course, extend use immunity to state courts, was held in *Adams* v. *Maryland*, 347 U.S. 179 (1954), and was recognized in *Brown* v. *Walker*, 161 U.S. 591 (1896).

[16] *Murphy* v. *Waterfront Comm.* 378 U.S. 52, 77–99 (1964). Concurring, Justice White and Stewart argued at length in support of the constitutional sufficiency of use immunity and the lack of a constitutional requirement of transactional immunity. Id., 92. *See also Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Assn.* v. *Comr. of Sanitation*, 392 U.S. 280 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), recognizing the propriety of compelling testimony with a use restriction attached.

[17] *Marchetti* v. *United States*, 390 U.S. 39, 58 (1968).

[18] Organized Crime Control Act of 1970, 84 Stat. 922, 18 U.S.C. §§ 6002–6003.

[19] 406 U.S. 441 (1972). A similar state statute was sustained in *Zicarelli* v. *New Jersey State Comm. of Investigation*, 406 U.S. 472 (1972).

[20] *Kastigar* v. *United States*, 406 U.S. 441, 459 (1972).

munity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to . . . criminal acts." ' Immunity from the use of compelled testimony and evidence derived directly and indirectly therefrom affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." [21]

***Required Records Doctrine.***—While the privilege is applicable to one's papers and effects,[22] it does not extend to corporate persons and hence corporate records, as has been noted, are subject to compelled production.[23] In fact, however, the Court has greatly narrowed the protection afforded in this area to natural persons by developing the "required records" doctrine. That is, it has held "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.' " [24] This exception

[21] Id., 453. Joining Justice Powell in the opinion were Justices Stewart, White, and Blackmun, and Chief Justice Burger. Justices Douglas and Marshall dissented, contending that a ban on use could not be enforced even if a use ban was constitutionally adequate. Id., 462, 467. Justices Brennan and Rehnquist did not participate but Justice Brennan's views that transactional immunity was required had been previously stated. *Piccirillo* v. *New York*, 400 U.S. 548, 552 (1971) (dissenting). *See also New Jersey* v. *Portash*, 440 U.S. 451 (1979) (prosecution use of defendant's immunized testimony to impeach him at trial violates self-incrimination clause). Neither the clause nor the statute prevents the perjury prosecution of an immunized witness or the use of all his testimony to prove the commission of perjury. *United States* v. *Apfelbaum*, 445 U.S. 115 (1980). *See also United States* v. *Wong*, 431 U.S. 174 (1977); *United States* v. *Mandujano*, 425 U.S. 564 (1976).

[22] *Boyd* v. *United States*, 116 U.S. 616 (1886). *Supra*, *pp.* 1178–1180. *But see Fisher* v. *United States*, 425 U.S. 391 (1976).

[23] *Supra*, *p.* 1246.

[24] *Shapiro* v. *United States*, 335 U.S. 1, 33 (1948), quoting *Davis* v. *United States*, 328 U.S. 582, 589–590 (1946), quoting in turn *Wilson* v. *United States*, 221 U.S. 361, 380 (1911). *Wilson* is the source of the required-records doctrine in its dicta, its holding in the case being the familiar one that a corporate officer cannot claim the privilege against self-incrimination to refuse to surrender corporate records in his custody. *Cf. Heike* v. *United States*, 227 U.S. 131 (1913). *Davis* was a search and seizure case and dealt with gasoline ration coupons which were government property even though in private possession. *See Shapiro*, *supra*, 36, 56–70 (Justice Frankfurter dissenting).

developed out of, as Justice Frankfurter showed in dissent, the rule that documents which are part of the official records of government are wholly outside the scope of the privilege; public records are the property of government and are always accessible to inspection. Because government requires certain records to be kept to facilitate the regulation of the business being conducted, so the reasoning goes, the records become public at least to the degree that government could always scrutinize them without hindrance from the record-keeper. "If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume." [25]

"It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself." [1] But the only limit which the Court suggested in *Shapiro* was that there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." [2] That there are limits established by the self-incrimination clause itself rather than by a subject matter jurisdiction test is evident in the Court's consideration of reporting and disclosure requirements implicating but not directly involving the required-records doctrine.

***Reporting and Disclosure.***—The line of cases begins with *United States* v. *Sullivan* [3] in which a unanimous Court held that

[25] Id., 51.

[1] Id., 32.

[2] Ibid.

[3] 274 U.S. 259, 263, 264 (1927). *Sullivan* was reaffirmed in *Garner* v. *United States*, 424 U.S. 648 (1976), in which the Court held that failure to claim one's privilege on his tax returns, and the giving of incriminating information leading to conviction, was consistent with the Fifth Amendment. One must assert his privilege to alert the Government to the possibility that it is seeking to obtain incriminating material; it is not coercion forbidden by the clause that upon a claim of the privilege the Government could seek an indictment for failure to file since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled under

the Fifth Amendment did not privilege a bootlegger in not filing an income tax return because the filing would have disclosed the illegality in which he was engaged. "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime," Justice Holmes stated for the Court. However, "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return . . . ." Utilizing its taxing power to reach gambling activities over which it might not have had jurisdiction otherwise,[4] Congress enacted a complicated statute imposing an annual occupational tax on gamblers and an excise tax on all their wages and coupled the tax with an annual registration requirement under which each gambler must file with the IRS a declaration of his business with identification of his place of business and his employees and agents, filings which were made available to state and local law enforcement agencies. These requirements were upheld by the Court against self-incrimination challenges on the three grounds that (1) the privilege did not excuse a complete failure to file, (2) since the threshold decision to gamble was voluntary, the required disclosures were not compulsory, and (3) since registration required disclosure only of prospective conduct, the privilege, limited to past or present acts, did not apply.[5]

Constitutional limitations appeared, however, in *Albertson* v. *SACB*[6] which struck down under the self-incrimination clause an order pursuant to statute requiring registration by individual members of the Communist Party or associated organizations. "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the ad-

the clause to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, irrespective of whether a good faith erroneous assertion of the privilege could subject him to prosecution, a question not resolved.

[4] The expansion of the commerce power would now obviate reliance on the taxing power. *Supra*, pp. 197–200.

[5] *United States* v. *Kahriger*, 345 U.S. 22 (1953); *Lewis* v. *United States*, 348 U.S. 419 (1955).

[6] 382 U.S. 70 (1965).

mission of a crucial element of a crime." [7] The gambling tax reporting scheme was next struck down by the Court.[8] Because of the pervasiveness of state laws prohibiting gambling, said Justice Harlan for the Court, "the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." [9] Overruling *Kahriger* and *Lewis*, the Court rejected the grounds relied on in those cases for their conclusions. Registering *per se* would have exposed a gambler to dangers of state prosecution, so *Sullivan* did not apply.[10] Any contention that the voluntary engagement in gambling "waived" the self-incrimination claim, because there is "no constitutional right to gamble," would nullify the privilege.[11] And the privilege was not governed by a "rigid chronological distinction" so that it protected only past or present conduct but it reached future self-incrimination the danger of which is not speculative and insubstantial.[12]

[7] Id., 79. The decision was unanimous, Justice White not participating. The same issue had been held not ripe for adjudication in *Communist Party* v. *SACB*, 367 U.S. 1, 105–110 (1961).

[8] *Marchetti* v. *United States*, 390 U.S. 39 (1968) (occupational tax); *Grosso* v. *United States*, 390 U.S. 62 (1968) (wagering excise tax). In *Haynes* v. *United States*, 390 U.S. 85 (1968), the Court struck down a requirement that one register a firearm which it was illegal to possess. The following Term on the same grounds the Court voided a statute making possession of marijuana without having paid a transfer tax and registering illegal. *Leary* v. *United States*, 395 U.S. 6 (1969); *United States* v. *Covington*, 395 U.S. 57 (1969). However, a statute was upheld which forbade one to sell narcotics to one who did not have a written order on a prescribed form since the requirement caused the self-incrimination of the buyer but not the seller, the Court viewing the statute as actually a flat proscription on sale rather than a regulatory measure. *Minor* v. *United States*, 396 U.S. 87 (1969). The congressional response was reenactment of the requirements coupled with use immunity. *United States* v. *Freed*, 401 U.S. 601 (1971).

[9] *Marchetti* v. *United States*, 390 U.S. 39, 48 (1968).

[10] "Every element of these requirements would have served to incriminate petitioners; to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.'" Id., 50.

[11] "The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." Id., 51. *But cf. California* v. *Byers*, 402 U.S. 424, 434 (1971) (plurality opinion), in which it is suggested that because one has no "right" to leave the scene of an accident a requirement that one involved in an accident stop and identify himself does not violate the self-incrimination clause.

[12] *Marchetti* v. *United States*, 390 U.S. 39, 52–54 (1968). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination . . . . This principle does not permit the rigid chronological distinctions adopted in *Kahriger* and *Lewis*. We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the

Significantly, then, Justice Harlan turned to distinguishing the statutory requirements here from the "required records" doctrine of *Shapiro*. "First, petitioner . . . was not . . . obliged to keep and preserve records 'of the same kind as he has customarily kept'; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony . . . . Second, whatever 'public aspects' there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in 'an essentially non-criminal and regulatory area of inquiry' while those here are directed to a 'selective group inherently suspect of criminal activities.' The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers, . . . but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*." [13]

Most recent of this line of cases is *California* v. *Byers* [14] which indicates that the Court has yet to settle on an ascertainable standard for judging self-incrimination claims in cases where government is asserting an interest other than criminal law enforcement. *Byers* sustained the constitutionality of a statute which required the driver of any automobile involved in an accident to stop and give his name and address. The state court had held that the self-incrimination clause privileged a driver who reasonably believed that compliance with the statute would result in self-incrimination to fail to comply with it. A plurality of the Court, however, determined that *Sullivan* and *Shapiro* applied and not the *Albertson-Marchetti* line of cases, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions and because the stat-

act which it is subsequently employed to evidence." Id., 53–54. *Cf. United States* v. *Freed*, 401 U.S. 601, 605–607 (1971).

[13] *Marchetti* v. *United States*, 390 U.S. 39, 57 (1968).

[14] 402 U.S. 424 (1971).

ute was directed to all drivers and not to a group which was either "highly selective" or "inherently suspect of criminal activities." The combination of a noncriminal motive with the general character of the requirement made too slight for reliance the possibility of incrimination.[15] Justice Harlan concurred to make up the majority on the disposition of the case, disagreeing with the plurality's conclusion that the stop and identification requirement did not compel incrimination.[16] However, the Justice thought that where there is absent in a reporting scheme a governmental purpose to enforce a criminal law and instead it is pursuing other legitimate regulatory interests, it is permissible to apply a balancing test between the government's interest and the individual's interest. When he balanced the interests protected by the Amendment—protection of privacy and maintenance of an accusatorial system—with the noncriminal purpose, the necessity for self-reporting as a means of securing information, and the nature of the disclosures required, Justice Harlan voted to sustain the statute.[17]

### Confessions: Police Interrogation, Due Process, and Self-Incrimination

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " [1] This language in an 1897 case marked a

[15] Id., 427–431 (Chief Justice Burger and Justices Stewart, White, and Blackmun).

[16] "The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer . . . . [I]t must be recognized that a reading of our more recent cases . . . suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are 'real' and not 'imaginary' risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* . . . start from an assumption of a non-prosecutorial governmental purpose in the decision to tax gambling revenues; those cases go on to apply what in another context I have called the 'real danger v. imaginary possibility standard . . . .' A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the 'inherently-suspect-class' factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual's point of view." Id., 473–438.

[17] Id., 448–458. The four dissenters argued that it was unquestionable that Byers would have faced real risks of self-incrimination by compliance with the statute and that this risk was sufficient to invoke the privilege. Id., 459, 464 (Justices Black, Douglas, Brennan, and Marshall).

[1] *Bram* v. *United States*, 168 U.S. 532, 542 (1897).

sharp if unacknowledged break with the doctrine of previous cases in which the Court had applied the common-law test of voluntariness to determine the admissiblity of confessions and while the language was never expressly disavowed in subsequent cases arising in the federal courts the Court seems nevertheless to have proceeded along due process standards rather than self-incrimination analysis. Because the self-incrimination clause for most of this period was not applicable to the States, the admissibility of confessions in state courts was determined under due process standards developed from common-law voluntariness principles. It was only after the Court extended the self-incrimination clause to the States that a divided Court reaffirmed the 1897 ruling and extended it and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.[2] Though recent research tends to treat as oversimplified Wigmore's conclusion that "there never was any historical connection . . . between the constitutional clause and the confession-doctrine," [3] the fact is that the contention, coupled with the inapplicability of the self-incrimination clause to the States, was apparently the basis for the Supreme Court's adjudication of confession cases until recently.

***The Common Law Rule.***—Not until the latter part of the eighteenth century did there develop a rule excluding from admission at trial confessions coerced from the defendant; prior to that time, even confessions obtained by torture were admissible. As the rule developed in England and in early United States jurisprudence, the rationale was the unreliability of the confession's contents when induced by a promise of benefit or a threat of harm.[4] In its first decision on the admissibility of confessions, the Court adopted the common-law rule, stressing that while a "voluntary confession of guilt is among the most effectual proofs in the law, from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution." "[T]he presumption upon which

[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[3] 3 J. Wigmore, *A Treatise on the Anglo-American System of Evidence* (Boston: 3d ed. 1940), § 823, at 250 n. 5; *see also* 8 id., (McNaughton rev. 1961), § 2266. It appears that while the two rules did develop separately, they did stem from some of the same consideration, and, in fact, the confession rule may be considered in important respects to be an off-shoot of the privilege against self-incrimination. *See* L. Levy, *Origins of the Fifth Amendment—The Right against Self-Incrimination* (New York: 1968), 325–332, 495 n. 43 *See also Culombe* v. *Connecticut*, 367 U.S. 568, 581–584, esp. 583 n. 25 (1961) (Justice Frankfurter announcing judgment of the Court).

[4] 3 J. Wigmore, *A Treatise on the Anglo-American System of Evidence* (Boston: 3d ed. 1940), § 823; "Developments in the Law—Confessions," 79 Harv. L. Rev. 935, 954–959 (1966).

weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law." [5] Subsequent cases followed essentially the same line of thought.[6] Then, in *Bram* v. *United States* [7] the Court assimilated the common-law rule thus mentioned as a command of the Fifth Amendment and indicated that henceforth a broader standard for judging admissibility was to be applied.[8] Though this rule [9] and the case itself was subsequently approved in several cases,[10] the Court could hold within a few years that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent [11] and more than once later Courts could doubt "whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy . . . ." [12]

***McNabb-Mallory Doctrine.***—Perhaps one reason the Court did not squarely confront the application of the self-incrimination clause to police interrogation and the admissibility of confessions in federal courts was that in *McNabb* v. *United States* [13] it promul-

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[5] *Hopt* v. *Utah*, 110 U.S. 574, 584–585 (1884). Utah at this time was a territory and subject to direct federal judicial supervision.

[6] *Pierce* v. *United States*, 160 U.S. 335 (1896); *Sparf* v. *United States*, 156 U.S. 51 (1895). In *Wilson* v. *United States*, 162 U.S. 613 (1896), failure to provide counsel or to warn the suspect of his right to remain silent was held to have no effect on the admissibility of a confession but was only to be considered in assessing the credibility of it.

[7] 168 U.S. 532 (1897). "[T]he generic language of the [Fifth] Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted. . . ." Id., 543.

[8] Id., 549.

[9] *Ziang Sun Wan* v. *United States*, 266 U.S. 1, 14–15 (1924). This case first held that the circumstances of detention and interrogration were relevant and perhaps controlling on the question of admissibility of a confession.

[10] *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921); *Powers* v. *United States*, 223 U.S 303, 313 (1912); *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 342, 347 (1963).

[11] *Powers* v. *United States*, 223 U.S. 303 (1912).

[12] *United States* v. *Carignan*, 342 U.S. 36, 41 (1951). *See also McNabb* v. *United States*, 318 U.S. 332, 346 (1943); *Brown* v. *Mississippi*, 297 U.S. 278, 285 (1936); *Stein* v. *New York*, 346 U.S. 156, 191 n. 35 (1953).

[13] 318 U.S. 332 (1943). *See also Anderson* v. *United States*, 318 U.S. 350 (1943).

gated a rule excluding confessions obtained after an "unnecessary delay" in presenting a suspect for arraignment after arrest.[14] This rule, developed pursuant to the Court's supervisory power over the lower federal courts [15] and hence not applicable to the States as a constitutional rule would have been,[16] was designed to implement the guarantees assured to a defendant by the Federal Rules of Criminal Procedure [17] and was clearly informed with concern over incommunicado interrogation and coerced confessions.[18] While the Court never attempted to specify a minimum time after which delay in presenting a suspect for arraignment would be unnecessary, Congress in recent years has legislated to set a six-hour period for interrogation following arrest before the suspect must be presented.[19]

***State Confession Cases.***—In its first encounter with a confession case arising from a state court, the Supreme Court set aside a conviction based on only the confessions of the defendants which had been extorted from them through repeated whippings with ropes and studded belts.[20] For some thirty years thereafter the

[14] In *Upshaw* v. *United States*, 335 U.S. 410 (1948), the Court rejected lower court interpretations that delay in arraignment was but one factor in determining the voluntariness of a confession and held that a confession obtained after a thirty-hour delay was inadmissible *per se*. *Mallory* v. *United States*, 354 U.S. 449 (1957), held that any confession obtained during an unnecessary delay in arraignment was inadmissible. A confession obtained during a lawful delay before arraignment was admissible. *United States* v. *Mitchell*, 322 U.S. 65 (1944).

[15] *McNabb* v. *United States*, 318 U.S. 332, 340 (1943); *Upshaw* v. *United States*, 335 U.S. 410, 414 n. 2 (1948). *Burns* v. *Wilson*, 346 U.S. 137, 145 n. 12 (1953), indicated that because the Court had no supervisory power over courts-martial, the rule did not apply in military courts.

[16] *Gallegos* v. *Nebraska*, 342 U.S. 55, 60, 63-64, 71-73 (1951); *Stein* v. *New York*, 346 U.S. 156, 187-188 (1953); *Culombe* v. *Connecticut*, 367 U.S. 568, 599-602 (1961) (Justice Frankfurter announcing judgment of the Court).

[17] Rule 5(a) requiring prompt arraignment was promulgated in 1946 but the Court in *McNabb* relied on predecessor statutes some of which required prompt arraignment. *Cf. Mallory* v. *United States*, 354 U.S. 449, 451-454 (1957). Rule 5(b) requires that the magistrate at arraignment must inform the suspect of the charge against him, warn him that what he says may be used against him, and tell him of his right to counsel and his right to remain silent and further he must provide for the terms of bail.

[18] *McNabb* v. *United States*, 318 U.S. 332, 343 (1943); *Mallory* v. *United States*, 354 U.S. 449, 452-453 (1957).

[19] The provision was part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, 18 U.S.C. § 3501(c).

[20] *Brown* v. *Mississippi*, 297 U.S. 278 (1936). "[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.

". . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." Id., 285, 286.

Court attempted through a consideration of the "totality of the circumstances" surrounding interrogation and the obtaining of each challenged confession to determine whether a confession was "voluntary" and admissible or "coerced" and inadmissible. During this time, the Court was balancing, in Justice Frankfurter's explication, a view that police questioning of suspects was indispensable in solving many crimes on the one hand with the conviction that the interrogation process is not to be used to overreach persons who stand helpless before it.[21] "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."[22] Obviously, a Court seeking to determine whether the making of a confession was voluntary operated under a severe handicap inasmuch as the interrogation process was in secret with only police and the suspect witness to it and inasmuch as the concept of voluntariness referred to the defendant's mental condition.[23] Despite, then, a bountiful number of cases, binding precedents were few.

On the one hand, many of the early cases disclosed rather clear instances of coercion of the nature that the Court could little doubt the confessions were involuntary. Not only physical torture,[24] but other overtly coercive tactics as well have been condemned. *Chambers* v. *Florida*[25] held that five days of prolonged questioning following arrests without warrants and incommunicado detention made the subsequent confessions involuntary. *Ashcraft* v. *Tennessee*[1] held inadmissible a confession obtained near the end of

[21] *Culombe* v. *Connecticut*, 367 U.S. 568, 570-602 (1961) (announcing judgment of the Court).

[22] Id., 602.

[23] "The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external 'phenomenological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, 'psychological' fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances." Id., 603. *See* "Developments in the Law—Confessions," 79 Harv. L. Rev. 935, 973-982 (1966).

[24] *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

[25] 309 U.S. 227 (1940).

[1] 322 U.S. 143 (1944). Dissenting, Justices Jackson, Frankfurter, and Roberts protested that "interrogation *per se* is not, while violence *per se* is, an outlaw." A

a 36-hour period of practically continuous questioning, under powerful electric lights, by relays of officers, experienced investigators, and highly trained lawyers. Similarly, *Ward* v. *Texas*,[2] voided a conviction based on a confession obtained after defendant, who had been arrested illegally in another county and brought some 100 miles away to a county where questioning began, which continued for some three days while defendant was driven from county to county, was continuously questioned, and was told falsely of a danger of lynching. "Since *Chambers* v. *State of Florida*, . . . this Court has recognized that coercion can be mental as well as physcial and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstrations were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion'. A prolonged interrogation of the accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror." [3]

While the Court would not hold that prolonged questioning by itself made a resultant confession involuntary,[4] it did increasingly find coercion present even in intermittent questioning over a period of days of incommunicado detention.[5] In *Stein* v. *New York*,[6]

confession made after interrogation was not truly "voluntary" because all questioning is "inherently coercive," because it puts pressure upon a suspect to talk. Thus, in evaluating a confession made after interrogation, the Court must, they insisted, determine whether the suspect was in possession of his own will and self-control and not look alone to the length or intensity of the interrogation. They accused the majority of "read[ing] an indiscriminating hostility to mere interrogation into the Constitution" and preparing to bar all confessions made after questioning. Id., 156. A possible result of the dissent was the decision in *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944), which stressed deference to state-court factfinding in assessing the voluntariness of confessions.

[2] 316 U.S. 547 (1942). *See also Canty* v. *Alabama*, 309 U.S. 629 (1940); *White* v. *Texas*, 310 U.S. 530 (1940); *Lomax* v. *Texas*, 313 U.S. 544 (1941); *Vernon* v. *Alabama*, 313 U.S. 540 (1941).

[3] *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960).

[4] *Lisenba* v. *California*, 314 U.S. 219 (1941).

[5] *Watts* v. *Indiana*, 338 U.S. 49 (1949) (Suspect held incommunicado without arraignment for seven days without being advised of his rights. He was held in solitary confinement in a cell with no place to sleep but the floor and questioned each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949) (Suspect held on suspicion for five days without arraignment and without being advised of his rights. He was questioned by relays of officers for periods briefer than in *Watts* during both days and nights); *Harris* v. *South Carolina*, 338 U.S. 68 (1949). (Suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, and held incommunicado. He was questioned for three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft).

however, the Court affirmed convictions of experienced criminals who had confessed after twelve hours of intermittent questioning over a period of thirty-two hours of incommunicado detention. While the questioning was less intensive than in the prior cases, Justice Jackson for the majority stressed that the correct approach was to balance "the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." [7] But by the time *Haynes* v. *Washington* [8] was decided, holding inadmissible a confession made by an experienced criminal because of the "unfair and inherently coercive context" in which the statement was made, it was clear that the Court was adhering to a rule which found coercion in the fact of prolonged interrogation without regard to the individual characteristics of the suspect.[9] However, the age and intelligence of suspects have been repeatedly cited by the Court in appropriate cases as demonstrating the particular susceptibility of the suspects to even mild coercion.[10]

Where, however, interrogation was not so prolonged that the Court would deem it "inherently coercive," the "totality of the circumstances" was looked to in determining admissibility. Although

Justice Jackson dissented in the latter two cases, willing to hold that a confession obtained under lengthy and intensive interrogation should be admitted short of a showing of violence or threats of it and especially if the truthfulness of the confession may be corroborated by independent means. Id., 57.

[6] 346 U.S. 156 (1953).

[7] Id., 185.

[8] 373 U.S. 503 (1963) (Confession obtained some 16 hours after arrest but interrogation over this period consumed little more than two hours; he was refused in his requests to call his wife and told that his cooperation was necessary before he could communicate with his family).

[9] Id., 514. *See also Spano* v. *New York*, 360 U.S. 315 (1959). (After eight hours of almost continuous questioning, suspect was induced to confess by rookie policeman who was a childhood friend and who played on suspect's sympathies by falsely stating that his job as a policeman and the welfare of his family was at stake); *Rogers* v. *Richmond*, 365 U.S. 534 (1961) (Suspect resisted questioning for six hours but yielded when officers threatened to bring his invalid wife to headquarters). More recent cases include *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (Escaped convict held incommunicado 16 days but periods of interogation each day about an hour each); *Greenwald* v. *Wisconsin*, 390 U.S. 519 (1968); *Darwin* v. *Connecticut*, 391 U.S. 346 (1968).

[10] *Gallegos* v. *Colorado*, 370 U.S. 49 (1962); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Reck* v. *Pate*, 367 U.S. 433 (1961); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961). The suspect in *Spano* v. *New York*, 360 U.S. 315 (1959), was a 25-year-old foreigner with a history of emotional instability. The fact that the suspect was a woman was apparently significant in *Lynumn* v. *Illinois*, 372 U.S. 528 (1963), in which officers threatened to have her children taken from her and to have her taken off the welfare relief rolls.

in some of the cases a single factor may well be thought to stand out as indicating the involuntariness of the confession,[11] generally the recitation of factors, including not only the age and intelligence of the suspect but also such things as the illegality of the arrest, the incommunicado detention, the denial of requested counsel, the denial of access to friends, the employment of trickery, and other things, seemed not to rank any factor above the others.[12] Of course, confessions may be induced through the exploitation of some illegal action, such as an illegal arrest[13] or an unlawful search and seizure,[14] and if that be so the confession is inadmissible. Where police obtain a subsequent confession after obtaining one which is inadmissible as involuntary, the Court will not assume that the subsequent confession was similarly involuntary but will independently evaluate whether the coercive actions which produced the first continued to produce the later confession.[15]

***From the Voluntariness Standard to Miranda.***—Invocation by the Court of a self-incrimination standard for judging the fruits of police interrogation in *Miranda* v. *Arizona*,[16] was no unheralded novelty. The rationale of the confession cases changed over time to one closely approximating the foundation purposes the Court has attributed to the self-incrimination clause. Historically, the basis of the rule excluding coerced and involuntary confessions was their untrustworthiness, their unreliability.[17] It appears that this basis informed the Court's judgment in the early state confession cases[18] as it had in earlier cases from the lower federal courts.[19]

[11] E.g., *Leyra* v. *Denno*, 347 U.S. 556 (1954) (Confession obtained by psychiatrist trained in hypnosis from a physically and emotionally exhausted suspect already subject to three days of interrogation); *Townsend* v. *Sain*, 372 U.S. 293 (1963) (Suspect had drug with properties of "truth serum" administered to him to relieve withdrawal pains of narcotics addition although police probably not aware of side effects of drug).

[12] E.g., *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Ashdown* v. *Utah*, 357 U.S. 426 (1958); *Thomas* v. *Arizona*, 356 U.S. 390 (1958).

[13] *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

[14] *Fahy* v. *Connecticut*, 375 U.S. 85 (1963).

[15] *United States* v. *Bayer*, 331 U.S. 532 (1947); *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Darwin* v. *Connecticut*, 391 U.S. 346 (1968).

[16] 384 U.S. 436 (1966).

[17] 3 J. Wigmore, *A Treatise on the Anglo-American System of Evidence* (Boston, 3d ed. 1940), § 882 at 246.

[18] *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *White* v. *Texas*, 310 U.S. 530 (1940).

[19] *Hopt* v. *Utah*, 110 U.S. 574 (1884); *Wilson* v. *United States*, 162 U.S. 613 (1896).

But in *Lisenba* v. *California*,[20] Justice Roberts drew a distinguishing line between the confession rule and the standard of due process. "[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is admissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false . . . The aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence, whether true or false." Over the next several years, while the Justices continued to use the terminology of voluntariness, the Court accepted at different times both the concepts of trustworthiness and of constitutional fairness.[21]

Ultimately, however, those Justices who chose to ground the exclusionary rule on the latter consideration predominated, so that in *Rogers* v. *Richmond*[22] Justice Frankfurter spoke for six other Justices in writing: "Our decisions under that [Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth." Nevertheless, the Justice said in another case, "[n]o

[20] 314 U.S. 219, 236 (1941).

[21] Compare *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944), with *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944), with *Malinski* v. *New York*, 324 U.S. 401 (1945). In *Watts* v. *Indiana*, 338 U.S. 49 (1949), *Harris* v. *South Carolina*, 338 U.S. 68 (1949), and *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949), five Justices followed the due process-fairness standard while four adhered to a trustworthiness rationale. *See* id., 57 (Justice Jackson concurring and dissenting). In *Stein* v. *New York*, 346 U.S. 156, 192 (1953), the trustworthiness rationale had secured the adherence of six Justices. The primary difference between the two standards is the admissibility under the trustworthiness standard of a coerced confession if its trustworthiness can be established, if, that is, it can be corroborated.

[22] 365 U.S 534, 540–541 (1961). Similar expressions may be found in *Spano* v. *New York*, 360 U.S. 315 (1959), and *Blackburn* v. *Alabama*, 361 U.S. 199 (1960). *See also Culombe* v. *Connecticut*, 367 U.S. 568, 583 n. 25 (1961), in which Justice Frankfurter, announcing the judgment of the Court, observed that "the conceptions underlying the rule excluding coerced confessions and the privilege again self-incrimination have become, to some extent, assimilated."

single litmus-paper test for constitutionally impermissible interrogation has been evolved." [23] Three years later, however, in *Malloy* v. *Hogan*,[24] in the process of applying the self-incrimination clause to the States, Justice Brennan for the Court reinterpreted the line of cases since *Brown* v. *Mississippi*,[25] to conclude that the Court had initially based its rulings on the common-law confession rationale but that beginning with *Lisenba* v. *California* [1] a "federal standard" had been developed, the Court had engaged in a "shift [which] reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." Today, continued Justice Brennan, "the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897" when *Bram* v. *United States* had announced that in federal courts the self-incrimination clause furnished the basis for admitting or excluding evidence.[2]

One week after the decision in *Malloy* v. *Hogan*, the Court essayed its first attempt to define the rules of admissibility of confessions in different terms than its previous case, while it continued to emphasize voluntariness though in self-incrimination terms rather than in due process terms. In *Escobedo* v. *Illinois*,[3] it held inadmissible the confession obtained from a suspect in custody who had repeatedly requested and had repeatedly been refused an opportunity to consult with his retained counsel who was present at the police station seeking to gain access to Escobedo.[4] While *Esco-*

[23] *Culombe* v. *Connecticut*, 367 U.S. 568, 601 (1961). The same thought informs the options of the Court in *Haynes* v. *Washington*, 373 U.S. 503 (1963).

[24] 378 U.S. 1 (1964).

[25] 297 U.S. 278 (1936).

[1] 314 U.S. 219 (1941).

[2] *Malloy* v. *Hogan*, 378 U.S. 1, 6–7 (1964). Protesting that this was "*post facto* reasoning at best," Justice Harlan contended that the "majority is simply wrong" in asserting that any of the state confession cases represented anything like a self-incrimination basis for the conclusions advanced. Id., 17–19. *Bram* v. *United States*, 168 U.S. 532 (1897), is discussed *supra*, *pp.* 1260–1261.

[3] 378 U.S. 478 (1964). Joining Justice Goldberg in the majority were Chief Justice Warren and Justices Black, Douglas, and Brennan. Justices Clark, Harlan, Stewart, and White dissented. Id., 492, 493, 495.

[4] Previously, it had been held that a denial of a request to consult counsel was but one of the factors to be considered in assessing voluntariness. *Crooker* v. *California*, 357 U.S. 433 (1958); *Cicenia* v. *Lagay*, 357 U.S. 504 (1958). Chief Justice Warren and Justices Black, Douglas, and Brennan were prepared in these cases to impose a requirement of right to counsel *per se*. Post-indictment interrogation without the presence of counsel seemed doomed after *Spano* v. *New York*, 360 U.S. 315 (1959), and this was confirmed in *Massiah* v. *United States*, 377 U.S 201 (1964). *See infra*, *p.* 1366.

*bedo* appeared in the main to be a Sixth Amendment right-to-counsel case, the Court at several points did emphasize that the suspect had not been warned of his constitutional rights in terms that clearly implicated self-incrimination considerations.[5]

***Miranda* v. *Arizona*.**—The Sixth Amendment holding of *Escobedo* was deemphasized and the Fifth Amendment self-incrimination rule made preeminent in *Miranda* v. *Arizona*[6] in which the Court summarized its holding as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right of refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

Basis for the Court's conclusions was the determination that police interrogation as conceived and practiced was inherently coercive and that this compulsion, though informal and legally sanc-

[5] *Escobedo* v. *Illinois*, 378 U.S. 478, 485, 491 (1964) (both pages containing assertions of the suspect's "absolute right to remain silent" in the context of police warnings prior to interrogation).

[6] 384 U.S. 436, 444–445 (1966). In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), the Court held that neither *Escobedo* nor *Miranda* was to be applied retroactively. In cases where trials commenced after the decisions were announced, the due process "totality of circumstances" test was to be the key. *Cf. Davis* v. *North Carolina*, 384 U.S. 737 (1966).

tionless, was contrary to the protection assured by the self-incrimination clause, the protection afforded in a system of criminal justice which convicted a defendant on the basis of evidence independently secured and not out of his own mouth. In the Court's view, this had been the law in the federal courts since 1897 and the application of the clause to the States in 1964 necessitated the application of the principle in state courts as well. Therefore, the clause requires that police interrogation practices be so structured as to secure to suspects that they not be stripped of the ability to make a free and rational choice between speaking and not speaking. The warnings and the provision of counsel were essential, the Court said, to this type of system.[7] "In these cases," said Chief Justice Warren, "we might not find the defendants' statements to have been involuntary in traditional terms."[8] The acknowledgment that the decision considerably expanded upon previous doctrine, even if the assimilation of self-incrimination values by the confession-exclusion rule be considered complete, was more clearly made a week after *Miranda* when in denying retroactivity to that case and to *Escobedo* the Court asserted that law enforcement officers had relied justifiably upon prior cases, "now no longer binding," which treated the failure to warn a suspect of his rights or the failure to grant access to counsel as one of the factors to be considered.[9] It was thus not the application of the self-incrimination clause to police interrogation in *Miranda* which constituted a major change from precedent but the series of warnings and guarantees which the Court imposed as security for the observance of the privilege.

While the Court's decision rapidly became highly controversial and the source of much political agitation, including a prominent role in the 1968 presidential election, the Court has continued to adhere to it,[10] not without considerable qualification, however. In

[7] Justices Clark, Harlan, Stewart, and White dissented, finding no historical support for the application of the clause to police interrogation and rejecting the policy considerations for the extension put forward by the majority. *Miranda* v. *Arizona*, 384 U.S. 436, 499, 504, 526 (1966). Justice White argued that while the Court's decision was not compelled or even strongly suggested by the Fifth Amendment, its history, and the judicial precedents, this did not preclude the Court from making new law and new public policy grounded in reason and experience, but he contended that the change made in *Miranda* was ill-conceived because it arose from a view of interrogation as inherently coercive and because the decision did not adequately protect society's interest in detecting and punishing criminal behavior. Id., 531–545.

[8] Id., 457. For the continuing recognition of the difference between the traditional involuntariness test and the *Miranda* test, *see Michigan* v. *Tucker*, 417 U.S. 433, 443–446 (1974); *Mincey* v. *Arizona*, 437 U.S. 385, 396–402 (1978).

[9] *Johnson* v. *New Jersey*, 384 U.S. 719, 731 (1966).

[10] *See*, e.g., *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Chief Justice Burger concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.")

1968, Congress enacted a statute designed to set *Miranda* aside in the federal courts and to reinstate the traditional voluntariness test; an effort to enact a companion provision applicable to the state courts was defeated.[11] The statute, however, appears to lie unimplemented because of constitutional doubts about it,[12] and changing membership of the Court has resulted only in some curtailing of the case's principles.

In one respect, though, it appears that the later Court has constructed a rationale by which *Miranda* claims would be disallowed in most instances in federal *habeas corpus*, which would substantially limit the operation of the case's holding.[13] This potential limitation flows from the analysis in *Michigan* v. *Tucker*,[14] in which the Court was confronted with the question whether *Miranda* required the exclusion of the testimony of a witness, when the witness was discovered because of the statement of defendant in interrogation following an inadequate *Miranda* warning.[15] The interrogation had taken place prior to *Miranda*, but the trial had followed the Court's decision,[16] leading to the exclusion of defendant's statement but not of the testimony of the witness. The actual holding of the Court and the concurrence of two Justices turned on the fact that the interrogation preceded *Miranda* and that warnings had been given, although not the full *Miranda* warnings; thus, in some respects, the decision is in the line of retroactivity cases. But of great possible significance was the language of the Court in considering "whether the police conduct complained of directly infringed upon respondent's rights against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right." [17] Finding that defendant's statement had not

[11] 82 Stat. 197, 18 U.S.C. §§ 3501-3502. See S. Rept. No. 1097, 90th Congress, 2d sess. (1968).

[12] *But cf. United States* v. *Crocker*, 510 F.2d 1129 (C.A. 10, 1975).

[13] Equivalent to search and seizure exclusionary claims under *Stone* v. *Powell*, 428 U.S. 465 (1976). *See supra, pp.* 1208-1210. Application of *Stone* to *Miranda* was reserved in *Wainwright* v. *Sykes*, 433 U.S. 72, 87 n. 11 (1977). *See Brewer* v. *Williams*, 430 U.S. 387, 413-414 (1977) (Justice Powell concurring), and id., 426-428 (Chief Justice Burger dissenting). Notice, however, that if *Miranda* claims were made subject to *Stone*, the traditional voluntariness test of admitting confessions and admissions with its varying emphases on reliability, trustworthiness, and constitutional fairness, which might well make those claims not subject to *Powell*, *see Rose* v. *Mitchell*, 443 U.S. 545 (1977), would make questionable the value in the Court's perspective of limiting *habeas Miranda* claims.

[14] 417 U.S. 433 (1974).

[15] It is not clear that the witness' testimony was suppressible in any event. *Cf. United States* v. *Ceccolini*, 435 U.S. 268 (1978) (a Fourth Amendment case).

[16] *See Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

[17] *Michigan* v. *Tucker*, 417 U.S. 433, 439 (1974). Justices Rehnquist, Stewart, Blackmun, Powell, and Chief Justice Burger joined the opinion of the Court. Jus-

been coerced or otherwise procured in violation of his privilege, the Court found that good-faith, inadvertent error in not fully complying with the "prophylactic" *Miranda* rules did not require exclusion of the testimony, because the error preceded *Miranda*, because exclusion would not deter wrongful conduct, and because admission would not implicate the trial court in the use of possibly untrustworthy evidence.[18] Obviously, dividing the question in this way between a constitutional right and a judicially-created enforcement mechanism permits courts a considerable degree of flexibility to apply or not apply the exclusionary rule previously thought to be fairly rigid under *Miranda*.[19]

In any event, since *Miranda*, the Court has estabished several lines of decisions with respect to interpreting it.

First, persons who are questioned while they are in *custody* must be given the *Miranda* warnings. *Miranda* applies to "custodial interrogation," that is, to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[20] Clearly, a suspect detained in jail is in custody, even if the detention is for some offense other than the one about which he is questioned.[21] If he is placed under arrest, even if he is in his own home, the questioning is custodial.[22] But the fact that a suspect may be present in a police station does not, in the absence of indicia that he was in custody, mean that the questioning is custodial,[23] and the fact that he is in his home or other familiar sur-

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tices Brennan and Marshall concurred on retroactivity grounds, id., 453, and Justice Stewart noted he could have joined this opinion as well. Ibid. Justice White, continuing to think *Miranda* was wrongly decided, concurred because he did not think the "fruits" of a *Miranda* violation should be excluded. Id., 460.

[18] Id., 446–452. The similarity with opinions interpreting the search and seizure exclusionary rule is striking. *Supra, pp.* 1208–1210.

[19] While the exclusionary rule may not be directly mandated by the constitutional provision in issue, it must be a constitutional standard, because if it were not the Court could not impose it on the States. See Monaghan, "Foreword: Constitutional Common Law," 89 Harv. L. Rev. 1 (1975); Schrock, Welsh & Collins, "Interrogational Rights: Reflections on *Miranda* v. *Arizona*," 52 So. Cal. L. Rev. 1 (1978).

[20] *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966).

[21] *Mathis* v. *United States*, 391 U.S. 1 (1968) (suspect in state jail questioned by federal officer about a federal crime).

[22] *Orozco* v. *Texas*, 394 U.S. 324 (1969) (four policemen entered suspect's bedroom at 4 a.m. and questioned him; though not formally arrested, he was in custody).

[23] *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though he was named by victim as culprit, questioning took place behind closed doors, and he was falsely informed his fingerprints had been found at scene of crime).

roundings will ordinarily lead to a conclusion that the inquiry was noncustodial.[24] As with investigative stops under the Fourth Amendment, there are great varieties of police-citizen contacts and the Supreme Court has not explored at any length the application of *Miranda* to questioning on the street and elsewhere in which the police have not acted with sufficiently clear assertions of authority as to indicate a custodial situation.[25]

Second, persons who are *interrogated* while they are in custody must be given the *Miranda* warnings. It is not necessary under *Miranda* that the police squarely ask a question. The breadth of the interrogation concept is demonstrated in *Rhode Island* v. *Innis*.[1] There, police had apprehended defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, defendant was not asked questions by the officers present, he having been given the *Miranda* warnings and asserting he wished to consult a lawyer before submitting to questioning. However, the officers engaged in conversation among themselves, in which they indicated that a school for handicapped children was near the crime scene and that they hoped the weapon was found before a child discovered it and was injured. Defendant then took them to the weapon's hiding place.

Unanimously rejecting a contention that *Miranda* would have been violated only by express questioning, the Court said: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were de-

[24] *Beckwith* v. *United States*, 425 U.S. 341 (1976) (IRS agents' interview with taxpayer in private residence, no custodial interrogation, although inquiry had "focused" on him.

[25] *Cf. United States* v. *Mendenhall*, 446 U.S. 544 (1980); *Reid* v. *Georgia*, 448 U.S. 438 (1980); *Brown* v. *Texas*, 443 U.S. 47 (1979).

[1] 446 U.S. 291 (1980). A remarkably similar factual situation was presented in *Brewer* v. *Williams*, 430 U.S. 387 (1977), which was decided under the Sixth Amendment. In addition to *Brewer*, the Court has also had difficulty in expounding on what constitutes interrogation for Sixth Amendment counsel purposes in *Messiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, 447 U.S. 264 (1980). The *Innis* Court indicated the definitions are not the same for each Amendment. *Supra*, 446 U.S., 300 n. 4.

signed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." [2]

A divided Court then concluded that the officers' conversation did not amount to a functional equivalent of questioning and that the evidence was admissible.[3]

In *Estelle* v. *Smith*,[4] the Court held that a prosecution psychiatrist's interview with defendant in order to determine his competency to stand trial, while the defense had raised no issue of insanity or incompetency, and while defendant was detained in jail, constituted questioning for *Miranda* purposes and the psychiatrist could not testify with respect to conclusions he had drawn from defendant's responses, because defendant had not been warned prior to the interview. Other instances of questioning in less formal contexts, i.e., in on-the-street encounters, in which the issues of custody and interrogation intertwine, await explication by the Court.

Third, before a suspect in custody is interrogated, he must be given *full* warnings, or the *equivalent*, of his *rights*. *Miranda*, of course, required express warnings to be given a suspect in custody of his right to remain silent, that anything he said may be used as evidence against him, that he has a right to counsel, and that if he cannot afford counsel he is entitled to an appointed attorney.[5] The Court recognized that "other fully effective means" could be devised to convey the right to remain silent,[6] but it was firm that the prosecution was not permitted to show that an unwarned suspect knew of his rights in some manner.[7] But it is not necessary that the police give the warnings as a verbatim recital of the words in the *Miranda* opinion itself, so long as the words used "fully conveyed" to a defendant his rights.[8]

Fourth, once a warned suspect asserts his *right* to *silence* and requests *counsel*, the police must scrupulously respect his assertion of right. The *Miranda* Court strongly stated that once a warned suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Further, if the suspect indicates he wishes the assistance of counsel before interrogation, the questioning must cease until he has counsel.[9] At least with respect to counsel, the Court

[2] *Rhode Island* v. *Innis*, 446 U.S. 291, 300–301 (1980).
[3] Id., 302–304. Justices Marshall, Brennan, and Stevens dissented, Id., 305, 307.
[4] 451 U.S. 454 (1981).
[5] *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). *See* id., 469–473.
[6] Ibid.
[7] Id., 469.
[8] *California* v. *Prysock*, 453 U.S. 355 (1981).
[9] *Miranda* v. *Arizona*, 384 U.S. 436, 472, 473–474 (1966).

has created practically a *per se* rule barring the police from continuing or from reinitiating interrogation with a suspect requesting counsel until counsel is present, save only that the suspect himself may initiate further proceedings. Thus, in *Edwards* v. *Arizona*,[10] the suspect had during questioning requested an attorney and questioning ceased, the suspect being returned to his cell. The following day, different police officers confronted the suspect and again warned him of his rights. The suspect thereafter incriminated himself. Holding that *Miranda* had been violated, the Court stated that "we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of this rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." [11]

However, the suspect must specifically ask for counsel; if he requests the assistance of someone else he thinks may be helpful to him, that is not a valid assertion of *Miranda* rights.[12] Moreover, the rigid *Edwards* rule is not applicable to other aspects of the warnings. That is, if the suspect asserts his right to remain silent, the questioning must cease, but officers are not precluding from themselves subsequently initiating a new round of interrogation, provided only that they again give the *Miranda* warnings.[13]

Fifth, a properly warned suspect may *waive* his *Miranda* rights and submit to custodial interrogation. *Miranda* recognized that a suspect may voluntarily and knowingly give up his rights and respond to questioning, but the Court cautioned that the prosecution bore a "heavy burden" to establish that a valid waiver had occurred.[14] While the waiver need not be express in order for it to be

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[10] 451 U.S. 477 (1981).

[11] Id., 484–485. The decision was unanimous, but three concurrences objected to a special rule limiting waivers with respect to counsel to suspect-initiated further exchanges. Id., 487, 488 (Chief Justice Burger and Justices Powell and Rehnquist).

[12] *Fare* v. *Michael C.*, 442 U.S. 707 (1979) (juvenile requested to see his parole officer, rather than counsel).

[13] *Michigan* v. *Mosley*, 423 U.S. 96 (1975) (suspect given *Miranda* warnings at questioning for robbery, requested cessation of interrogation, and police complied; some two hours later, a different policeman interrogated suspect about a murder, gave him a new *Miranda* warning, and suspect made incriminating admission; since police "scrupulously honored" suspect's request, admission valid).

[14] *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966).

valid,[15] neither may a suspect's silence or similar conduct constitute a waiver.[16] It must be shown that the suspect was competent to understand and appreciate the warning and to be able to waive his rights.[17] Essentially, resolution of the issue of waiver "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" [18]

Sixth, the admissions of an unwarned or improperly warned suspect *may not be used* directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. A confession or other incriminating admissions obtained in violation of *Miranda* may not, of course, be introduced against him at trial for purposes of establishing guilt [19] or for determining the sentence, at least in bifurcated trials in capital cases,[20] and neither may the "fruits" of such a confession or admission be used.[21] The Court, in opinions which bespeak a sense of the necessity of narrowly construing *Miranda,* has broadened the permissible impeachment purposes for which unlawful confessions and admissions may be used.[22] Thus, in *Harris* v. *New York,*[23] the Court held that the

[15] *North Carolina* v. *Butler,* 441 U.S. 369 (1979) (refusal of suspect to sign written waiver and absence of explicit oral waiver not necessarily showing of lack of waiver).

[16] Id., 373. But silence, "coupled with an understanding of his rights and a course of conduct indicating waiver," may support a conclusion of waiver. Ibid.

[17] *Tague* v. *Louisiana,* 444 U.S. 469 (1980).

[18] *North Carolina* v. *Butler,* 441 U.S. 369, 374-375 (1979) (quoting *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938)).

[19] *Miranda* v. *Arizona,* 384 U.S. 436, 479 (1966).

[20] *Estelle* v. *Smith,* 451 U.S. 454 (1981). The Court has yet to consider the applicability of the ruling in a noncapital, nonbifurcated trial case.

[21] *Cf. Harrison* v. *United States,* 392 U.S. 219 (1968) (after confessions obtained in violation of *McNabb-Mallory* were admitted against him, defendant took the stand to rebut them and made damaging admissions; after his first conviction was reversed, he was retried without the confessions but prosecutor introduced his testimony at the first trial; Court reversed conviction, because testimony was tainted by the admission of the confessions). *But see Michigan* v. *Tucker,* 417 U.S. 433 (1974). Confessions may be the poisonous fruit of other constitutional violations, such as illegal searches or arrests. E.g., *Brown* v. *Illinois,* 422 W.S. 590 (1975); *Dunaway* v. *New York,* 442 U.S. 200 (1979); *Taylor* v. *Alabama,* 457 U.S. 687 (1982).

[22] Under *Walter* v. *United States,* 347 U.S. 62 (1954), defendant not only denied the offense of which he was accused (sale of drugs), but he asserted he had never dealt in drugs. The prosecution was permitted to impeach him concerning heroin seized illegally from his home two years before. The Court observed that defendant could have denied the offense without making the "sweeping" assertions, as to which the government could impeach him.

[23] 401 U.S. 222 (1971) (defendant had denied only the commission of the offense. The Court observed that it was only "speculative" to think that impermissible police conduct would be encouraged by permitting such impeachment, a resort to deterrence analysis being contemporaneously used to ground the Fourth Amendment exclusionary rule, whereas defendant's right to testify was the obligation to testify truthfully and the prosecution could impeach him for committing perjury). *See also United States* v. *Havens,* 446 U.S. 620 (1980) (Fourth Amendment).

prosecution could use defendant's statements, obtained in violation of *Miranda*, to impeach his testimony if he voluntarily took the stand and denied commission of the offense. Subsequently, in *Oregon* v. *Hass*,[24] the Court permitted impeachment use of a statement made by the defendant after he had been warned but in which police had ignored his request for counsel. Such impeachment material, however, must still meet the standard of voluntariness associated with the pre-*Miranda* tests for the admission of confessions and statements.[25]

**The Operation of the Exclusionary Rule**

***Supreme Court Review.***—The Court's review of the question of admissibility of confessions or other incriminating statements is designed to prevent the foreclosure of the very question to be decided by it, the issue of voluntariness under the due process standard, the issue of the giving of the requisite warnings and the subsequent waiver, if there is one, under the *Miranda* rule. Recurring to Justice Frankfurter's description of the inquiry as a "three-phased process" in due process cases at least,[1] it can be seen that the Court's self-imposed rules of restraint on review of lower-court fact-finding greatly infuenced the process. The finding of facts surrounding the issue of coercion—the length of detention, any violence, circumstances of interrogation, use of tricks and ruses, *et cetera*—is the proper function of the trial court which had the advantage of having the witnesses before it. "This means that all testimonal conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat*, necessarily, that we are not to be bound by findings wholly lacking support in evidence." [2]

But with regard to the issues of how the accused reacted to the circumstances of his interrogation and of the legal significance of how he reacted, those issues are subject to open review of the conclusions of the lower courts. "No more restricted scope of review would suffice adequately to protect federal constitutional rights.

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[24] 420 U.S. 714 (1975). Contrarily, though, defendant may not be impeached by evidence of his silence after police have warned him of his right to remain silent. *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

[25] E.g., *Mincey* v. *Arizona*, 437 U.S. 385 (1978); *New Jersey* v. *Portash*, 440 U.S. 450 (1979).

[1] *Colombe* v. *Connecticut*, 367 U.S. 568, 603–606 (1961).

[2] Id., 603, *See Ashcraft* v. *Tennessee*, 322 U.S. 143, 152–153 (1944); *Lyons* v. *Oklahoma*, 322 U.S. 596, 602–603 (1944); *Watts* v. *Indiana*, 338 U.S. 49, 50–52 (1949); *Gallegos* v. *Nebraska*, 342 U.S. 55, 60–62 (1951); *Stein* v. *New York*, 346 U.S. 156, 180–182 (1953); *Payne* v. *Arkansas*, 356 U.S. 560, 561–562 (1958).

For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply be declining to draw inferences which the historical facts compel. Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate . . . that the state court's determination should control. But where, on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process—where this is all that appears in the record—a State judgment that the confession was voluntary cannot stand." [3] *Miranda,* of course, does away with the judgments about the effect of lack of warnings and the third phase, the legal determination of the interreaction of the first two phases is determined solely by two factual determinations, whether the warnings were given and if so whether there was a valid waiver. Presumably, supported determinations of these two facts by trial courts would preclude independent review by the Supreme Court. Yet, the Court has been clear that when the factfinding has such a substantial effect on one's constitutional rights it may and will independently review the facts.[4]

***Procedure in the Trial Courts.***—The Court has placed constitutional limitations upon the procedures followed by trial courts for determining the admissibility of confessions and other incriminating admissions. Three procedures were developed over time to deal with the question of admissibility when involuntariness was claimed. By the orthodox method, the trial judge heard all the evidence on voluntariness in a separate and preliminary hearing and if he found the confession involuntary the jury never received it, while if he found it voluntary the jury received it with the right to consider its weight and credibility, which consideration included the circumstances of its making. By the New York method, the

[3] *Culombe* v. *Connecticut,* 367 U.S. 568, 605 (1961). *See Watts* v. *Indiana,* 338 U.S. 49, 51 (1949); *Malinski* v. *New York,* 324 U.S. 401, 404, 417 (1945).

[4] "In cases in which there is a claim of denial of rights under the Federal Constitution this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Niemotko* v. *Maryland,* 340 U.S. 268, 271 (1951); *Time, Inc.* v. *Pape,* 401 U.S. 279, 284 (1971), and cases cited.

judge first reviewed the confession under a standard leading to its exclusion only if he found it not possible that "reasonable men could differ over the [factual] inferences to be drawn" from it; otherwise, the jury would receive the confession with instructions to first determine its voluntariness and to consider it if it were voluntary and to disregard it if it were not. By the Massachusetts method, the trial judge himself determined the voluntariness question and if he found the confession involuntary the jury never received it; if he found it to have been voluntarily made he permitted the jury to receive it with instructions that the jurors should make their own independent determination of voluntariness.[5]

The New York method was upheld against constitutional attack in *Stein* v. *New York*,[6] but eleven years later a five-to-four decision in *Jackson* v. *Denno*,[7] found it inadequate to protect the due process rights of defendants. The procedure did not, the Court held, ensure a "reliable determination on the issue of voluntariness" and did not sufficiently guarantee that convictions would not be grounded on involuntary confessions. Since there was only a general jury verdict of guilty, it was impossible to determine whether the jury had first focused on the issue of voluntariness and then either had found the confession voluntary and considered it on the question of guilt or had found it involuntary, disregarded it, and reached a conclusion of guilt on wholly independent evidence. It was doubtful that a jury could appreciate the values served by the exclusion of involuntary confessions enough to put out of mind the content of the confession no matter what was determined with regard to its voluntariness. The rule was reiterated in *Sims* v. *Georgia*[8] in which the Court voided a state practice permitting the judge to let the confession go to the jury for the ultimate decision on voluntariness upon an initial determination merely that the prosecution had made out a *prima facie* case that the confession was voluntary. The Court has interposed no consti-

[5] *Jackson* v. *Denno*, 378 U.S. 368, 410–423 (1964) (appendix to opinion of Justice Black concurring in part and dissenting in part).

[6] 346 U.S. 156, 170–179 (1953). Significant to the Court's conclusion on this matter was the further conclusion of the majority that coerced confessions were inadmissible solely because of their unreliability and if their trustworthiness could be established the utilization of an involuntary confession violated no constitutional prohibition. This conception was contrary to earlier cases and was subsequently repudiated. *See Jackson* v. *Denno*, 378 U.S. 368, 383–387 (1964).

[7] 378 U.S. 368 (1964). The decision was 5–4, Justice White writing the opinion of the Court and Justice Black the dissent. When he joined the Court, Chief Justice Burger associated himself with the Black position. *Sigler* v. *Parker*, 396 U.S. 482, 484 (1970) (dissenting). On the sufficiency of state court determinations, *see Swenson* v. *Stidham*, 409 U.S. 224 (1972); *Lo Vallee* v. *Della Rose*, 410 U.S. 690 (1973).

[8] 385 U.S. 538 (1967).

tutional objection to utilization of either the orthodox or the Massachusetts method for determining admissibility.[9] It has held that the prosecution bears the burden of establishing voluntariness by a preponderance of the evidence, rejecting a contention that it should be determined only upon proof beyond a reasonable doubt.[10]

## DUE PROCESS

### History and Scope

"It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." [1] The content of due process is "a historical product." [2] Ultimately, the concept is derivable from chapter 39 of Magna Carta, in which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." [3] The phrase "due process of law" first appeared in a statutory rendition of this chapter in 1354. "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." [4] Though Magna Carta

[9] *Jackson* v. *Denno*, 378, 378 U.S. 368 and n. 8 (1964); *Lego* v. *Twomey*, 404 U.S. 477, 489–490 (1972) (rejecting contention that jury should be required to pass on voluntariness following judge's determination.)

[10] *Lego* v. *Twomey*, 404 U.S. 477 (1972). Joining Justice White's opinion for the Court were Chief Justice Burger and Justices Stewart and Blackmun. Justices Brennan, Douglas, and Marshall dissented. Id., 490.

[1] *Solesbee* v. *Balkcom*, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934).

[2] *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

[3] Text and commentary on this chapter may be found in W. McKechnie, *Magna Carta—A Commentary on the Great Charter of King John* (Glasgow: 2d rev. ed. 1914), 375–395. The chapter became chapter 29 in the Third Reissue of Henry III in 1225. Id., 504, and *see* 139–159. As expanded, it read: "No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land." *See also* J. Holt, *Magna Carta* (Cambridge: 1965), 226–229. The 1225 reissue also added to chapter 29 the language of chapter 40 of the original text. "To no one will we sell, to no one will we deny or delay right or justice." This 1225 reissue became the standard text thereafter.

[4] 28 Edw. III, c. 3. *See* F. Thompson, *Magna Carta—Its Role in the Making of the English Constitution, 1300–1629* (Minneapolis: 1948), 86–97, recounting several

was in essence the result of a struggle over interest between the King and his barons,[5] this particular clause over time transcended any such limitation of scope and throughout the fourteenth century parliamentary statutory interpretation of it expanded far beyond any of the intention of the drafters.[6] The understanding which the founders of the American constitutional system, and those who wrote the due process clauses, brought to the subject they derived from Coke who in his *Second Institutes* expounded the proposition that the term "by law of the land" was equivalent to "due process of law," which he in turn defined as "by due process of the common law," that is, "by the indictment or presentment of good and lawful men . . . or by writ original of the Common Law." [7] The significance of both terms was procedural, but there was in Coke's writings on chapter 29 a rudimentary concept of substantive restrictions, which did not develop in England because of parliamentary supremacy, but which was to flower in the United States.

The term "law of the land" was early the preferred expression in colonial charters and declarations of rights, which gave way to the term "due process of law," although some state constitutions continued to employ both terms. Whichever phraseology was used, the expression seems generally to have occurred in close association with precise safeguards of accused persons, but, as is true of the Fifth Amendment here under consideration, the provision also obtains some suggestion of limitations on substance because of the following guarantee of just compensation upon the taking of private property for public use.[8]

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statutory reconfirmations. Note that the limitation of "free man" had given way to the all-inclusive delineation.

[5] W. McKechnie, *Magna Carta—A Commentary on the Great Charter of King John* (Glasgow: 2d rev. ed. 1914); J. Holt, *Magna Carta* (Cambridge: 1965).

[6] F. Thompson, *Magna Carta—Its Role in the Making of the English Constitution, 1300–1629* (Minneapolis: 1948).

[7] Sir Edward Coke, *Institutes of the Laws of England, Part II* (London: 1641), 50–51. For a review of the influence of Magna Carta and Coke on the colonies and the new nation, *see*, e.g., A. Howard, *The Road from Runnymede—Magna Carta and Constitutionalism in America* (Charlottesville: 1968).

[8] The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the "law of the land" phrase in a separate article, 3 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d Sess. (Washington: 1909), 1688, whereas Virginia used the clause in a section of guarantees of procedural rights in criminal cases. 7 id., 3813. New York in its constitution of 1821 was the first State to pick up "due process of law" from the United States Constitution. 5 id., 2648.

***Scope of the Guaranty.***—Standing by itself, the phrase "due process" would seem to refer solely and simply to procedure, to process in court, and therefore to be so limited that "due process of law" would be what the legislative branch enacted it to be. But that is not the interpretation which has been placed on the term. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law' by its mere will." [9] All persons within the territory of the United States are entitled to its protection, including corporations,[10] aliens,[11] and presumptively citizens seeking readmission to the United States,[12] but States as such are not so entitled.[13] It is effective in the District of Columbia [14] and in territories which are part of the United States,[15] but it does not apply of its own force to unincorporated territories.[16] Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.[17]

Early in our judicial history, a number of jurists attempted over the opposition of others to formulate a theory of natural rights—natural justice which would limit the power of government especially with regard to the property rights of persons.[18] State courts were the arenas in which this struggle was carried out prior to the Civil War between adherents of a "vested rights" theory of protection of property and jurists who argued that, first, the written constitution was the supreme law of the State and that judicial review could look only to that document in scrutinizing legislation and not to the "unwritten law" of "natural rights," and second, that the "police power" of government enabled legislatures to regulate the use and holding of property in the public interest, subject

[9] *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. (59 U.S.) 272, 276 (1856). Webster had made the argument as counsel in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518–582 (1819). And *see* Chief Justice Shaw's opinion in *Jones* v. *Robbins*, 8 Gray (74 Mass.) 329 (1857).

[10] *Sinking Fund Cases*, 99 U.S. 700, 719 (1879).

[11] *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896).

[12] *United States* v. *Ju Toy* 198 U.S. 253, 263 (1905); *cf. Quon Quon Poy* v. *Johnson*, 273 U.S. 352 (1927).

[13] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323–324 (1966).

[14] *Wight* v. *Davidson*, 181 U.S. 371, 384 (1901).

[15] *Lovato* v. *New Mexico*, 242 U.S. 199, 201 (1916).

[16] *Public Utility Comm.* v. *Ynchausti & Co.*, 251 U.S. 401, 406 (1920).

[17] *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946). Justices Rutledge and Murphy in the latter case argued that the due process clause applies to every human being, including enemy belligerents.

[18] Compare the remarks of Justices Chase and Iredell in *Calder* v. *Bull*, 3 Dall. (3 U.S.) 386, 388–389, 398–399 (1798).

only to the specific prohibitions of the written constitution. The "vested rights" jurists thus found in the "law of the land" and the "due process" clauses of the state constitutions a restriction upon the substantive content of legislation, which prohibited, regardless of the matter of procedure, a certain kind or degree of exertion of legislative power altogether.[19] Thus, Chief Justice Taney was not innovating when in his opinion in the *Dred Scott* case he pronounced, without elaboration, one of the reasons the Missouri Compromise was unconstitutional was that an act of Congress which deprived "a citizen of his liberty or property merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." [20] Following the War, with the ratification of the Fourteenth Amendment's due process clause, substantive due process interpretations were urged on the Supreme Court with regard to state legislation; first resisted, the arguments came in time to be accepted and they imposed upon both federal and state legislation a firm judicial hand which was not to be removed until the crisis of the 1930's and which today in non-economic legislation continues to be reasserted.

"It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. While the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper." [21] The most obvious difference between the two due process clauses is that the Fifth Amendment clause as it binds the Federal Government coexists with a number of other express provisions in the Bill of Rights guaranteeing fair procedure and nonarbitrary action, such as jury trials, grand jury indictments, and nonexcessive bail and fines, as well as just compensation, whereas the Fourteenth Amendment clause as it binds the States has been held to contain implicitly not only the standards of fairness and justness found within the Fifth Amendment's clause but also to contain many guarantees that are expressly set out in the Bill of Rights. In

[19] The full account is related in E. Corwin, *Liberty Against Government* (Baton Rouge: 1948), ch. 3. The pathbreaking decision of the era was *Wynhamer* v. *The People*, 13 N.Y. 378 (1856).

[20] *Scott* v. *Sandford*, 19 How. (60 U.S.) 393, 450 (1857).

[21] *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901).

that sense, the two clauses are not the same thing, but insofar as they do impose such implicit requirements of fair trials, fair hearings, and the like, which exist separately from, though they are informed with, express constitutional guarantees, the interpretation of the two clauses is substantially if not wholly the same, and, save for areas in which the particularly national character of the Federal Government requires separate treatment, discussion of the meaning of due process is largely reserved for the section on the Fourteenth Amendment. Finally, it should be noted that some Fourteenth Amendment interpretations have been carried back to broaden interpretations of the Fifth Amendment's due process clause, such as, e.g., the development of equal protection standards as an aspect of Fifth Amendment due process.

**Procedural Due Process**

In 1855, the Court first attempted to assess its standards for judging what was due process. At issue was the constitutionality of summary proceedings under a distress warrant to levy on the lands of a government debtor. The Court first ascertained that Congress was not free to make any process "due process." "To what principles, then are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." A survey of history disclosed that the law in England seemed always to have contained a summary method for recovering debts owned the Crown not unlike the law in question. Thus, "tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law. . . ." [1]

This formal approach to the meaning of due process could obviously have limited both Congress and the state legislatures in the development of procedures unknown to English law. But when

[1] *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. (59 U.S. 272, 276–277, 280 (1856). A similar approach was followed in Fourteenth Amendment due process interpretation in *Davidson* v. *City of New Orleans*, 96 U.S. 97 (1878), and *Munn* v. *Illinois*, 94 U.S. 113 (1877).

California's abandonment of indictment by grand jury was challenged, the Court refused to be limited by the fact that such proceeding was the English practice and that Coke had indicated that it was a proceeding required as "the law of the land." The meaning of the Court in *Murray's Lessees* was "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law." To hold that only historical, traditional procedures can constitute due process, the Court said, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." [2] Therefore, in observing the due process guarantee, it was concluded, the Court must look "not [to] particular forms of procedures, but [to] the very substance of individual rights to life, liberty, and property." The due process clause prescribed "the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." [3]

***Generally.***—The phrase "due process of law" does not necessarily imply a proceeding in a court or a plenary suit and trial by jury in every case where personal or property rights are involved.[4] "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." [5] What is unfair in one situation may be fair in another.[6] "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt

[2] *Hurtado* v. *California*, 110 U.S. 516, 528–529 (1884).

[3] Id., 531–532, 535, 537. This flexible approach has been the one followed by the Court. E.g., *Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Palko* v. *Connecticut*, 302 U.S. 319 (1937); *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934).

[4] *Davidson* v. *City of New Orleans*, 96 U.S. 97, 102 (1878); *Public Clearing House* v. *Coyne*, 194 U.S. 497, 508 (1904).

[5] *Ex parte Wall*, 107 U.S. 265, 289 (1883).

[6] *Compare Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272 (1856), *with Ng Fung Ho* v. *White*, 259 U.S. 276 (1922).

complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." [7]

***Administrative Proceedings: A Fair Hearing.***—With respect to action taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before the final order becomes effective.[8] In *Bowles* v. *Willingham*,[9] it sustained orders fixing maximum rents issued without a hearing at any stage, saying "where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." But where, after consideration of charges brought against an employer by a complaining union, the National Labor Relations Board undertook to void an agreement between an employer and another independent union, the latter was entitled to notice and an opportunity to participate in the proceedings.[10] Although a taxpayer must be afforded a fair opportunity for hearing in connection with the collection of taxes,[11] collection by distraint of personal property is lawful if the taxpayer is allowed a hearing thereafter.[12]

When the Constitution requires a hearing it requires a fair one, held before a tribunal which at least meets currently prevailing standards of impartiality.[13] An opportunity must be given not only to present evidence, but also to know the claims of the opposing party and to meet them. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon the proposal before the final command is issued.[14] But a variance between the charges and

[7] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 163 (1951) (Justice Frankfurter concurring).

[8] *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152, 153 (1941).

[9] 321 U.S. 503, 521 (1944).

[10] *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938).

[11] *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127 (1907); *Lipke* v. *Lederer*, 259 U.S. 557 (1922).

[12] *Phillips* v. *Comr.*, 283 U.S. 589 (1931). *Cf. Springer* v. *United States*, 102 U.S. 586, 593 (1881); *Passavant* v. *United States*, 148 U.S. 214 (1893). The collection of taxes is, however, very nearly a wholly unique area. *See Perez* v. *Ledesma*, 401 U.S. 82, 127 n. 17 (1971) (Justice Brennan concurring in part and dissenting in part). On the limitations on private prejudgment collection, *see Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

[13] *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950). *But see Arnett* v. *Kennedy*, 416 U.S. 134, 170 n. 5 (Justice Powell), 196–199 (Justice White) (1974) (hearing before probably partial officer at pretermination stage).

[14] *Margan* v. *United States*, 304 U.S. 1, 18–19 (1938). Especially with regard to administrative hearings and subsequent review in selective service cases has the

findings will not invalidate administrative proceedings where the record shows that at no time during the hearing was there any misunderstanding as to the basis of the complaint.[15] The mere admission of evidence which would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency.[16] A provision that such a body shall not be controlled by rules of evidence does not, however, justify orders without a foundation in evidence having rational probative force. Hearsay may be received in an administrative hearing and may constitute by itself substantial evidence in support of an agency determination provided that there are present factors which assure the underlying reliability and probative value of the evidence and, at least in the case at hand, where the claimant before the agency had the opportunity to subpoena the witnesses and cross examine them with regard to the evidence.[17] While the Court has recognized that in some circumstances a "fair hearing" implies a right to oral argument,[18] it has refused to lay down a general rule that would cover all cases.[19]

In the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command and applicable Navy regulations which confirm this authority together with a stipulation in the contract between a res-

Court experienced some difficulty with this principle. *Compare Gonzales* v. *United States*, 348 U.S. 407 (1955) (conscientious objector contesting his classification before appeals board must be furnished copy of recommendation submitted by Department of Justice; only by being appraised of the arguments and conclusions upon which recommendations were based would he be enabled to present his case effectively), *with United States* v. *Nugent*, 346 U.S. 1 (1953) (in auxiliary hearing which culminated in Justice Department's report and recommendation, it is sufficient that registrant be provided with resume of adverse evidence in FBI report because the "imperative needs of mobilization and national vigilance" mandate a minimum of "litigious interruption") and *Gonzales* v. *United States*, 364 U.S. 59 (1960) (five-to-four decision finding no due process violation when petitioner (1) at departmental proceedings was not permitted to rebut statements attributed to him by his local board, because the statements were in his file and he had opportunity to rebut both before hearing officer and appeal board, nor (2) at trial was denied access to hearing officer's notes and report, because he failed to show any need and did have Department recommendations).

[15] *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 349–350 (1938).

[16] *Western Chem. Co.* v. *United States*, 271 U.S. 268 (1926). *See also United States* v. *Abilene & So. Ry. Co.*, 265 U.S. 274, 288 (1924).

[17] *Richardson* v. *Perales*, 402 U.S. 389 (1971).

[18] *Londoner* v. *Denver*, 210 U.S. 373 (1908).

[19] *FCC* v. *WJR*, 337 U.S. 265, 274–277 (1949). *See also Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945). *See* Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001–1011. *Cf. Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 637, 646 (1962), wherein the majority rejected Justice Black's dissenting thesis that the dismissal with prejudice of a damage suit without notice to the client and grounded upon the dilatory tactics of his attorney, and the latter's failure to appear at a pretrial conference, amounted to a taking of property without due process of law.

taurant concessionaire and the Naval Gun Factory forbidding employment on the premises of any person not meeting security requirements, due process was not denied by the summary exclusion on security grounds, without hearing or advice as to the basis for the exclusion, of concessionaire's cook from the Gun Factory grounds. The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest.[20] Since the Civil Rights Commission acts solely as an

[20] *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 900-901 (1961). Four dissenters, Justices Brennan, Black, Douglas, and Chief Justice Warren, emphasized the inconsistency between the Court's acknowledgment that the cook had a right not to have her entry badge taken away for arbitrary reasons, and its rejection of her right to be told in detail the reasons for such action. The case has subsequently been cited as involving an "extraordinary situation." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 264 n. 10 (1970).

Manifesting a disposition to adjudicate on non-constitutional grounds dismissals of employees under the Federal Loyalty Program, the Court, in *Peters* v. *Hobby*, 349 U.S. 331 (1955), invalidated, as in excess of its delegated authority, a finding of reasonable doubt as to the loyalty of the petitioner by a Loyalty Review Board which, on its own initiative, reopened his case after he had twice been cleared by his Agency Loyalty Board, and arrived at its conclusion on the basis of adverse information not offered under oath and supplied by informants, not all of whom were known to the Review Board and none of whom was disclosed to petitioner for cross-examination by him. The Board was found not to possess any power to review on its own initiative, but was limited to reviewing cases brought to it by an agency or by one of its employees. Concurring, Justices Douglas and Black condemned as irreconcilable with due process and fair play the use of faceless informers whom the petitioner is unable to confront and cross-examine.

In *Cole* v. *Young*, 351 U.S. 536 (1956), also decided on the basis of statutory interpretation, there is to be found an intimation that grave due process issues would be raised by the application to federal employees, not occupying sensitive positions, of a measure which authorized, in the interest of national security, summary suspensions and unreviewable dismissals of allegedly disloyal employees by agency heads. In *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), the Court nullified dismissals for security reasons by invoking an established rule of administrative law to the effect that an administrator must comply with procedures outlined in applicable agency regulations, notwithstanding that such regulations conform to more rigorous substantive and procedural standards than are required by Congress or that the agency action is discretionary in nature. In both of the last cited decisions, dismissals of employees as security risks were set aside by reason of the failure of the employing agency to conform the dismissal to its established security regulations. *See Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

Again avoiding constitutional issues, the Court, in *Greene* v. *McElroy*, 360 U.S. 474 (1959), invalidated the security clearance procedure observed by the Defense Department as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order which sanctioned a comparable department security clearance program whereunder an executive employed by a defense contractor could be deprived of employment in his chosen profession by revocation of his security clearance without a hearing at which he and the governmental agency had no opportunity to confront, examine and cross-examine confidential informants who had supplied information impugning his loyalty. Justices Frankfurter, Harlan, and Whittaker concurred without passing on the validity of such procedure, if authorized. Justice Clark dissented. *See also* the dissenting opinions of Justices Douglas

investigative and fact-finding agency and makes no adjudications, the Court, in *Hannah* v. *Larche*,[21] upheld supplementary rules of procedure adopted by the Commission, independently of statutory authorization, whereunder state electoral officials and others accused of discrimination and summoned to appear at its hearings, are not apprised of the identity of their accusers, and witnesses, including the former, are not accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings. Such procedural rights, the Court maintained, have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations in no way determining private rights.

***Aliens: Entry and Deportation.***—To aliens who have never been naturalized or acquired any domicile or residence in the United States, the decision of an executive or administrative officer, acting within powers expressly conferred by Congress, with regard to whether or not they shall be permitted to enter the country, is due process of law.[22] Since the status of an alien resident returning from abroad is equivalent to that of an entering alien, his exclusion by the Attorney General on the basis of secret, undisclosed information without a hearing also is deemed consistent with due process.[23] The complete authority of Congress in the matter of admis-

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and Black in *Beard* v. *Stahr*, 370 U.S. 41, 43 (1962), and in *Williams* v. *Zuckert*, 371 U.S. 531, 533 (1963).

[21] 363 U.S. 420, 493, 499 (1960). Justices Douglas and Black dissented on the ground that when the Commission summons a person accused of violating a federal election law with a view to ascertaining whether the accusation may be sustained, it acts in lieu of a grand jury or a committing magistrate, and therefore should be obligated to afford witnesses the procedural protection herein denied. Congress subsequently amended the law relating to the Commission to require that any person who is defamed, degraded, or incriminated by evidence or testimony presented to the Commission be afforded the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before the Commission can make public such evidence or testimony. Further, any such person before the evidence or testimony is released must be afforded an opportunity to appear publicly to state his side and to file verified statements with the Commission which it must release with any report or other document containing defaming, degrading, or incriminating evidence or testimony. 84 Stat. 1357 (1970), 42 U.S.C. § 1975a(e). *With Hannah* v. *Larche, compare Jenkins* v. *McKeithen*, 395 U.S. 411 (1969).

[22] *United States* v. *Ju Toy*, 198 U.S. 253, 263 (1905). *See also The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903). *Cf. United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950).

[23] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The long continued detention on Ellis Island of a non-deportable alien does not change his status or give rise to any right of judicial review. In dissent, Justices Black and Douglas maintained that the protracted confinement on Ellis Island without a hearing could not be reconciled with due process. Also dissenting, Justices Frankfurter and Jackson contended that when indefinite commitment on Ellis Island becomes the means

sion of aliens justifies delegation of power to executive officers to enforce the exclusion of aliens afflicted with contagious diseases by imposing upon the owner of the vessel bringing any such alien into the country, a money penalty, collectible before and as a condition of the grant of clearance.[24] If the person seeking admission claims American citizenship, the decision of the Secretary of Labor may be made final, but it must be made after a fair hearing, however summary, and must find adequate support in the evidence. A decision based upon a record from which relevant and probative evidence has been omitted is not a fair hearing.[25] Where the statute made the decision of an immigration inspector final unless an appeal was taken to the Secretary of the Treasury, a person who failed to take such an appeal did not, by an allegation of citizenship, acquire a right to a judicial hearing on *habeas corpus*.[1]

Deportation proceedings are not criminal prosecutions within the meaning of the Bill of Rights.[2] The authority to deport is drawn from the power of Congress to regulate the entrance of aliens and impose conditions upon the performance of which their continued liberty to reside within the United States may be made to depend. Findings of fact reached by executive officers after a fair, though summary deportation hearing, may be made conclu-

of enforcing exclusion, due process requires that a hearing precede such deprivation of liberty.

*Cf. Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 (1953), wherein the Court, after acknowledging that resident aliens held for deportation are entitled to procedural due process, ruled that as a matter of law the Attorney General must accord notice of the charges and a hearing to a resident alien seaman who is sought to be "expelled" upon his return from a voyage overseas. The *Knauff* case was distinguished on the ground that the seaman's status was not that of an entrant, but rather that of a resident alien. *And see Leng May Ma* v. *Barber*, 357 U.S. 185 (1958).

[24] *Oceanic Navig. Co.* v. *Stranahan*, 214 U.S. 320 (1909).

[25] *Kwock Jan Fat* v. *White*, 253 U.S. 454, 457 (1920). *See also Chin Yow* v. *United States*, 208 U.S. 8 (1908).

[1] *United States* v. *Sing Tuck*, 194 U.S. 161 (1904). *See also Quon Quon Poy* v. *Johnson*, 273 U.S. 352, 358 (1927).

[2] *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952). But this fact does not mean that a person may be deported on the basis of judgment reached on the civil standard of proof, that is, by a preponderance of the evidence. Rather, the Court has held, a deportation order may only be entered if it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. *Woodby* v. *INS*, 385 U.S. 276 (1966). *Woodby*, and similar rulings were the result of statutory interpretation and were not constitutionally compelled. *Vance* v. *Terrazas*, 444 U.S. 252, 266–267 (1980).

sive.[3] In *Wong Yang Sung* v. *McGrath*,[4] however, the Court intimated that a hearing before a tribunal which did not meet the standards of impartiality embodied in the Administrative Procedure Act[5] might not satisfy the requirements of due process of law. To avoid such constitutional doubts, the Court construed the law to disqualify immigration inspectors as presiding officers in deportation proceedings. Except in time of war deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.[6] In contrast with the decision in *United States* v. *Ju Toy*[7] that a person seeking entrance to the United States was not entitled to a judicial hearing on his claim of citizenship, a person arrested and held for deportation is entitled to a day in court if he denies that he is an alien.[8] A closely divided Court has ruled that in time of war the deportation of an enemy alien may be ordered summarily by executive action; due process of law does not require the courts to deter-

[3] *Zakonaite* v. *Wolf*, 226 U.S. 272 (1912). *See Jay* v. *Boyd*, 351 U.S. 345 (1956), wherein the Court emphasized that suspension of deportation is not a matter of right, but of grace, like probation or parole, and accordingly an alien is not entitled to a hearing which contemplates full disclosure of the considerations, specifically, information of a confidential nature pertaining to national security, which induced administrative officers to deny suspension. In four dissenting opinions, Chief Justice Warren, together with Justices Black, Frankfurter, and Douglas, found irreconcilable with a fair hearing and due process the delegation by the Attorney General of his discretion to an inferior officer and the vesting of the latter with power to deny a suspension on the basis of undisclosed evidence which may amount to no more than uncorroborated hearsay.

[4] 339 U.S. 33 (1950). *See also Kimm* v. *Rosenberg*, 363 U.S. 405, 408, 410, 415 (1960), wherein the Court ruled that when, at a hearing on his petition for suspension of a deportation order, an alien invoked the Fifth Amendment in response to questions as to Communist Party membership, and contended that the burden of proving such affiliation was on the Government, it was incumbent on the alien to supply the information inasmuch as the Government had no statutory discretion to suspend deportation of a Communist. Justices Douglas, Black, Brennan, and Chief Justice Warren dissented on the ground that exercise of the privilege is a neutral act, supporting neither innocence nor guilt and may not be utilized as evidence of dubious character. Justice Brennan also thought the Government was requiring the alien to prove non-membership when no one had intimated that was a Communist.

[5] 5 U.S.C. 551 *et seq.*

[6] *Vajtauer* v. *Comr. of Immigration*, 273 U.S. 103, 106 (1927). *See also Mahler* v. *Eby*, 264 U.S. 32, 41 (1924).

Although in *Heikkila* v. *Barber*, 345 U.S. 229 (1953), the Court held that a deportation order under the Immigration Act of 1917 might be challenged only by *habeas corpus*, in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), it established that, under the Immigration Act of 1952, 8 U.S.C. § 1101, the validity of a deportation order also may be contested in an action for declaratory judgment and injunctive relief.

[7] 198 U.S. 253 (1905).

[8] *Ng Fung Ho* v. *White*, 259 U.S. 276, 281 (1922).

mine the sufficiency of any hearing which is gratuitously afforded to the alien.[9]

***Judicial Review of Administrative Proceedings.***—To the extent that constitutional rights are involved, due process of law imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as questions of law are concerned, but the extent to which the courts should and will go in reviewing determinations of fact has been a highly controversial issue. In *St. Joseph Stock Yards Co.* v. *United States,*[10] the Court held that upon review of an order of the Secretary of Agriculture establishing maximum rates for services rendered by a stockyard company, due process required that the court exercise its independent judgment upon the facts to determine whether the rates were confiscatory.[11] Subsequent cases sustaining rate orders of the Federal Power Commission have not dealt explicitly with this point.[12] The Court has said simply that a person assailing such an order "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[13]

There has been a division of opinion in the Supreme Court with regard to what extent, if at all, proceedings before military tribunals should be reviewed by the courts for the purpose of determining compliance with the due process clause. In *In re Yamashita,*[14] the majority denied a petition for *certiorari* and petitions for writs of *habeas corpus* to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. It held that since the military commission, in admitting evidence to which objection was made, had not violated any act of Congress, a treaty, or a military command defining its authority, its ruling on evidence and on the mode of conducting the proceedings were not reviewable by the courts. Again, in *Johnson* v. *Eisentrager,*[15] the Court overruled a lower court decision, which in reli-

[9] *Ludecke* v. *Watkins,* 335 U.S. 160 (1948). Three of the four dissenting Justices, Justices Douglas, Murphy, and Rutledge, argued that even an enemy alien could not be deported without a fair hearing.

[10] 298 U.S. 38 (1936).

[11] Id., 51–54. Justices Brandeis, Stone, and Cardozo, while concurring in the result, took exception to this proposition.

[12] *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942); *FPC* v. *Hope Gas Co.,* 320 U.S. 591 (1944).

[13] *FPC* v. *Hope Gas Co.,* 320 U.S. 591, 602 (1944).

[14] 327 U.S. 1 (1946).

[15] 339 U.S. 763 (1950). Justices Douglas, Black, and Burton dissented.

ance upon the dissenting opinion in the *Yamashita* case, had held that the due process clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of *habeas corpus*.

Without dissent, the Court, in *Hiatt* v. *Brown*,[16] reversed the judgment of a lower court which had discharged a prisoner serving a sentence imposed by a court-martial because of errors whereby the respondent had been deprived of due process of law. The Court held that the court below had erred in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Clark wrote: "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision." [17] Similarly, in *Burns* v. *Wilson*,[18] the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam wherein the petitioners asserted that their imprisonment resulted from proceedings violative of their basic constitutional rights. Four Justices, with whom Justice Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners' allegations and does not embrace an opportunity "to prove *de novo*" what petitioners had "failed to prove in the military courts." According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

**Substantive Due Process**

Justice Harlan, dissenting in *Poe* v. *Ullman*,[1] observed that one view of due process, "ably and insistently argued . . ., sought to limit the provision to a guarantee of procedural fairness." But, he continued, due process "in the consistent view of this Court has ever been a broader concept than" that view. "Were due process merely a procedural safeguard it would fail to reach those situa-

[16] 339 U.S. 103 (1950).

[17] Id., 111.

[18] 345 U.S. 137, 140-141, 146, 147, 148, 150, 153 (1953).

[1] 367 U.S. 497, 540, 541 (1961). The internal quotation is from *Hurtado* v. *California*, 110 U.S. 516, 532 (1884). Development of substantive due process is noted, *supra*, *pp.* 1281-1285 and is treated *infra*, *pp.* 1474-1590.

tions where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's *'per legem terrae'* and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.' "

***Discrimination.***—"Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." [2] At other times, however, the Court assumed that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." [3] The theory that was to prevail seems first to have been enunciated by Chief Justice Taft who observed that the due process and equal protection clauses are "associated" and that "[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law." [4] Thus, in *Bolling* v. *Sharpe*,[5] a companion case to *Brown* v. *Board of Education*,[6] the Court held that segregation of pupils in the public schools of the District of Columbia violated the due process clause. "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohib-

[2] *Detroit Bank* v. *United States*, 317 U.S. 329, 337 (1943); *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 468 (1941).

[3] *Steward Machine Co.* v. *Davis*, 301 U.S. 558, 585 (1937). *See also Currin* v. *Wallace*, 306 U.S. 1, 13–14 (1939).

[4] *Truax* v. *Corrigan*, 257 U.S. 312, 331 (1921). *See also Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

[5] 347 U.S. 497, 499–500 (1954).

[6] 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results it might have based on the equal protection clause if the cases had come from the States. E.g., *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). *See also Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946).

ited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

"Equal protection analysis in the Fifth Amendment area," the Court has said, "is the same as that under the Fourteenth Amendment." [7] So saying, the court has applied much of its Fourteenth Amendment jurisprudence to strike down sex classifications in federal legislation,[8] reached classifications with an adverse impact upon illegitimates,[9] and invalidated some welfare assistance provisions with some interesting exceptions.[10] However, almost all legislation involves some degree of classification whereby its operation is directed to particular categories of persons, things, or events, and just as the equal protection clause itself does not outlaw "reasonable" classifications, neither is the due process clause any more intolerant of the great variety of social and economic legislation typically containing what must be arbitrary line-drawing.[11] Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving the rights of property of a

[7] *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975).

[8] *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). *But see Rostker* v. *Goldberg*, 453 U.S. 57 (1981); *Califano* v. *Jobst*, 434 U.S. 47 (1977).

[9] *Compare Jiminez* v. *Weinberger*, 417 U.S. 628 (1974), *with Matheus* v. *Lucas*, 427 U.S. 495 (1976).

[10] *Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973). *See also Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).

[11] *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); With respect to courts and criminal legislation, *see Hurtado* v. *United States*, 410 U.S. 578 (1973); *Marshall* v. *United States*, 414 U.S. 417 (1974); *United States* v. *MacCollom*, 426 U.S. 317 (1976).

private person.[12] A veterans' law which extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable, it being rational for Congress to have determined that the disruption caused by military service was qualitatively and quantitatively different from that caused by alternative service and for Congress to have so provided to make military service more attractive.[13]

"The federal sovereign, like the States, must govern impartially. . . . [B]ut . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."[14] The paramount federal power over immigration and naturalization is the principal example, although there are undoubtedly others, of the national government being able to classify upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories as well—that would result in invalidation were a state to enact them. The instances may be relatively few, but they do exist.

***Congressional Police Measures.***—Numerous regulations of a police nature, imposed under powers specifically granted to the Federal Government, have been sustained over objections based on the due process clause. Congress may require the owner of a vessel entering United States ports, and on which alien seamen are afflicted with specified diseases, to bear the expense of hospitalizing such persons.[15] It may prohibit the transportation in interstate commerce of filled milk [16] or the importation of convict-made goods

[12] *Hill* v. *United States ex rel. Weiner*, 300 U.S. 105, 109 (1937). *See also District of Columbia* v. *Brooke*, 214 U.S. 138 (1909); *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375 (1924); *Detroit Bank* v. *United States*, 317 U.S. 329 (1943).

[13] *Johnson* v. *Robison*, 415 U.S. 361 (1974). *See also Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) (Military law that classified men more adversely than women deemed rational because it had the effect of compensating for prior discrimination against women).

[14] *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). Thus, the power over immigration and aliens permitted federal discrimination on the basis of alienage, *Hampton*, *supra* (employment restrictions like those previously voided when imposed by States), durational residency, *Mathews* v. *Diaz*, 426 U.S. 67 (1976) (similar rules imposed by States previously voided), and illegitimacy. *Fiallo* v. *Bell*, 430 U.S. 787 (1977) (similar rules by States would be voided). Racial preferences and discriminations in immigration have had a long history, e.g., *The Chinese Exclusion Cases*, 130 U.S. 581 (1889), and no one doubts the power continues today, e.g., *Dunn* v. *INS*, 499 F.2d 856, 858 (C.A. 9), *cert. den.*, 419 U.S. 1106 (1975); *Narenji* v. *Civiletti*, 617 F.2d 745, 748 (C.A.D.C. 1979), *cert. den.*, 446 U.S. 957 (1980), although Congress has removed most such classifications from the statute books.

[15] *United States* v. *New York S.S. Co.*, 269 U.S. 304 (1925).

[16] *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938); *Carolene Products Co.* v. *United States*, 323 U.S. 18 (1944).

into any State where their receipt, possession, or sale is a violation of local law.[17] It may require employers to bargain collectively with representatives of their employees chosen in a manner prescribed by law, to reinstate employees discharged in violation of law, and to permit use of a company owned hall for union meetings.[18] Subject to First Amendment considerations, it may regulate the postal service to deny its facilities to persons who would use them for purposes contrary to public policy.[19]

***Congressional Regulation of Public Utilities.***—Inasmuch as Congress, in giving federal agencies jurisdiction over various public utilities, usually has prescribed standards substantially identical with those by which the Supreme Court has tested the validity of state action, the review of their orders seldom has turned on constitutional issues. In two cases, however, maximum rates for stockyard companies prescribed by the Secretary of Agriculture were sustained only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.[20] A few years later, in *FPC* v. *Hope Gas Co.*,[21] the Court adopted an entirely different approach. It took the position that the validity of the Commission's order depended upon whether the impact or total effect of the order is just and reasonable, rather than upon the method of computing the rate base. Rates which enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the "present fair value" method.

Orders prescribing the form and contents of accounts kept by public utility companies,[22] and statutes requiring a private carrier

[17] *Kentucky Whip & Collar Co.* v. *Illinois C.R. Co.*, 299 U.S. 334 (1937).

[18] E.g. *Virginian Ry. Co.*, v. *System Federation No. 40*, 300 U.S. 515 (1937); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225 (1956); *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[19] *Ex parte Jackson*, 96 U.S. 727 (1878); *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970).

[20] *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936); *Denver Union Stock Yards Co.* v. *United States*, 304 U.S. 470 (1938).

[21] 320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Justice Stone in *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942), to the effect that the Commission was not bound to the use of any single formula or combination of formulas in determining rates.

[22] *A.T.&T. Co.* v. *United States*, 299 U.S. 232 (1936); *United States* v. *New York Tel. Co.*, 326 U.S. 638 (1946); *Northwestern Co.* v. *FPC*, 321 U.S. 119 (1944).

to furnish information for valuing its property to the Interstate Commerce Commission [23] have been sustained against the objection that they were arbitrary and invalid. An order of the Secretary of Commerce directed to a single common carrier by water requiring it to file a summary of its books and records pertaining to its rates was held not to violate the Fifth Amendment.[24]

***Congressional Regulation of Railroads.***—Legislation or administrative orders pertaining to railroads have been challenged repeatedly under the due process clause but seldom with success. Orders of the Interstate Commerce Commission establishing through routes and joint rates have been sustained,[25] as has its division of joint rates to give a weaker group of carriers a greater share of such rates where the proportion allotted to the stronger group was adequate to avoid confiscation.[1] The recapture of one half of the earnings of railroads in excess of a fair net operating income, such recaptured earnings to be available as a revolving fund for loans to weaker roads, was held valid on the ground that any carrier earning an excess held it as trustee.[2] An order enjoining certain steam railroads from discriminating against an electric railroad by denying it reciprocal switching privileges did not violate the Fifth Amendment even through its practical effect was to admit the electric road to a part of the business being adequately handled by the steam roads.[3] Similarly, the fact that a rule concerning the allotment of coal cars operated to restrict the use of private cars did not amount to a taking of property.[4] Railroad companies were not denied due process of law by a statute forbidding them to transport in interstate commerce commodities which have been manufactured, mined or produced by them.[5] An order approving a lease of one railroad by another, upon condition that displaced employees of the lessor should receive partial compensation for the loss suffered by reason of the lease [6] is consonant with due process of law. A law prohibiting the issuance of free passes was held constitutional even as applied to abolish rights created by a prior agreement whereby the carrier bound itself to issue such

[23] *Valvoline Oil Co.* v. *United States*, 308 U.S. 141 (1939); *Champlin Rfg. Co.* v. *United States*, 329 U.S. 29 (1946).

[24] *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 146 (1937).

[25] *St. Louis S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 143 (1917).

[1] *New England Divisions Case*, 261 U.S. 184 (1923).

[2] *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, 481, 483 (1924).

[3] *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U.S. 287 (1926). *Cf. Seaboard Air Line Ry. Co.* v. *United States*, 254 U.S. 57 (1920).

[4] *Assigned Car Cases*, 274 U.S. 564, 575 (1927).

[5] *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 405, 411, 415 (1909).

[6] *United States* v. *Lowden*, 308 U.S. 225 (1939).

passes annually for life, in settlement of a claim for personal injuries.[7] A non-arbitrary Interstate Commerce Commission order establishing a non-compensatory rate for carriage of certain commodities does not violate the due process or just compensation clauses as long as the public interest thereby is served and the rates as a whole yield just compensation.[8]

Occasionally, however, regulatory action has been held invalid under the due process clause. An order issued by the Interstate Commerce Commission relieving short line railroads from the obligation to pay the usual fixed sum per day rental for cars used on foreign roads for a space of two days was held to be arbitrary and invalid.[9] A retirement act which made eligible for pensions all persons who had been in the service of any railroad within one year prior to the adoption of the law, counted past unconnected service of an employee toward the requirement for a pension without any contribution therefor, and treated all carriers as a single employer and pooled their assets, without regard to their individual obligations, was held unconstitutional.[10]

***Taxation.***—In laying taxes, the Federal Government is less narrowly restricted by the Fifth Amendment than are the States by the Fourteenth. It may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States,[11] or the income of a citizen resident abroad, which is derived from property located at his residence.[12] The difference is explained by the fact that protection of the Federal Government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the State's borders. The Supreme Court has said that, in the absence of an equal protection clause, "a claim of unreasonable classification or inequality in the incidence or application of a tax raise no question under the Fifth Amendment . . . ." [13] It has sustained, over charges of unfair differentiation between persons, a graduated income tax,[14] a higher tax on oleomargarine than on butter,[15] an

[7] *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467 (1911).
[8] *B. & O. R. Co.* v. *United States*, 345 U.S. 146 (1953).
[9] *Chicago, R.I. & P. Ry. Co.* v. *United States*, 284 U.S. 80 (1931).
[10] *Railroad Retirement Board* v. *Alton R. Co.* 295 U.S. 330 (1935). *But cf. Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976).
[11] *United States* v. *Bennett*, 232 U.S. 299, 307 (1914).
[12] *Cook* v. *Tait*, 265 U.S. 47 (1924).
[13] *Helvering* v. *Lerner Stores Co.*, 314 U.S. 463, 468 (1941). *But see supra*, pp. 1295–1297.
[14] *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24 (1916).
[15] *McCray* v. *United States*, 195 U.S. 27, 61 (1904).

excise tax on "puts" but not on "call," [16] a tax on the income of business operated by corporations but not on similar enterprises carried on by individuals,[17] an income tax on foreign corporations, based on their income from sources within the United States, while domestic corporations are taxed on income from all sources,[18] a tax on foreign-built but not upon domestic yachts,[19] a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service,[20] a gift tax law embodying a plan of graduations and exemptions under which donors of the same amount might be liable for different sums [21] an Alaska statute imposing license taxes only on nonresident fisherman,[22] an act which taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal,[23] an excess profits tax which defined "invested capital" with reference to the original cost of the property rather than to its present value,[24] an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers,[25] an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor's moiety,[1] and a tax on nonprofit mutual insurers although such insurers organized before a certain date were exempt inasmuch as a continuing exemption for all insurers would have led to their multiplication to the detriment of other federal programs.[2]

***Retroactive Taxes.***—It has been customary from the beginning for Congress to give some retroactive effect to its tax laws, usually making them effective from the beginning of the tax year or from the date of introduction of the bill that became the law.[3] Applica-

[16] *Treat* v. *White*, 181 U.S. 264 (1901).

[17] *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911).

[18] *National Paper Co.* v. *Bowers*, 266 U.S. 373 (1924).

[19] *Billings* v. *United States*, 232 U.S. 261, 282 (1914).

[20] *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937).

[21] *Bromley* v. *McCaughn*, 280 U.S. 124 (1929).

[22] *Haavik* v. *Alaska Packers' Assn.*, 263 U.S. 510 (1924).

[23] *Alaska Fish Co.* v. *Smith*, 255 U.S. 44 (1921).

[24] *LaBelle Iron Works* v. *United States*, 256 U.S. 377 (1921).

[25] *Helvering* v. *Northwest Steel Mills*, 311 U.S. 46 (1940).

[1] *Fernandez* v. *Wiener*, 326 U.S. 340 (1945); *cf. Coolidge* v. *Long*, 282 U.S. 582 (1931).

[2] *United States* v. *Maryland Savings-Share Ins. Co.*, 400 U.S. 4 (1970).

[3] *United States* v. *Darusmont*, 449 U.S. 292, 296–297 (1981).

tion of an income tax statute to the entire calendar year in which enactment took place has never, barring some peculiar circumstance, been deemed to deny due process.[4] "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."[5] A special income tax on profits realized by the sale of silver, retroactive for 35 days, which was approximately the period during which the silver purchase bill was before Congress, was held valid.[6] An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year.[7] Retroactive assessment of penalties for fraud or negligence,[8] or of an additional tax on the income of a corporation used to avoid a surtax on its shareholder,[9] does not deprive the taxpayer of property without due process of law.

An additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the due process clause.[10] A transfer tax measured in part by the value of property held jointly by a husband and wife, including that which comes to the joint tenancy as a gift from the decedent spouse, is valid,[11] as is the inclusion in the gross income

[4] *Stockdale v. Insurance Companies*, 20 Wall. (87 U.S.) 323, 331, 332 (1874); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 20 (1916); *Cooper v. United States*, 280 U.S. 409, 411 (1930); *Milliken v. United States*, 283 U.S. 15, 21 (1931); *Reinecke v. Smith*, 289 U.S. 172, 175 (1933); *United States v. Hudson*, 299 U.S. 498, 500–501 (1937); *Welch v. Henry*, 305 U.S. 134, 146, 148–150 (1938); *Fernandez v. Wiener*, 326 U.S. 340, 355 (1945); *United States v. Darusmont*, 449 U.S. 292, 297 (1981).

[5] *Welch v. Henry*, 305 U.S. 134, 146–147 (1938).

[6] *United States v. Hudson*, 299 U.S. 498 (1937). *See also Stockdale v. Insurance Companies*, 20 Wall. (87 U.S.) 323, 331, 341 (1874); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 20 (1916); *Lynch v. Hornby*, 247 U.S. 339, 343 (1918).

[7] *Cooper v. United States*, 280 U.S. 409 (1930); *see also Reinecke v. Smith*, 289 U.S. 172 (1933).

[8] *Helvering v. Mitchell*, 303 U.S. 391 (1938).

[9] *Helvering v. Nat. Grocery Co.*, 304 U.S. 282 (1938).

[10] *Patton v. Brady*, 184 U.S. 608 (1902).

[11] *Tyler v. United States*, 281 U.S. 497 (1930); *United States v. Jacobs*, 306 U.S. 363 (1969).

of the settlor of income accruing to a revocable trust during any period when he had power to revoke or modify it.[12]

However, the Court has treated differently gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,[13] at least in part on the basis that such imposition unfairly treats a taxpayer who could have altered his behavior to avoid the tax if it could have been anticipated by him at the time the transaction was effected. Also, a conclusive presumption that gifts made within two years of death were made in contemplation of death was condemned as arbitrary and capricious, even with respect to subsequent transfers.[14]

***Deprivation of Property: Retroactive Legislation.***—Federal regulation of future action, based upon rights previously acquired by the person regulated, is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not ordinarily condemn it. The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating *former* employees, who had terminated work in the industry before passage of the law, for black lung disabilities contracted in the course of their work, was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.[15] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, i.e., that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law, therefore, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

Rent regulations were sustained as applied to prevent execution of a judgment of eviction rendered by a state court before the enabling legislation was passed.[16] For the reason that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end," no vested right to use housing, built with the aid of FHA mortgage insurance for transient purposes, was acquired by

[12] *Reinecke* v. *Smith*, 289 U.S. 172 (1933).

[13] *Untermyer* v. *Anderson*, 276 U.S. 440 (1928); *Blodgett* v. *Holden*, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928); *Nichols* v. *Coolidge*, 274 U.S. 531 (1927).

[14] *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

[15] *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14–20 (1976). *But see* id., 38 (Justice Powell concurring).

[16] *Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947).

one obtaining insurance under an earlier section of the National Housing Act, which, though silent in this regard, was contemporaneously construed as barring rental to transients, and was later modified by an amendment which expressly excluded such use.[17] An order by an Area Rent Director reducing an unapproved rental and requiring the landlord to refund the excess previously collected, was held, with one dissenting vote, not to be the type of retroactivity which is condemned by law.[18] The application of a statute providing for tobacco marketing quotas, to a crop planted prior to its enactment, was held not to deprive the producers of property without due process of law since it operated, not upon production, but upon the marketing of the product after the act was passed.[19]

In the exercise of its comprehensive powers over revenue, finance, and currency, Congress may make Treasury notes legal tender in payment of debts previously contracted [20] and may invalidate provisions in private contracts calling for payment in gold coin,[21] but rights against the United States arising out of contract are more strongly protected by the due process clause. Hence, a law purporting to abrogate a clause in government bonds calling for payment in gold coin was invalid,[22] and a statute abrogating contracts of war risk insurance was held unconstitutional as applied to outstanding policies.[23]

The due process clause has been successfully invoked to defeat retroactive invasion or destruction of property rights in a few cases. A revocation by the Secretary of the Interior of previous approval of plats and papers showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property without due process of law.[24] The exception of

[17] *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 89–91, 92–93 (1958). In dissenting, Justices Harlan, Frankfurter, and Whittaker maintained that under the due process clause the United States, in its contractual relations, is bound by the same rules as private individuals unless the action taken falls within the general federal regulatory power.

[18] *Woods* v. *Stone*, 333 U.S. 472 (1948).

[19] *Mulford* v. *Smith*, 307 U.S. 38 (1939). An increase in the penalty for production of wheat in excess of quota was valid as applied retroactively to wheat already planted, where Congress concurrently authorized a substantial increase in the amount of the loan which might be made to cooperating farmers upon stored "farm marketing excess wheat." *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

[20] *Legal Tender Cases (Knox* v. *Lee)*, 12 Wall. (79 U.S.) 457, 551 (1871).

[21] *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935).

[22] *Perry* v. *United States*, 294 U.S. 330 (1935).

[23] *Lynch* v. *United States*, 292 U.S. 571 (1934). *See also De La Rama S.S. Co.* v. *United States*, 344 U.S. 386 (1953). Notice that these kinds of cases are precisely the ones that would be condemned under the contract clause, even as relaxedly scrutinized as now, if the action was taken by a State. E.g., *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

[24] *Noble* v. *Union River Logging R.R.*, 147 U.S. 165 (1893).

the period of federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read as prospective only because the limitation was an integral part of the liability, not merely a matter of remedy, and would violate the Fifth Amendment if retroactive.[25]

***Bankruptcy Legislation.***—In acting pursuant to its power to enact uniform bankruptcy legislation, Congress has regularly authorized retrospective impairment of contractual obligations,[1] but that the due process clause (by itself or infused with takings principles) constitutes a limitation upon Congress' power to deprive persons of more secure forms of property, such as the rights secured creditors have to obtain repayment of a debt. The Court had long followed a rule of construction favoring prospective only application of bankruptcy laws, absent a clear showing of congressional intent,[2] but it was not until 1935 that the Court actually held unconstitutional a retrospective law. There, the Frazier-Lemke Act, which by its terms applied only retrospectively, authorized a court to stay proceedings for the foreclosure of a mortgage for five years, the debtor to remain in possession at a reasonable rental, with the option of purchasing the property at its appraised value at the end of the stay, was held unconstitutional because it deprived the creditor of substantial property rights acquired prior to the passage of the act.[3] However, a modified law, under which the stay was subject to termination by the court and which continued the right of the creditor to have the property sold to pay the debt, was sustained.[4]

Without violation of the due process clause, the sale of collateral under the terms of a contract may be enjoined, if such sale would hinder the preparation or consummation of a proposed railroad reorganization, provided the injunction does no more than

[25] *Danzer Co.* v. *Gulf R.R.*, 268 U.S. 633 (1925).

[1] E.g., *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 188 (1902); *Continental Illinois Natl. Bank & Trust Co.* v. *Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648, 673–675 (1935).

[2] *Holt* v. *Henley*, 232 U.S. 637, 639–640 (1914). *See also Auffmordt* v. *Rasin*, 102 U.S. 620, 622 (1881).

[3] *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935).

[4] *Wright* v. *Vinton Branch*, 300 U.S. 440 (1937). The relatively small modifications that the Court accepted as making the difference in validity, and the fact that subsequently the Court interpreted the statute so as to make smaller the modifications, *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 184 & n. 3 (1939), *Wright* v. *Union Central Ins. Co.*, 311 U.S. 273, 278–279 (1940), has created differences of opinion with respect to whether *Radford* remains sound law. *Cf. Helvering* v. *Griffiths*, 318 U.S. 371, 400–401 & n. 52 (1943) (suggesting *Radford* might not have survived *Vinton Branch*).

delay the enforcement of the contract.[5] A provision that claims resulting from rejection of an unexpired lease should be treated as on a parity with provable debts, but limited to an amount equal to three years rent, was held not to amount to a taking of property without due process of law, since it provided a new and more certain remedy for a limited amount, in lieu of an existing remedy inefficient and uncertain in result.[6] A right of redemption allowed by state law upon foreclosure of a mortgage was unavailing to defeat a plan for reorganization of a debtor corporation where the trial court found that the claims of junior lienholders had no value.[7]

***Right to Sue the Government.***—A right to sue the Government on a contract is a privilege, not a property right protected by the Constitution.[8] The right to sue for recovery of taxes paid may be conditioned upon an appeal to the Commissioner and his refusal to refund.[9] There was no denial of due process when Congress took away the right to sue for recovery of taxes, where the claim for recovery was without substantial equity, having arisen from the mistake of administrative officials in allowing the statute of limitations to run before collecting a tax.[10] The denial to taxpayers of the right to sue for refund of processing and floor stock taxes collected under a law subsequently held unconstitutional, and the substitution of a new administrative procedure for the recovery of such sums, was held valid.[11] Congress may cut off the right to recover taxes illegally collected by ratifying the imposition and collection thereof, where it could lawfully have authorized such exactions prior to their collection.[12]

***Congressional Power to Abolish Common Law Judicial Actions.***—Similarly, it is clearly settled that "[a] person has no property, no vested interest, in any rule of the common law."[13] It follows, therefore, that Congress in its discretion may abolish common law actions, replacing them with other judicial actions or with administrative remedies at its discretion. There is slight intimation in

[5] *Continental Illinois Natl. Bank & Trust Co.* v. *Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648 (1935).

[6] *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445 (1937).

[7] *In re 620 Church Street Corp.*, 299 U.S. 24 (1936). In the context of Congress' plan to save major railroad systems, *see Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

[8] *Lynch* v. *United States*, 292 U.S. 571, 581 (1934).

[9] *Dodge* v. *Osborn*, 240 U.S. 118 (1916).

[10] *Graham & Foster* v. *Goodcell*, 282 U.S. 409 (1931).

[11] *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337 (1937).

[12] *United States* v. *Heinszen & Co.*, 206 U.S. 370, 386 (1907).

[13] *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912). *See also Silver* v. *Silver*, 280 U.S. 117, 122 (1929) (a state case).

some of the cases that if it does abolish a common law action it *must* either duplicate the recovery at common law or provide a reasonable substitute remedy.[14] Such a holding seems only remotely likely,[15] but some difficulties may be experienced with respect to legislation that retrospectively affects rights to sue, such as shortening or lengthening statutes of limitation, and the like, although these have typically risen in state contexts. In one interesting decision, the Court did sustain an award of additional compensation under the Longshoremen's and Harbor Workers' Compensation Act, made pursuant to a private act of Congress passed after expiration of the period for review of the original award, directing the Commission to review the case and issue a new order, the challenge being made by the employer and insurer.[16]

***Deprivation of Liberty: Economic Legislation.***—The proscription of deprivation of liberty without due process, insofar as substantive due process was involved, was long restricted to invocation against legislation deemed to abridge liberty of contract.[17] The two leading cases invalidating federal legislation, however, have both been overruled as the Court adopted a very restrained standard of review of economic legislation.[18] The Court's "hands-off" policy with regard to reviewing economic legislation is quite pronounced.[19]

## NATIONAL EMINENT DOMAIN POWER

### Overview

"The Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private

[14] The intimation stems from *New York Central Railroad* v. *White* 243 U.S. 188 (1917) (a state case, involving the constitutionality of a workmen's compensation law). While denying any person's vested interested in the continuation of any particular right to sue, id., 198, the Court did seem twice to suggest that abolition without a reasonable substitute would raise due process problems. Id., 201. In *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 87–92 (1978), it noticed the contention but passed it by because the law at issue was a reasonable substitute.

[15] It is more likely with respect to congressional provision of a statutory substitute for a cause of action arising directly out of a constitutional guarantee. E.g., *Carlson* v. *Green*, 446 U.S. 14, 18–23 (1980).

[16] *Paramino Co.* v. *Marshall*, 309 U.S. 370 (1940).

[17] *See infra*, pp. 1484–1497.

[18] *Adair* v. *United States*, 208 U.S. 161 (1908), overruled in substance by *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941); *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

[19] E.g., *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1981); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).

property for public use, rather than a grant of new power." [1] Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." [2] "All separate interests of individuals in property are held of the government under this tacit agreement or implied reservation. Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property . . . whenever the public interest requires it." [3] Until 1876, there was some doubt with regard to the existence of a federal power of eminent domain,[4] but in *Kohl* v. *United States* [5] the doubt was laid to rest, as the Court affirmed that the power was as necessary to the existence of the National Government as it was to the existence of any State. The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken for the effectuation of a granted power,[6] but once this is conceded the ambit of national powers is so wide-ranging that vast numbers of objects may be effected.[7] This prerogative of the National Government can neither be enlarged nor diminished by a State.[8] Whenever lands in a State are needed for a public purpose, Congress may authorize that they be taken, either by proceedings in the courts of the State, with its consent, or by proceedings in the courts of the United States, with or without any consent, or by proceeding in the courts of the United States, with or without any consent or concurrent act of the State.[9]

[1] *United States* v. *Carmack* 329 U.S. 230, 241–242 (1946). The same is true of "just compensation" clauses in state constitutions. *Boom Co.* v. *Patterson*, 98 U.S. 403, 406 (1879).

[2] *Boom Co.* v. *Patterson*, 98 U.S. 403, 406 (1879).

[3] *Beekman* v. *Saratoga & Schenectady R.R. Co.* 3 Paige Ch. 45, 72–73 (N.Y. 1831), noted as "the true doctrine of the law" in *West River Bridge* v. *Dix*, 6 How. (47 U.S.) 507, 535 (1848).

[4] Prior to this time, the Federal Government pursued condemnation proceedings in state courts. *Kohl* v. *United States*, 91 U.S. 367, 373 (1876); *United States* v. *Jones*, 109 U.S. 513 (1883).

[5] 91 U.S. 367 (1876).

[6] *United States* v. *Gettysburg Electric Ry. Co.*, 160 U.S. 668, 679 (1896).

[7] E.g., *California* v. *Central Pacific Railroad*, 127 U.S. 1, 39 (1888) (highways); *Luxton* v. *North River Bridge Co.*, 153 U.S. 525 (1894) (interstate bridges); *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890) (railroads); *Albert Hanson Lumber Co.* v. *United States* 261 U.S. 581 (1923) (canal); *Ashwander* v. *TVA*, 297 U.S. 288 (1936) (hydroelectric power). "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." *Berman* v. *Parker*, 348 U.S. 26, 33 (1954).

[8] *Kohl* v. *United States*, 91 U.S. 367 374 (1876).

[9] *Chappell* v. *United States*, 160 U.S. 499, 510 (1896). The fact that land included in a federal reservoir project is owned by a State, or that its taking may impair the

"Prior to the adoption of the Fourteenth Amendment," the power of eminent domain of state governments "was unrestrained by any federal authority." [10] The express just compensation provision of the Fifth Amendment did not apply to the States,[11] and at first the contention that the due process clause of the Fourteenth Amendment afforded property owners the same measure of protection against the States as the Fifth Amendment did against the Federal Government was rejected.[12] However, within a decade, the Court was found declining to hold that "the question as to the amount of compensation to be awarded to the railroad company was one of local law merely, and [insofar as] that question was determined in the mode prescribed by the Constitution and [state] law, the [property owner] appearing and having full opportunity to be heard, the requirement of due process of law was observed." On the contrary, the Court ruled, although a state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation . . . . The mere form of the proceeding instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him or his property without compensation." [13] While the guarantees of just compensation flow from two different sources the standards used by the Court in dealing with the issues appear to be identical and both federal and state cases will be dealt with herein without expressly continuing to recognize the two different bases for the rulings.

It should be borne in mind that while the power of eminent domain, though it is inherent in organized governments, may only be exercised pursuant to legislative authorization directly or through delegation to another governmental body, the power may be delegated as well to private corporations, such as public utilities, railroad and bridge companies, and other such associations, when

tax revenue project is owned by a State, or that the reservoir will obliterate part of the State's boundary and interfere with the State's own project for water development and conservation, constitutes no barrier to the condemnation of the land by the United States. *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941). Land held in trust and used by a city for public purposes may be condemned. *United States* v. *Carmack*, 329 U.S. 230 (1946).

[10] *Green* v. *Frazier*, 253 U.S. 233, 238 (1920).

[11] *Barron* v. *Baltimore*, 7 Pet. (32 U.S.) 243 (1833). *See supra*, pp. 950–956.

[12] *Davidson* v. *City of New Orleans*, 96 U.S. 97 (1878). The Court attached most weight to the fact that both due process and just compensation were guaranteed in the Fifth Amendment while only due process was contained in the Fourteenth and refused to equate the missing term with the present one.

[13] *Chicago B. & Q. R.R. Co.* v. *City of Chicago*, 166 U.S. 226, 233, 236–237 (1987). *See also Sweet* v. *Rechel*, 159 U.S. 380, 398 (1895).

they are promoting a valid public interest or furnishing a public service. Such delegation has long been approved.[14]

**Public Use**

Explicit in the language of the just compensation clause is the requirement that the taking of private property be for a public use or purpose; the Court has long accepted the principle that one is deprived of his property without due process of law in violation of this guarantee if a State takes the property for any reason other than a public use.[1] The question whether a particular intended use is a public use is clearly a judicial one,[2] but the Court has always insisted on a high degree of judicial deference to the legislative determination. "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." [3] When it is state action being challenged under the Fourteenth Amendment, there is the additional factor of the Court's willingness to defer to the highest court of the State in resolving such an issue.[4] As early as 1908, the Court was obligated to admit that notwithstanding its retention of the power of judicial review, "no case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State court as a taking for public uses. . . ." [5] In a 1946 case, however, involving federal eminent domain power, the Court cast considerable doubt upon the power of courts to review the issue of public use. "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority." [6] There is some suggestion that "the scope of the judi-

[14] *Noble* v. *Oklahoma City*, 297 U.S. 481 (1936); *Luxton* v. *North River Bridge Co.*, 153 U.S. 525 (1895). One of the earliest examples is *Curtiss* v. *Georgetown & Alexandria Turnpike Co.*, 6 Cr. (10 U.S.) 233 (1810).

[1] *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 158–159 (1896); *Cole* v. *La Grange*, 113 U.S. 1, 6 (1885).

[2] "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." *City of Cincinnati* v. *Vester*, 281 U.S. 439, 444 (1930).

[3] *Berman* v. *Parker*, 348 U.S. 26, 32 (1954) (federal eminent domain power in District of Columbia).

[4] *Green* v. *Frazier*, 253 U.S. 283, 240 (1920); *City of Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930).

[5] *Hairston* v. *Danville & Western Ry. Co.*, 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in *Missouri Pac. Ry* v. *Nebraska*, 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.

[6] *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 551–552 (1946). Justices Reed and Frankfurter and Chief Justice Stone disagreed with this view. Id., 555, 557 (concurring).

cial power to determine what is a 'public use'" may be different as between Fifth and Fourteenth Amendment cases with greater power in the latter type of cases than in the former,[7] but it may well be that the case simply stands for the necessity for great judicial restraint.[8] Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or expediency of the particular taking is exclusively in the legislature or the body to which the legislature has delegated the decision and is not subject to judicial review.[9]

At an earlier time, the factor of judicial review would have been vastly more important than it is now, inasmuch as the prevailing judicial view was that the term "public use" was synonymous with "use by the public" and that if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. This view was rejected some time ago.[10] The modern conception of the power of eminent domain equates it with the police power in the furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such "definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition . . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the traditional application of the police power . . . ." Effectuation of these matters being within the authority of the legislature, state or federal, the power to achieve them through the exercise of eminent domain is established. "For the power of eminent domain is merely the means to the end." [11] Traditionally, takings have been utilized to facilitate transportation, the supplying of water, and the like,[12] but

[7] Id., 552.

[8] Ibid. So it seems to have been considered in *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

[9] *Rindge Co.* v. *Los Angeles County*, 262 U.S. 700, 709 (1923); *Bragg* v. *Weaver*, 251 U.S. 57, 58 (1919); *Berman* v. *Parker*, 358 U.S. 26, 33 (1954).

[10] *Clark* v. *Nash*, 198 U.S. 361, (1905); *Mt. Vernon-Woodberry Cotton Duck Co.*, v. *Alabama Interstate Power Co.*, 240 U.S. 30, 32, (1916).

[11] *Berman* v. *Parker*, 348 U.S. 26, 32, 33 (1954).

[12] E.g., *Kohl* v. *United States*, 91 U.S. 367 (1876) (public buildings); *Chicago M. & S.P.R. Co.* v. *City of Minneapolis*, 232 U.S. 430 (1914) (canal); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); *Dohany* v. *Rogers*, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right of way required for widening a highway); *Delaware, L. & W.R.R.* v. *Morristown*, 276 U.S. 182 (1928) (establishment by a municipality of a public hack stand upon driveway maintained by rail-

the use of the power to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.[13]

The Supreme Court in one case seems to have approved generally the widespread use of the power of eminent domain by federal and state governments in conjunction with private companies to facilitate urban renewal, destruction of slums, erection of low-cost housing in place of deteriorated housing, and the promotion of aesthetic values as well as economic ones. In *Berman* v. *Parker*,[14] a unanimous Court observed: "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river. . . . The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well

road upon its own terminal grounds to afford ingress and egress to its patrons); *Clark* v. *Nash*, 198 U.S. 361 (1905) (right of way across neighbor's land to enlarge irrigation ditch for water without which land would remain valueless); *Strickley* v. *Highland Boy Mining Co.*, 200 U.S. 527 (1906) (right of way across a placer mining claim for aerial bucket line). In *Missouri Pac. Ry.* v. *Nebraska*, 164 U.S. 403 (1896), however, the Court held that it was an invalid use when a State attempted to compel, on payment of compensation, a railroad, which had permitted the erection of two grain elevators by private citizens on its right of way, to grant upon like terms a location to another group of farmers to erect a third grain elevator for their own benefit.

[13] E.g., *Shoemaker* v. *United States*, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); *Rindge Co.* v. *Los Angeles County*, 262 U.S. 700 (1923) (scenic highway); *Brown* v. *United States*, 263 U.S. 78 (1923) (condemnation of property near town flooded by establishment of reservoir in order to locate a new town site, even though there might be some surplus lots to be sold); *United States* v. *Gettysburg Electric Ry. Co.*, 160 U.S. 668 (1896), and *Roe* v. *Kansas ex rel. Smith*, 278 U.S. 191 (1929) (historic sites).

[14] 348 U.S. 26, 32–33 (1954). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said: "Once the object is within the authority of Congress the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude." Id., 33–34.

as clean, well-balanced as well as carefully patrolled." For "public use," then, it may well be that "public interest" is the more correct phrase.

### Just Compensation

"When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation." [1] The Fifth Amendment's guarantee "that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [2]

The just compensation required by the Constitution to be paid is that which constitutes "a full and perfect equivalent for the property taken," [3] and the equivalent must be in money not in kind.[4] "The general rule is that compensation 'is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future,' . . . [but] 'mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded!' " [5] The general

[1] *Backus* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 573, 575 (1898).

[2] *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). "The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." *United States* v. *Cors*, 337 U.S. 325, 332 (1949). There is no constitutional prohibition against confiscation of enemy property, but aliens not so denominated are entitled to the protection of this clause. *Compare United States* v. *Chemical Foundation*, 272 U.S. 1 (1926), and *Stoehr* v. *Wallace*, 255 U.S. 239 (1921), *with Silesian-American Corp.* v. *Clark*, 332 U.S. 469 (1947), *Russian Fleet* v. *United States*, 282 U.S. 481 (1931), and *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952).

[3] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain, is the measure of such compensation. *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281 (1943); *United States* v. *Miller*, 317 U.S. 369, 375 1943); *Roberts* v. *New York City*, 295 U.S. 264 (1935). The value of the property to the government for its particular use is not a criterion. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956). Attorneys' fees and expenses are not embraced in the concept. *Dohany* v. *Rogers*, 281 U.S. 362 (1930).

[4] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893); *Van Horne's Lessee* v. *Dorrance*, 2 Dall. (2 U.S.) 304, 315 (C.C. Pa. 1795).

[5] *Chicago B. & Q. R.R. Co.* v. *Chicago*, 166 U.S. 226, 250 (1897). *McGovern* v. *City of New York*, 229 U.S. 363, 372 (1913). *See Brown Co.* v. *Patterson*, 98 U.S. 403 (1879); *McCandless* v. *United States*, 298 U.S. 342 (1936).

standard thus is the market value, what a willing buyer would pay to willing seller.[6] If fair market value does not exist or cannot be calculated, resort must be had to other data which will yield a fair compensation.[7] Especially is it difficult to compute a just compensation when in wartime enormous disruptions in supply and governmentally-imposed price ceilings totally skew market conditions. Holding that the reasons which underlie the rule of market value when a free market exists apply as well where value is measured by a government-fixed ceiling price, the Court permitted owners of cured pork and black pepper to recover only the ceiling price for the commodities, despite findings by the Court of Claims that the replacement cost of the meat exceeded its ceiling price and that the pepper had a "retention value" in excess of that price.[8] By a five-to-four decision, the Court ruled that the Government was not obliged to pay the present market value of a tug when the value had been greatly enhanced as a consequence of the Government's wartime needs.[9]

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases in which the Court on five-to-four votes awarded compensation in one and denied it in the other.[10] Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land since 1919 and that had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly

[6] *United States* v. *Miller*, 317 U.S. 369, 374 (1943); *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 275 (1943). *See also United States* v. *New River Collieries Co.*, 262 U.S. 341 (1923); *Olson* v. *United States*, 292 U.S. 264 (1934); *Kimball Laundry Co.* v. *United States*, 388 U.S. 1 (1949). Exclusion from the amount to be paid to the owners of condemned property of the value of improvements made by the Government under a lease was held constitutional. *Old Dominion Land Co.* v. *United States*, 269 U.S. 55 (1925).

[7] *United States* v. *Miller*, 317 U.S. 369, 374 (1943). For an example, *see Albert Hanson Lumber Co.* v. *United States*, 261 U.S. 581-589 (1923).

[8] *United States* v. *Felin & Co.*, 334 U.S. 624 (1948); *United States* v. *Commodities Trading Corp.*, 339 U.S. 121 (1950). *And see Vogelstein & Co.* v. *United States*, 262 U.S. 337 (1923).

[9] *United States* v. *Cors*, 337 U.S. 325 (1949). *And see United States* v. *Toronto Navigation Co.*, 338 U.S. 396 (1949).

[10] *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973); *United States* v. *Fuller*, 409 U.S. 488 (1973). For compensation in both cases were Justices Powell, Douglas, Brennan, and Marshall; opposing compensation in both cases were Justices Rehnquist, White, and Blackmun, and Chief Justice Burger. Justice Stewart made the majority in both cases.

have placed a value on the possibility.[11] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally-owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land, although if the adjacent land had been privately owned a fair market value standard would have required consideration of the potential use of the private land with the neighboring land, inasmuch as it is the general rule that government need not pay for taking value it itself creates.[12]

***Interest.***—Ordinarily, property is taken under a condemnation suit upon the payment of the money award by the condemner and no interest accrues.[13] If, however, the property is taken in fact before payment is made, just compensation includes an increment which, to avoid use of the term "interest," the Court has called "an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking." [14] If the owner and the Government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.[15] Where property of a citizen has been mistakenly seized by the Government and it is converted into money which is invested, the owner is entitled in recovering compensation to an allowance for the use of his property.[16]

***Rights for Which Compensation Must Be Made.***—If a unit of real property is condemned the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. If only a portion of a single tract is taken, the owner's compensation includes any element of value arising out of

[11] *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973). The dissent argued that since upon expiration of the lease only salvage value of the improvements could be claimed by the lessee, just compensation should be limited to that salvage value. Id., 480.

[12] *United States* v. *Fuller*, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally-created value should apply only when the Government was in fact acting in the use of its own property; here the Government was acting only as a condemnor. Id., 494.

[13] *Danforth* v. *United States*, 308 U.S. 271, 284 (1939).

[14] *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938); *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933).

[15] *Albrecht* v. *United States*, 329 U.S. 599 (1947).

[16] *Henkels* v. *Sutherland*, 271 U.S. 298 (1926); *See also Phelps* v. *United States*, 274 U.S. 341 (1927).

the relation of the part taken to the entire tract.[17] On the other hand, if the taking has in fact benefited the owner, the benefit may be set off against the value of the land condemned,[18] although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off.[19] When certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the subsequent erection of a fire station on the property instead was held not to have deprived the owner of any part of his just compensation.[20]

The franchise of a private corporation is property which cannot be taken for public use without compensation. Upon condemnation of a lock and dam belonging to a navigation company, the Government was required to pay for the franchise to take tolls as well as for the tangible property.[21] Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property for which compensation must be made when the Government uses the patent.[22] The frustration of a private contract by the requisitioning of the entire output of a steel manufacture is not a taking for which compensation is required,[23] but government requisitioning from a power company of all the electric power which could be produced by use of the water diverted through its intake canal, thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitle the lessee to compensation for the rights taken.[24] When, upon default of a ship-builder, the Government, pursuant to contract with him, took title to incompleted boats, the material men, whose liens under state laws had attached when they supplied the shipbuilder, had a compensable interest equal to whatever value these liens had when the Government "took" or destroyed them in perfecting its title.[25]

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[17] *Bauman* v. *Ross*, 167 U.S. 548 (1897); *Sharp* v. *United States*, 191 U.S. 341, 351–352, 354 (1903). Where the taking of a strip of land across a farm closed a private right-of-way, an allowance was properly made for the value of the easement. *United States* v. *Welch*, 217 U.S. 333 (1910).

[18] *Bauman* v. *Ross*, 167 U.S. 548 (1897).

[19] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893).

[20] *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 (1932).

[21] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 345 (1983).

[22] *James* v. *Campbell*, 104 U.S. 356, 358 (1882). *See also Hollister* v. *Benedict Mfg. Co.*, 113 U.S. 59, 67, (1885).

[23] *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923).

[24] *International Paper Co.* v. *United States*, 282 U.S. 399 (1931).

[25] *Armstrong* v. *United States*, 364 U.S. 40, 50 (1960).

***Consequential Damages.***—The Fifth Amendment does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if they are not reflected in the market value of the property taken.[1] "Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever, he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress." [2] An exception to the general principle has been established by the Court where only a temporary occupancy is assumed; then the taking body must pay the value which a hypothetical long-term tenant in possession would require when leasing to a temporary occupier requiring his removal, including in the market value of the interest the reasonable cost of moving out the personal property stored in the premises, the cost of storage of goods against their sale, and the cost of returning the property to the premises.[3]

***Enforcement of Right to Compensation.***—The nature and character of the tribunal to determine compensation is in the discretion of the legislature and such body may be a regular court, a special legislative court, a commission, or an administrative body.[4] The estimate of just compensation is not required to be made by a jury but may be entrusted to other.[5] If a body other than a court is des-

[1] *Mitchell* v. *United States*, 267 U.S. 341 (1925); *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266 (1943); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946). For consideration of the problem of fair compensation in a government supervised bankruptcy reorganization proceedings, *see New Haven Inclusion Cases*, 399 U.S. 392, 489–495 (1970).

[2] *United States* v. *General Motors Corp.*, 323 U.S. 373, 382 (1945).

[3] *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). In *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), the Government seized the tenant's plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business for the period of military occupancy; the Court narrowly held that the Government must compensate for the loss in value of the business attributable to the destruction of its "trade routes," that is, for the loss of customers built up over the years and for the continued hold of the laundry upon their patronage. *See also United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).

[4] *United States* v. *Jones*, 109 U.S. 513 (1883); *Bragg* v. *Weaver*, 251 U.S. 57 (1919).

[5] *Bauman* v. *Ross*, 167 U.S. 548 (1897). Even when a jury is provided to determine the amount of compensation, it is the rule at least in federal court that the trial judge is to instruct the jury with regard to the criteria and this includes determination of "all issues" other than the precise issue of the amount of compensation,

ignated to determine just compensation, its decision must be subject to judicial review,[6] although the scope of review may be limited by the legislature.[7] When the judgment of a state court with regard to the amount of compensation is questioned, the Court's review is restricted. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution." [8] "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally." [9] Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, its findings as to the amount of damages will not be overturned on appeal, even though as a consequence of error therein the property owner received less than he ought to have.[10]

**When Property Is Taken**

The issue whether one's property has been "taken" with the consequent requirement of just compensation can hardly arise when government institutes condemnation proceedings directed to it. Where, however, damage results to property because of government action, or where regulatory action requires the cessation of an activity with or on the property or deprives it otherwise of value, whether there has been a taking or not in the Fifth Amendment sense become critical.

***Government Activity Not Directed at the Property.***—The older cases proceeded on the basis that the requirement of just compensation for property taken for public use referred only to direct appropriation and not to consequential injuries resulting from the exercise of lawful power.[1] Accordingly, consequential damages to abutting property caused by an obstruction in a street resulting from the authorization of a railroad to erect tracts, sheds, and fences over a portion thereof was held to effect no unconstitutional

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so that the judge decides those matters relating to what is computed in making the calculation. *United States* v. *Reynolds*, 397 U.S. 14 (1970).

[6] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893).

[7] *Long Island Water-Supply Co.* v. *Brooklyn*, 166 U.S. 685 (1897).

[8] *Backus* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 569, (1898).

[9] *McGovern* v. *City of New York*, 229 U.S. 363, 370-371 (1913).

[10] Id., 371. *And see Provo Bench Canal Co.* v. *Tanner*, 239 U.S. 323 (1915); *Appleby* v. *City of Buffalo*, 221 U.S. 524 (1911).

[1] *Cf.* the statement of the Court in *Legal Tender Cases*, 12 Wall. (79 U.S.) 457, 551 (1871).

deprivation of property,[2] as neither was the erection over a street of an elevated viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, lessening the circulation of light and air over it and impairing access to one's premises, any more than the changing of a grade in the street.[3] Nor was government held liable for the extra expense which the property owner must obligate in order to ward off the consequence of the governmental action, such as the expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,[4] or for the flooding of land consequent on private construction of a dam under public licensing when the flooding could have been prevented by raising the height of the dikes around the land.[5]

But the Court as well decided long ago that "taking" included destruction or severe impairment of use,[6] and it now holds that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." [7] It was thus held that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired the guns at the fort across the land and had established a fire control service there.[8] In two major cases, the Court held that the lessees or operators of airports were required to compensate the owners of adjacent land when the noise, glare, and fear of injury occasioned by the low altitude landing of planes over the land unfitted it for the use to which the owners had applied it.[9]

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[2] *Meyer* v. *City of Richmond*, 172 U.S. 82 (1898).

[3] *Sauer* v. *City of New York*, 206 U.S. 536 (1907). But see the litigation in the state courts cited by Justice Cardozo in *Roberts* v. *City of New York*, 295 U.S. 264, 278-282 (1935).

[4] *Chicago, B. & Q. R.R. Co.* v. *City of Chicago*, 166 U.S. 226 (1897).

[5] *Manigault* v. *Spring*, 199 U.S. 473 (1905).

[6] *Pumpelly* v. *Green Bay Co.*, 13 Wall. (80 U.S.) 166, 177-178 (1872). *And see Welch* v. *Swasey*, 214 U.S. 91 (1909).

[7] *United States* v. *Dickinson*, 331 U.S. 745, 748 (1947).

[8] *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (1922). *Cf. Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U.S. 1 (1919); *Peabody* v. *United States*, 231 U.S. 530 (1913).

[9] *United States* v. *Causby*, 328 U.S. 256 (1946); *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in a suit by one whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking. *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914).

***Navigable Waters.***—One important reservation to the developing law of liability in this area is the repeated holdings that riparian ownership is subject to the power of Congress to regulate commerce. When damage results consequentially from an improvement of a navigable river, or an improvement on a nonnavigable river designed to affect navigability elsewhere, it is not a taking of property but merely an exercise of a servitude to which the property is always subject.[10] This exception is not, of course, applicable to the damage the Government may do to land by causing overflows, by erosion, and otherwise, consequent on erection of dams.[11]

***Police Power vs. Eminent Domain Power.***—While it is established now that government may take private property, with compensation, to promote the public interest, that interest may be served as well or better by regulation of property or its use pursuant to the police power of the government involved, and there is broad dicta over the years that no one may claim damages on being compelled to render obedience to a police regulation designed to secure the common welfare, especially in the area of health and safety regulations.[12] "The distinguishing characteristic between eminent domain and the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest." [13] But regulation may deprive an owner of all beneficial use of his property and may destroy the values of the property for the purposes to which it is suited, even if the public interest is thereby greatly enhanced.[14] The older cases flatly denied the possibility of

[10] *Gibson* v. *United States*, 166 U.S. 269 (1897); *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82 (1913); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940); *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945); *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956); *United States* v. *Rands*, 389 U.S. 121 (1967).

[11] *United States* v. *Lynah*, 188 U.S. 445 (1903); *United States* v. *Cress*, 243 U.S. 316 (1917); *Jacobs* v. *United States*, 290 U.S. 13 (1933); *United States* v. *Dickinson*, 331 U.S. 745 (1947); *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799 (1950); *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624 (1961). When previously nonnavigable waters are made navigable by private investment, government may not simply assert a navigable servitude and direct the property owners to afford access to the general public without paying compensation. *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); *Vaughn* v. *Vermillion Corp.*, 444 U.S. 206 (1979).

[12] E.g, *Legal Tender Cases*, 12 Wall. (79 U.S.) 457, 551 (1871); *Chicago, B. & Q. R.R. Co.* v. *City of Chicago*, 166 U.S. 226, 255 (1897); *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923); *Norman* v. *Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 260–261 (1964).

[13] 1 Nichols' *The Law of Eminent Domain*, J. Sackman ed. (New York: 3d rev. ed. 1964), § 1.42 (emphasis in original).

[14] E.g., *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (ordinance restricting owner of brick factory from continuing his use after residential growth surrounding facto-

damages or compensation for this diminution or destruction of property values,[15] and although the Court established as a general principle, in 1922, that "if regulation goes too far it will be recognized as a taking," [16] the Court in the intervening years has failed to develop standards by which it can be determined when a regulation goes too far and, indeed, what remedy a property owner has if government does go too far.

In the *Mahon* case, Justice Holmes for the Court, over Justice Brandeis' vigorous dissent, held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased in deeds which reserved to the coal companies ownership of subsurface mining rights and which held harmless the companies for damage caused by subsurface mining operations. The statute thus gave the homeowners more than they had been able to obtain through contracting, and as to the companies which owned only a subsurface estate the statute deprived them of all that they owned, inasmuch as the coal could not be otherwise extracted. The Court observed that" [f]or practical purposes, the right to coal consists in the right to mine," and that the statute, by making it "commercially impracticable to mine certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying it." [17] The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went "too far." [18]

As governmental regulation of property has expanded over the years—in terms of zoning and land use controls, environmental regulations, and the like—the Court never developed, as it admitted, a "set formula to determine where regulation ends and taking begins." [19] Rather, as one commentator remarked, its decisions

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ry made use noxious, reducing value by more than 90%); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (no compensation due owner's loss of red cedar trees ordered destroyed because they were infected with rust that threatened contamination of neighboring apple orchards: preferment of public interest in saving cash crop to property interest in ornamental trees rational).

[15] *Mugler* v. *Kansas*, 123 U.S. 623, 668–669 (1887) (ban on manufacture of liquor greatly devalued plaintiff's plant and machinery; no taking possible simply because of legislation deeming a use injurious to public health and welfare).

[16] *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

[17] Id., 414–415.

[18] Id., 415. In dissent, Justice Brandeis argued that a restriction imposed to abridge the owner's exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. Id., 416.

[19] *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). The phrase appeared first in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962).

constitute a "crazy quilt pattern" of judgments.[20] The most recent effort to enunciate a comprehensive theory must be reckoned to have fallen short.

In *Penn Central Transp. Co.* v. *City of New York*,[21] the Court left considerally confused the applicable standards by which it may be determined whether a police power regulation that substantially restricts the profitable use of private property is a taking. The City has a landmarks preservation law under which properties and areas are designated as landmarks; following designation, the owner must maintain the property or area and must obtain special permission in order to alter the exterior architectural features or to construct any exterior improvement. Penn Central, owning Grand Central Terminal which had been properly designated, sought approval to construct a 53-story office building atop the terminal, necessitating some considerable changes in the building, and from which the Company reasonably anticipated a net of $2 million annually in rents; approval was denied. The Company then attacked the constitutionality of the landmarks law, contending that its property had in effect been "taken" because it could not enjoy the fulfillment of its expectations with respect to it.

Acknowledging that it, "quite simply, had been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons," the Court went on to specify that "essentially ad hoc, factual inquiries" were necessary.[22] The landmarks law was sustained upon a consideration of a set of balancing factors. First, courts must look to the economic impact of the regulation on the owner and particularly to the extent to which the regulation interferes with distinct investment-backed expectations. Here, the Company retained much money-producing ability in the Terminal and its rental of available spaces; moreover, the City specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right which mitigated the

[20] Dunham, "*Griggs* v. *Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law," 1962 Sup. Ct. Rev. 63. For an effort to ground taking jurisprudence in its philosophical precepts, see Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165 (1967). A comprehensive analysis of the law in context is "Developments in the Law-Zoning," 91 Harv. L. Rev. 1427 (1978).

[21] 438 U.S. 104 (1978). Justices Rehnquist and Stevens and Chief Justice Burger dissented. Id., 138.

[22] Id., 124.

burden otherwise to be suffered by the owner. And, too, the landmarks designation did not alter the primary expectancy of the Company to use the site for what it had always been used, as a rail terminal. Second, the character of the governmental regulation must be examined. When there is a physical invasion by the government, a taking may more easily be found than when there is a public program adjusting the benefits and burdens of economic life to promote the common good. The landmarks law was of the latter type, the preservation of historic sites being a permissible goal and one which served the public interest.[23]

In the course of its opinion the Court rejected three tests which have at varying times been used to judge the facial validity of land-use regulations. First, it has been argued that government may ban the use of property for purposes that would be noxious, of hazard to health or safety, without compensating, but that compensation must be awarded whenever for a public purpose government regulates a use which has no harmful effect on the public or surrounding property owners.[24] The Court denied that there was any such test and that prior cases had turned on the concept. "These case are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." [25] Second, it has been suggested that the test of taking turn on whether the regulations resolve conflicts between individuals, in which case no compensation is owed, or whether they further governmental interests at the expense of individuals, in which case compensation is required. This test the Court made irrelevant to this kind of regulation by observing that the landmarks law "neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city." [1] Third, it has been argued that in order not to be a taking a regulation of property use must spread its distribution of benefits and burdens broadly so that each person burdened has at the same time the enjoyment of the benefit of the restraint upon his neighbors. But the Court deemed it immaterial that the landmarks law has a more severe impact on some landowners than on others:

[23] Id., 124–128, 135–138.
[24] The dissent was based upon this test. Id., 144–146.
[25] Id., 133–134 n. 30.
[1] Id., 135.

"Legislation designed to promote the general welfare commonly burdens some more than others." [2]

The test, then according to *Penn Central* is basically one of *ad hoc* balancing. But evaluation is furthered by consideration of the cases over serveral decades. First, it is reasonably established that when government occupies or by regulation authorizes someone else to occupy property, or however minor a part of one's property, the action constitutes a taking and compensation must be paid.[3] The modern case dealt with a law that required landlords to permit a cable television company to install its cable facilities upon their buildings, which constituted occupancy of about 1½ cubic feet of space on the exterior of each building, at a *de minimis* payment; a divided Court held the regulation constituted a taking and demanded determination of just compensation.[4] Similarly, when the government retained the interest of funds it required to be deposited with the clerk of the county court as a precondition to certain suits, its action constituted a taking in the absence of a showing that the interest earned went to a purpose that government was entitled to put it. Because a separate statute required payment for the clerk's services, that showing was absent.[5]

However, in times of great public peril, such as war, spreading municipal fires, and the like, it appears that property may be taken and destroyed without necessitating compensation. Thus, in *United States* v. *Caltex*,[6] the owners of property destroyed by retreating United States armies in Manila during World War II were held not entitled to compensation, and in *United States* v. *Central Eureka Mining Co.*,[7] the Court held that a federal order suspend-

[2] Id., 133–134. The dissent would have applied this test in cases of regulation of non-noxious uses. Id., 147–150.

[3] E.g., *Pumpelly* v. *Green Bay Co.*, 13 Wall. (80 U.S.) 166 (1872); *City of St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92 (1893); *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U.S. 540 (1904).

[4] *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Justices Blackmun, Brennan, and White dissented. Id., 442. *See also Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) (imposition of navigable servitude requiring public access to a pond was a taking under the circumstances; owner's right to exclude others one of the most essential of the rights of property). *But see PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) (requiring shopping center to permit individuals to exercise free expression rights on property onto which public had been invited not so destructive of right to exclude as to constitute taking).

[5] *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980).

[6] 344 U.S. 149 (1952). In dissent, Justices Black and Douglas advocated the applicability of a test formulated by Justice Brandeis in *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 429 (1935), a regulation case, to the effect that "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

[7] 357 U.S. 155 (1958). In dissent, Justice Harlan argued for the test stated above. Id., 179. *See supra*, n. 6.

ing the operations of a nonessential gold mine for the duration of the war in order to redistribute the miners, unaccompanied by governmental possession and use or a forced sale of the facility, was not a taking entitling the owner to compensation for loss of profits. Finally, the Court held that when federal troops occupied several buildings belonging to petitioners during a riot in order to dislodge rioters and looters who had already invaded the buildings, the action was taken as much for the owners' benefit as for the general public benefit and the owners must bear the costs of the damage inflicted on the buildings subsequent to the occupation.[8]

Second, when the regulation is aimed at a noxious or harmful effect of land use, even one that occurs not because of anything the owner has done but simply because growth has caused an impinging upon his domain, it is highly unlikely that compensation will be required.[9] Thus, in *Goldblatt* v. *Town of Hempstead*,[10] the town had expanded around an excavation used by a company for mining sand and gravel and it enacted an ordinance which, in effect, terminated further mining at the site. Declaring that no compensation was owed, the Court stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." [11] Similarly, a federal

[8] *National Board of YMCA* v. *United States*, 395 U.S. 85 (1969). "An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." *United States* v. *Sponenbarger*, 308 U.S. 256, 265 (1939).

[9] It is under this heading that *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), and, perhaps, *Miller* v *Schoene*, 276 U.S. 272 (1928), fall. *Schoene* may also be assigned to the public peril line of cases.

[10] 369 U.S. 590 (1962).

[11] Id., 593. The Court posited a two-part test. First, the interests of the public required the interference, and, second, the means were reasonably necessary for the accomplishment of the purpose and were not unduly oppressive of the individual. Id., 595. The test was derived from *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894) (holding that state officers properly destroyed fish nets belonging to plaintiffs that were banned by state law to preserve from extinction certain fisheries).

ban on the sale of artifacts made from eagle feathers was sustained as applied to the existing inventory of a commercial dealer in such artifacts.[12] The ban served a substantial public purpose—the protection of the eagle from extinction—and the owner still had viable economic uses for his holdings, such as displaying them in a museum and charging admission, and he still had the value of possession.

Third, when the regulation is of non-noxious or non-harmful uses of property but is instead intended to further a public interest, there is raised the broad issue dealt with in *Penn Central*: When does regulation go too far. The Court had been early concerned with the imposition upon one or a few individuals of the costs of furthering the public interest.[13] But it was with respect to zoning that the Court first experienced some difficulty which has grown today. In 1926, the Court first confronted a zoning case, involving a comprehensive zoning ordinance of the Village of Euclid, Ohio, which regulated the location of trades, industries, apartment houses, single- and two-family houses, and other such uses.[14] The realty company attacked the plan which as applied prevented development of its land for industrial purposes, reducing its value from $10,000 an acre to $2,500 an acre. Acknowledging that zoning was of recent origin, the Court observed that it must find its justification in the police power and be evaluated by the constitutional standards applied to exercises of the police power. After considering traditional nuisance law for its learning, the Court determined that the public interest was served by segregation of incompatible land uses and the ordinance was thus valid on its face; whether its application to diminish some property values in any particular case was also valid would depend, the Court said, upon a finding that it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." [15]

In *Nectow* v. *City of Cambridge*,[16] the Court did invalidate the application of a zoning ordinance to a tract of land, finding that

[12] *Andrus* v. *Allard*, 444 U.S. 51 (1979).

[13] *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405 (1935) (government may not require railroad at its own expense to separate the grade of a railroad track from that of an interstate highway). *See also Panhandle Eastern Pipe Line Co.* v. *State Comm.*, 294 U.S. 613 (1935); *Atchison, T. & S. F. Ry.* v. *Public Utility Comm.*, 346 U.S. 346 (1953), and *compare Georgia Ry. & Electric Co.* v. *City of Decatur*, 295 U.S. 165 (1935), with id., 297 U.S. 620 (1936).

[14] *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

[15] Id., 395. *See also Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927).

[16] 277 U.S. 183 (1928).

the tract would be rendered nearly worthless and that to exempt the tract would impair no substantial municipal interest. But then the Court withdrew from the scene, largely leaving the States and their municipalities free to develop increasingly more comprehensive zoning techniques.[17] Following the *Penn Central* decision, however, renewed interest in the issue of regulation versus taking was observed, although the matter was framed as the remedy property owners were to pursue to object to land use regulations.[18]

The remedy question arises because there are two possible constitutional objections to be made to regulations that go "too far" in reducing the value of one's property or which do not substantially advance a legitimate governmental interest. The violation may be deemed a denial of due process and the regulation will be invalidated; the violation may be deemed a taking and compensation will be owed, at least for the period in which the regulation was in effect. By and large, the state courts have looked askance at legal actions which were "inverse condemnation" [19] suits or suits for damages in the land use field and have required property owners to pursue due process avenues leading only to invalidations of constitutionally objectionable regulations.[20] The adverse effects of this approach upon

[17] *But see Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (considering and sustaining single-family zoning as applied to group of college students in house), and *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (considering and voiding single-family zoning so strictly construed as to bar grandmother from keeping with her two grandchildren of different children). Some due process cases were also considered. *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U.S. 116 (1928); *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668 (1976).

[18] In *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), the Court found itself unable to reach the principal question but passed on the facial validity of the zoning, saying that application of a general zoning law to particular property would effect "a taking if the ordinance does not substantially advance legitimate state interests . . . or if it denies an owner economically viable use of his land . . . ." Id., 260. *See also Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 293–297 (1981), and *Hodel* v. *Indiana*, 452 U.S. 314, 333–336 (1981) (rejecting facial taking challenges to strip mining law); *Texaco* v. *Short*, 454 U.S. 516 (1982) state statute deeming mineral claims lapsed upon failure of putative owners to take prescribed steps).

[19] "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity." *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 638 n. 2 (1981) (Justice Brennan dissenting). *See United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *Agins* v. *City of Tiburon*, 447 U.S. 255, 258 n. 2 (1980). For "inverse condemnation" cases against the United States, see *Jacobs* v. *United States*, 290 U.S. 13 (1933); *United States* v. *Causby*, 328 U.S. 256 (1946); *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962).

[20] *See, e.g., Fred F. French Investing Co.* v. *City of New York*, 39 N.Y. 2d 587, 350 N.E. 2d 381, *cert. den.*, 429 U.S. 990 (1976); *Agins* v. *City of Tiburon*, 24 Cal. 3d

property owners are that they are denied compensation for losses they incurred between enactment of the regulation and its invalidation and that the municipality may simply amend its regulation slightly and cause the litigation to resume.[21] Although the Court has yet to speak on the issue, in an influential dissent, in which a majority of the Court then sitting seems to have agreed, Justice Brennan has argued that property owners who establish that they have been unconstitutionally subjected to zoning or regulation that has diminished the value of their property are entitled to compensation, at least for a temporary taking. In his view, courts should declare that compensation is due but that it is open to government to cease its regulation, and thus owe only temporary compensation or damages, or to proceed and owe full just compensation.[22] The Court's evident interest insures confrontation with this question again and a decision with substantial impact upon governmental land use decisions at all levels.

266, 598 P.2d 25 (1979), *aff'd. on other grounds*, 447 U.S. 255 (1980). The Supreme Court in *Agins* could not decide whether the California court had held that a regulation could never constitute a taking or that a property owner could sue only to invalidate. *See San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 639–646 (1981) (Justice Brennan dissenting).

[21] Id., 653–660 (Justice Brennan dissenting).

[22] Ibid. Joining Justice Brennan in dissent were Justices Stewart, Marshall, and Powell. Justice Rehnquist joined the Court's decision rejecting review because of a lack of a final judgment below, but he noted that if he did reach merits "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." Id., 633–634. The Court itself had remarked that "the federal constitutional aspects" of the landowner's entitlement to a monetary remedy "are not to be cast aside lightly." Id., 633.

# SIXTH AMENDMENT

# RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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## RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

### SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### CRIMINAL PROSECUTIONS

**Coverage**

Criminal prosecutions in the District of Columbia [1] and in incorporated territories [2] must conform to this Amendment, but those in the unincorporated territories need not do so.[3] In upholding a trial before a United States consul of a United States citizen for a crime committed within the jurisdiction of a foreign nation, the Court specifically held that this Amendment reached only citizens and others within the United States or who were brought to the United States for trial for alleged offenses committed elsewhere and not to citizens residing or temporarily sojourning abroad.[4] It is clear that this holding no longer is supportable after *Reid* v. *Covert*,[5] but it is not clear what the constitutional rule is. All of

[1] *Callan* v. *Wilson*, 127 U.S. 540 (1888).

[2] *Reynolds* v. *United States*, 98 U.S. 145 (1879). *See also Lovato* v. *New Mexico*, 242 U.S. 199 (1916).

[3] *Balzac* v. *Puerto Rico*, 258 U.S. 298, 304–305 (1922); *Dorr* v. *United States*, 195 U.S. 138 (1904). These holdings are, of course, merely one element of the doctrine of the *Insular Cases*, *see De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901), concerned with the "Constitution following the flag." *Supra*, *pp.* 355–356. *Cf. Rassmussen* v. *United States*, 197 U.S. 516 (1905).

[4] *In re Ross*, 140 U.S. 453 (1891).

[5] 354 U.S. 1 (1957) (holding that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by court-martial in times of peace for capital offenses committed abroad). Four Justices, Black, Douglas, Brennan, and Chief Justice Warren, disapproved *Ross* as "resting . . . on a fundamental misconception" that the Constitution did not limit the actions of the United States Govern-

the rights guaranteed in this Amendment are so fundamental that they have been made applicable against state abridgment by the due process clause of the Fourteenth Amendment.[6]

***Offenses Against the United States.***—There are no common-law offenses against the United States. Only those acts which Congress has forbidden, with penalties for disobedience of its command, are crimes.[7] Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions,[8] as is true also of deportation proceedings,[9] but contempt proceedings which were at one time not considered to be criminal prosecutions are no longer within that category.[10] To what degree Congress may make conduct engaged in outside the territorial limits of the United States a violation of federal criminal law is a matter obscured by the paucity of cases and it is an open question.[11]

## RIGHT TO A SPEEDY AND PUBLIC TRIAL

### Speedy Trial

***Source and Rationale.***—The right to a speedy trial may be derived from a provision of Magna Carta and it was a right so interpreted by Coke.[1] Much the same language was incorporated into the Virginia Declaration of Rights of 1776[2] and from there into

ment wherever it acted, id., 5–6, 10–12, and evinced some doubt with regard to the *Insular Cases* as well. Id., 12–14. Justices Frankfurter and Harlan, concurring, would not accept these strictures but were content to limit *Ross* to its particular factual situation and to distinguish the *Insular Cases*. Id., 41, 65. Cf. *Middendorf* v. *Henry*, 425 U.S. 25, 33–42 (1976) (declining to decide whether there is a right to counsel in a court-martial, but ruling that the summary court-martial involved in the case was not a "criminal prosecution" within the meaning of the Amendment).

[6] Citation is made in the sections dealing with each provision.

[7] *United States* v. *Hudson & Goodwin*, 7 Cr. (11 U.S.) 32 (1812); *United States* v. *Coolidge*, 1 Wheat. (14 U.S.) 415 (1816); *United States* v. *Britton*, 108 U.S. 199, 206 (1883); *United States* v. *Eaton*, 144 U.S. 677, 687 (1892).

[8] *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320 (1909); *Hepner* v. *United States*, 213 U.S. 103 (1909); *United States* v. *Regan*, 232 U.S. 37 (1914).

[9] *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 289 (1904); *Zakonaite* v. *Wolf*, 226 U.S. 272 (1912).

[10] *Compare In re Debs*, 158 U.S. 564 (1895), *with Bloom* v. *Illinois*, 391 U.S. 194 (1968).

[11] *Cf. United States* v. *Bowman*, 260 U.S. 94 (1922) (treating question as a matter of statutory interpretation). *See* National Commission on Reform of Federal Criminal Laws, *Working Papers* (Washington: 1970), 69–76.

[1] "We will sell to no man, we will not deny or defer to any man either justice or right." Ch. 40 of the 1215 Magna Carta, a portion of ch. 29 of the 1225 reissue. *Klopfer* v. *North Carolina*, 386 U.S. 213, 223–224 (1967).

[2] 7 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d sess. (Washington: 1909), § 8, 3813.

the Sixth Amendment. Unlike other provisions of the Amendment, this guarantee can be attributable to reasons which have to do with the rights of and infliction of harms to both defendants and society. The provision is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself." [3] The passage of time alone may lead to the loss of witnesses through death or other reasons and the blurring of memories of available witnesses. But on the other hand, "there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused." Persons in jail must be supported at considerable public expense and often families must be assisted as well. Persons free in the community may commit other crimes, may be tempted over a lengthening period of time to "jump" bail, and may be able to use the backlog of cases to engage in plea bargaining for charges or sentences which do not give society justice. And delay often retards whatever deterrence or rehabilitation there may be found in the criminal law.[4]

***Application and Scope.***—Because the guarantee of a speedy trial "is one of the most basic rights preserved by our Constitution," it is one of those "fundamental" liberties embodied in the Bill of Rights which the due process clause of the Fourteenth Amendment makes applicable to the States.[5] The protection afforded by this guarantee "is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." Invocation of the right need not await indictment, information, or other formal charge but begins with the actual restraints imposed by arrest if it precedes the formal preferring of charges.[6] Possible prejudice that may

[3] *United States* v. *Ewell*, 383 U.S. 116, 120 (1966). *See also Klopfer* v. *North Carolina*, 386 U.S. 213, 221–222 (1967); *Smith* v. *Hooey*, 393 U.S. 374, 377–379 (1969); *Dickey* v. *Florida*, 389 U.S. 30, 37–38 (1970).

[4] *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972); *Dickey* v. *Florida*, 398 U.S. 30, 42 (1970) (Justice Brennan concurring). Congress by the Speedy Trial Act of 1974, P.L. 93–619, 88 Stat. 2076, 18 U.S.C. §§ 3161–3174, has codified the law with respect to the right, intending "to give effect to the sixth amendment right to a speedy trial." S. Rept. 93–1021, 93d Congress, 2d sess. (1974), 1.

[5] *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). The quoted phrase is id., 226.

[6] *United States* v. *Marion*, 404 U.S. 307, 313, 320, 322 (1971). Justice Douglas, Brennan, and Marshall disagreed, arguing that the "right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pretrial indictment delays as it is to post-indictment delays," but concurring because they did not think the guarantee violated under the facts of the case. Id., 326, 328. In *United States* v. *MacDonald*, 456 U.S. 1 (1982), the Court held the clause was not implicated by the action of the United States when, in May of 1970, it proceeded with a charge of murder against defendant under military law but dismissed the

result from delays between the time government discovers sufficient evidence to proceed against one and the time of instituting those proceedings is guarded against by statutes of limitation which represent a legislative judgment with regard to permissible periods of delay.[7] In two cases, the Court held that this guarantee had been violated by States which preferred criminal charges against persons who were already incarcerated in prisons of other jurisdictions following convictions on other charges when those States ignored the defendants' requests to be given prompt trials and made no effort through requests to prison authorities to obtain custody of the prisoners for purposes of trial.[8] A state practice permitting the prosecutor to take *nolle prosequi with leave*, which discharged the accused from custody but left him subject at any time thereafter, the statute of limitations being tolled, to prosecution at the discretion of the prosecutor, was condemned as violative of the guarantee.[9]

***When the Right is Denied.***—"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." [10] No length of time is *per se* too long to pass scrutiny under this guarantee,[11] but on the other hand nei-

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charge in October of that year, and he was discharged in December. In June of 1972, the investigation was reopened and an investigation was begun, but a grand jury was not convened until August of 1974, and MacDonald was not indicted until January of 1975. The period between dismissal of the first charge and the later indictment had none of the characteristics which called for application of the speedy trial clause. The period between arrest and indictment must be considered in evaluating a speedy trial claim.

[7] *United States* v. *Marion*, 404 U.S. 307, 322–323 (1971). *Cf. United States* v. *Toussie*, 397 U.S. 112, 114–115 (1970). In some circumstances, pre-accusation delay could constitute a due process violation but not a speedy trial problem. If prejudice results to a defendant because of the government's delay, a court should balance the degree of prejudice against the reasons for delay given by the prosecution. *Marion*, *supra*, 324; *United States* v. *Lovasco*, 431 U.S. 783 (1977); *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982).

[8] *Smith* v. *Hooey*, 393 U.S. 374 (1969); *Dickey* v. *Florida*, 398 U.S. 30 (1970).

[9] *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). In *Pollard* v. *United States*, 352 U.S. 354 (1957), the majority assumed and the dissent asserted that sentence is part of the trial and that too lengthy or unjustified delay in imposing sentence could fall afoul of this guarantee.

[10] *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905) (holding that the guarantee could not be invoked by a defendant first indicted in one district to prevent removal to another district where he had also been indicted).

[11] *Cf. Pollard* v. *United States*, 352 U.S. 354 (1957); *United States* v. *Ewell*, 383 U.S. 116 (1966). *See United States* v. *Provoo*, 350 U.S. 857 (1955), *aff'g* 17 F.R.D. 183 (D.C.D. Md. 1955).

ther does the defendant have to show actual prejudice by delay.[12] The Court rather has adopted an *ad hoc* balancing approach. "We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." [13] The fact of delay triggers an inquiry and is dependent on the circumstances of the case. Reasons for delay will vary. A deliberate delay for advantage will weigh heavily, whereas the absence of a witness would justify an appropriate delay, and such factors as crowded dockets and negligence will fall between these other factors.[14] It is the duty of the prosecution to bring a defendant to trial and the failure of the defendant to demand the right is not to be construed as a waiver of the right; [15] yet, the defendant's acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee and the defendant's responsibility for the delay would be conclusive. Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay.[16]

A determination that a defendant has been denied his right to a speedy trial results in a decision to dismiss the indictment or to reverse a conviction in order that the indictment be dismissed.[17]

**Public Trial**

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the an-

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[12] *United States* v. *Marion*, 404 U.S. 307, 320 (1971); *Barker* v. *Wingo*, 407 U.S. 514, 536 (1972) (Justice White concurring).

[13] *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972). For the federal courts, Congress under the Speedy Trial Act of 1974 imposed strict time deadlines, replacing the *Barker* factors.

[14] *Barker* v. *Wingo*, 407 U.S. 514, 531 (1972).

[15] Id., 528. *See* generally id., 523–529. Waiver is "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and it is not to be presumed but must appear from the record to have been intelligently and understandingly made. *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962).

[16] *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972).

[17] *Strunk* v. *United States*, 412 U.S. 434 (1973). A trial court denial of a motion to dismiss on speedy trial clause violations grounds is not an appealable order under the "collateral order" exception to the finality rule. One must raise the issue on appeal from a conviction. *United States* v. *MacDonald*, 435 U.S. 850 (1977).

cient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment . . . most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *letter de cachet*. All of these institutions obviously symbolized a menace to liberty. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." [1] The purposes of the requirement of open trials are multiple: it helps to assure the criminal defendant a fair and accurate adjudication of guilt or innocence, it provides a public demonstration of fairness, it discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality. The Court has also expatiated upon the therapeutic value to the community of open trials to enable the public to see justice done and the fulfillment of the urge for retribution that people feel upon the commission of some kinds of crimes.[2] Because of the near universality of the guarantee in this country, the Supreme Court has had little occasion to deal with the right. It is a right so fundamental that it is protected against state deprivation by the due process clause,[3] but

[1] *In re Oliver*, 333 U.S. 257, 266–270 (1948) (footnote citations omitted). Other panegyrics to the value of openness, accompanied with much historical detail, are *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 406, 411–433 (1979) (Justice Blackmun concurring in part and dissenting in part); *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 564–573 (1980) (plurality opinion of Chief Justice Burger); id., 589–597 (Justice Brennan concurring); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603–607 (1982).

[2] *Estes* v. *Texas*, 381 U.S. 532, 538–539 (1965); *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 569–573 (1980) (plurality opinion of Chief Justice Burger); id., 593–597 (Justice Brennan concurring).

[3] *In re Oliver*, 333 U.S. 257 (1948); *Levine* v. *United States*, 362 U.S. 610 (1960). Both cases were contempt proceedings which were not then "criminal prosecutions" to which the Sixth Amendment applied, now *see Bloom* v. *Illinois*, 391 U.S. 194 (1986), so that the cases were wholly due process holdings. *Cf. Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 591 n. 16 (1980) (Justice Brennan concurring).

it is not so absolute that reasonable regulation designed to forestall prejudice from publicity and disorderly trials is foreclosed.[4] The banning of television cameras from the courtroom and the precluding of live telecasting of a trial is not a denial of the right,[5] although the Court does not inhibit televised trials under the proper circumstances.[6] The Sixth Amendment guarantee is apparently a personal right of the defendant, which he may waive in conjunction with the prosecution and the court,[7] although the First Amendment has been held to protect public and press access to trials in all but the most extraordinary circumstances.[8]

## RIGHT TO TRIAL BY IMPARTIAL JURY

### Jury Trial

By the time the United States Constitution and the Bill of Rights were drafted and ratified, the institution of trial by jury was almost universally revered, so revered that its history had been traced back to Magna Carta.[1] The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerers to discover the King's rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials. Trial by petit jury was not employed at least until the reign of Henry III, in which the jury was first essentially a body of wit-

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[4] *Cf. Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976).

[5] *Estes* v. *Texas*, 381 U.S. 532 (1965). *Cf. Nixon* v. *Warner Communications*, 435 U.S. 589, 610 (1978).

[6] *Chandler* v. *Florida*, 449 U.S. 560 (1981).

[7] *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979). What exactly this case stands for is subject to considerable dispute. A 5-to-4 decision, it involved not a trial, but a pretrial supression hearing. Nonetheless, the opinion of the Court several times seemed to conflate the *pretrial* and *trial* issues of openness and to state that its interpretation of the Sixth Amendment applied to *trials*, while one concurrence, although joining the opinion, limited its agreement to the pretrial issue, id., 394 (Chief Justice Burger), and a second concurrence explicitly observed that under the Sixth Amendment members of the public had no right to attend criminal trials. Id., 403 (Justice Rehnquist). The four Justices who concurred in part and dissented in part argued for public access under the Sixth Amendment. Id., 406 (Justices Blackmun, Brennan, White, and Marshall). At the most, the case may well stand only for the proposition that pretrial hearings may be closed, see the various qualifications in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), and even as to that the First Amendment may sweep it away.

[8] *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980); *Globe Newspapers* v. *Superior Court*, 457 U.S. 596 (1982). *See also Gannett Co.* v. *DePasquale*, 443 U.S. 368, 397 (1979) (Justice Powell concurring).

[1] Historians no longer accept this attribution. Thayer, "The Jury and Its Development," 5 Harv. L. Rev. 249, 265 (1892), and the Court has noted this. *Duncan* v. *Louisiana*, 391 U.S. 145, 151 n. 16 (1968).

nesses, called for their knowledge of the case until in the reign of Henry VI when it became the trier of evidence. It was not until the Seventeenth Century that the jury emerged as a safeguard for the criminally accused.[2] Thus, in the Eighteenth Century, Blackstone could commemorate the institution as part of a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown" because "the truth of every accusation . . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion." [3] The right was guaranteed in the constitutions of the original 13 States, was guaranteed in the body of the Constitution [4] and in the Sixth Amendment, and the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.[5] "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' "[6]

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in

[2] W. Forsyth, *History of Trial by Jury* (London: 1852).

[3] W. Blackstone, *Commentaries on the Laws of England*, T. Cooley ed. (Chicago: 4th ed. 1896), *349–*350. The other of the "two-fold barrier" was, of course, indictment by grand jury.

[4] In Art. III, § 2.

[5] *Duncan* v. *Louisiana*, 391 U.S. 145, 153 (1968).

[6] *Thompson* v. *Utah*, 170 U.S. 343, 349-350 (1898), quoting 3 J. Story, *Commentaries on the Constitution of the United States* (Boston, 1833), § 1773.

the criminal law in this insistence upon community participation in the determination of guilt or innocence." [7]

Because "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants," the Sixth Amendment provision is binding on the States through the due process clause of the Fourteenth Amendment.[8] But inasmuch as it cannot be said that every criminal trial or any particular trial which is held without a jury is unfair,[9] it is possible for a defendant to waive the right and go to trial before a judge alone.[10]

***The Attributes of the Jury.***—It was previously the position of the Court that the right to a jury trial meant "a trial by jury as understood and applied at comon law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted." [11] It had therefore been held that this included trial by a jury of 12 persons [12] who must reach a unanimous verdict [13] and that the jury trial must be held during the first court proceeding and not *de novo* at the first appellate stage.[14] However, as it extended the guarantee to the States, the

[7] *Duncan* v. *Louisiana*, 391 U.S. 145, 155–156 (1968). At other times the function of accurate factfinding has been emphasized. E.g., *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 543 (1971). While federal judges may comment upon the evidence, the right to a jury trial means that he must make clear to the jurors that his remarks are advisory only and that they are the final determiners of all factual questions. *Quercia* v. *United States*, 289 U.S. 466 (1933).

[8] *Duncan* v. *Louisiana*, 391 U.S. 145, 158–159 (1968).

[9] Id., 159. Thus, state trials conducted before *Duncan* was decided were held to be valid still. *DeStefano* v. *Woods*, 392 U.S. 631 (1968).

[10] *Patton* v. *United States*, 281 U.S. 276 (1930). As with other waivers, this one must be by the express and intelligent consent of the defendant. A waiver of jury trial must also be with the consent of the prosecution and the sanction of the court. A refusal by either the prosecution or the court to defendant's request for consent to waive denies him no right since he then gets what the Constitution guarantees, a jury trial. *Singer* v. *United States*, 380 U.S. 24 (1965). It may be a violation of defendant's rights to structure the trial process so as effectively to encourage him "needlessly" to waive or to penalize the decision to go to the jury, but the standards here are unclear. *Compare United States* v. *Jackson*, 390 U.S. 570 (1968), *with Brady* v. *United States*, 397 U.S. 742 (1970), *and McMann* v. *Richardson*, 397 U.S. 759 (1970), *and see State* v. *Funicello*, 60 N.J. 60, 286 A. 2d 55 (1971), *cert. den.*, 408 U.S. 942 (1972).

[11] *Patton* v. *United States*, 281 U.S. 276, 288 (1930).

[12] *Thompson* v. *Utah*, 170 U.S. 343 (1898). Dicta in other cases was to the same effect. *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900); *Rassmussen* v. *United States*, 197 U.S. 516, 519 (1905); *Patton* v. *United States*, 281 U.S. 276, 288 (1930).

[13] *Andres* v. *United States*, 333 U.S. 740 (1948). *See* dicta in *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900); *Patton* v. *United States*, 281 U.S. 276, 288 (1930).

[14] *Callan* v. *Wilson*, 127 U.S. 540 (1888). Preserving *Callan*, as being based on Article II, § 2, as well as on the Sixth Amendment and being based on a more burdensome procedure, the Court in *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976), approved a state two-tier system under which persons accused of certain crimes must

Court indicated that at least some of these standards were open to re-examination [15] and in subsequent cases it has done so. In *Williams* v. *Florida*,[16] the Court held that the fixing of jury size at 12 was "a historical accident" which, while firmly established when the Sixth Amendment was proposed and ratified, was not required as an attribute of the jury system, either as a matter of common-law background [17] or by any ascertainment of the intent of the framers.[18] Being bound neither by history nor framers' intent, the Court rather thought the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." The size of the jury, the Court continued, bore no discernable relationship to the purposes of jury trial, the prevention of oppression and the reliability of factfinding, and there was little reason to believe that as between 12 and six, which was the number at issue in the case, any great advantage accrued to the defendant nor that the larger number appreciably increased the variety of viewpoints on the jury. A jury should be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility that a cross-section of the community will be represented on it, but the Court did not speculate whether there was a minimum permissible size and it recognized the propriety of conditioning jury size on the seriousness of the offense.[19]

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be tried in the first instance in the lower tier without a jury and if convicted may appeal to the second tier for a trial *de novo* by jury. Applying a due process standard, the Court, in an opinion by Justice Blackmun, found that neither the imposition of additional financial costs upon a defendant, nor the imposition of increased psychological and physical hardships of two trials, nor the potential of a harsher sentence on the second trial impermissibly burdened the right to a jury trial. Justices Stevens, Brennan, Stewart, and Marshall dissented. Id., 632. *See also North* v. *Russell*, 427 U.S. 328 (1976).

[15] *Duncan* v. *Louisiana*, 391 U.S. 145, 158 n. 30 (1968) ; *DeStefano* v. *Woods*, 392 U.S. 631, 632–633 (1968).

[16] 399 U.S. 78 (1970). Justice Marshall would have required juries of 12 in both federal and state courts, id., 116, while Justice Harlan contended that the Sixth Amendment required juries of 12 although his view of the due process standard was that the requirement was not imposed on the States. Id., 117.

[17] The development of 12 as the jury size is traced in id., 86–92.

[18] Id., 92–99. While the historical materials were scanty, the Court thought it more likely than not that the framers of the Bill of Rights did not intend to incorporate into the word "jury" all its common-law attributes. This conclusion was drawn from the extended dispute between House and Senate over inclusion of a "vicinage" requirement in the clause, which was a common law attribute, and the elimination of language attaching to jury trials their "accustomed requisites." *But see* id., 123 n. 9 (Justice Harlan).

[19] Id., 99–103. In *Ballew* v. *Georgia*, 435 U.S. 223 (1978), the Court unanimously, but with varying expressions of opinion, held that conviction by a unanimous five-person jury in a trial for a nonpetty offense deprived an accused of his right to trial by jury. While readily admitting that the line between six and five members is not

But when the unanimity rule was reconsidered, the division of the Justices was such that different results were reached with regard to state and federal courts.[20] Applying the same type of analysis as that used in *Williams*, four Justices acknowledged that unanimity was a common-law rule but observed for the reasons reviewed in *Williams* that it seemed more likely than not that the framers of the Sixth Amendment had not intended to preserve the requirement within the term "jury." Therefore, the Justices undertook a functional analysis of the jury and could not discern that the requirement of unanimity materially affected the role of the jury as a barrier against oppression and as a guarantee of a commonsense judgment of laymen on the facts of preferred charges. Neither did the Justices think the unanimity requirement implicated in the constitutional requirement of proof beyond a reasonable doubt nor that unanimity was necessary to preserve the feature of the requisite cross-section representation on the jury.[21] Four dissenting Justices thought that omitting the unanimity requirement would undermine the reasonable doubt standard, would permit a majority of jurors simply to ignore those interpreting the facts differently, and would permit oppression of dissenting minorities.[22] Justice Powell, on the other hand, thought that unanimity was mandated in federal trials by history and precedent and that it should not be departed from; however, because it was the due process clause of the Fourteenth Amendment which imposed the basic jury-trial requirement on the States, he did not believe that it was necessary to impose all the attributes of a federal jury on the States and that if a state procedure comported with due process

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easy to justify, the Justices believed that reducing a jury to five persons in nonpetty cases raised substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six.

[20] *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), involved a trial held after *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), was decided and thus concerned whether the Sixth Amendment itself required jury unanimity, while *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), involved a pre-*Duncan* trial and thus raised the question whether due process required jury unanimity. *Johnson* held, five-to-four, that the due process clause was not violated by a conviction on a nine-to-three vote of a jury which was sufficient to convict in cases in which punishment was necessarily at hard labor. Justice White's opinion was joined by Justices Blackmun, Powell, and Rehnquist, and Chief Justice Burger, while Justices Douglas, Brennan, Stewart, and Marshall dissented. Id., 380, 395, 397, 399.

[21] *Apadoca* v. *Oregon*, 406 U.S. 404 (1972) (Justices White, Blackmun, and Rehnquist, and Chief Justice Burger). Justice Blackmun indicated a doubt that any closer division than nine-to-three in jury decisions would be permissible. Id., 365.

[22] Id., 414, and *Johnson* v. *Louisiana*, 406 U.S. 356, 380, 395, 397, 399 (1972) (Justices Douglas, Brennan, Stewart, and Marshall).

standards it should be permitted. He therefore concurred in permitting less-than-unanimous verdicts in state courts.[23]

***Criminal Proceedings to Which the Guarantee Applies.***—Although the Sixth Amendment provision does not differentiate among types of criminal proceedings in which the right to a jury trial is or is not present, the Court has always excluded petty offenses from the guarantee in federal courts, defining the line between petty and serious offenses either by the maximum punishment available [24] or by the nature of the offense.[25] This line has been adhered to in the application of the Sixth Amendment to the States [1] and the Court has now held "that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." [2] The Court has as well made some changes in the meaning attached to the term "criminal proceeding." Previously, it had been applied only to situations in which a person has been accused of an offense by information or presentment.[3] Thus, a civil action to collect statutory penalties and punitive damages, because not technically criminal, has been held to implicate no right to jury trial.[4] But more recently the Court has held denationalization to be punishment which Congress may not impose without adhering to the guarantees of the Fifth and Sixth Amendments [5] and the same type of analysis

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[23] Id., 366. *Burch* v. *Louisiana*, 441 U.S. 130 (1979), however, held that conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense, under a provision permitting conviction by five out of six jurors, violated the right of the accused to trial by jury. Acknowledging that the issue was "close" and that no bright line illuminated the boundary between permissible and impermissible, the Court thought the near-uniform practice throughout the Nation of requiring unanimity in six-member juries required nullification of the state policy. See also *Brown* v. *Louisiana*, 447 U.S. 323 (1980) (*Burch* held retroactive).

[24] *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); *Schick* v. *United States*, 195 U.S. 65 (1904); *Callan* v. *Wilson*, 127 U.S. 540 (1888).

[25] *District of Columbia* v. *Colts*, 282 U.S. 63 (1930).

[1] *Duncan* v. *Louisiana*, 391 U.S. 145, 159–162 (1968); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

[2] *Baldwin* v. *New York*, 399 U.S. 66, 69 (1970). Justices Black and Douglas would have required a jury trial in all criminal proceedings in which the sanction imposed bears the indicia of criminal punishment. Id., 74 (concurring); *Cheff* v. *Schnackenberg*, 384 U.S. 373, 384, 386 (1966) (dissenting). Chief Justice Burger and Justices Harlan and Stewart objected to setting this limitation at six months for the States, preferring to give them greater leeway. *Baldwin*, *supra*, 76; *Williams* v. *Florida*, 399 U.S. 78, 117, 143 (1970) (dissenting). No jury trial was required when the trial judge suspended sentence and placed defendant on probation for three years. *Frank* v. *United States*, 395 U.S. 147 (1969).

[3] *United States* v. *Zucker*, 161 U.S. 475, 481 (1896).

[4] Ibid.; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320 (1909); *Hepner* v. *United States*, 213 U.S. 103 (1909).

[5] *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963).

could be used with regard to other sanctions. In a long line of cases, the Court had held that no constitutional right to jury trial existed in trials of criminal contempt.[6] But in *Bloom* v. *Illinois*,[7] the Court announced that "[o]ur deliberations have convinced us . . . that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution . . . and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial." At least in state systems and probably in the federal system as well, there is no constitutional right to a jury trial in juvenile proceedings.[8]

**Impartial Jury**

Impartiality as a principle of the right to trial by jury is served not only by the Sixth Amendment, which is as applicable to the States as to the Federal Government,[1] but as well by the due process and equal protection clauses of the Fourteenth,[2] and perhaps the due process clause of the Fifth Amendment, and the Court's supervisory power has been directed to the issue in the federal system.[3] Prior to the Court's extension of a right to jury trials in

[6] E.g., *Green* v. *United States*, 356 U.S. 165, 183–187 (1958), and cases cited; *United States* v. *Burnett*, 376 U.S. 681, 692–700 (1964), and cases cited. In *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), pursuant to its supervisory power over the lower federal courts, a plurality of the Court imposed a maximum six-months imprisonment term in contempt cases where trial was without jury.

[7] 391 U.S. 194, 198 (1968). Justices Harlan and Stewart dissented. Id., 215. As in other cases, the Court drew the line between serious and petty offenses at six months, but because, unlike other offenses, no maximum punishments are usually provided for contempts it indicated the actual penalty imposed should be looked to. Id., 211. *And see Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

[8] *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971).

[1] *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Gonzales* v. *Beto*, 405 U.S. 1052 (1972).

[2] Thus, it violates the equal clause to exclude Negroes from grand and petit juries, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972), whether defendant is or is not a Negro, *Peters* v. *Kiff*, 407 U.S. 493 (1972), and exclusion of potential jurors because of their national ancestry is unconstitutional, at least where defendant is of that ancestry as well, *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Castaneda* v. *Partida*, 430 U.S. 482 (1977).

[3] In the exercise of its supervisory power over the federal courts, the Court has permitted any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. *Glasser* v. *United States*, 315 U.S. 60, 83–87 (1942); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946); *Ballard* v. *United States*, 329 U.S. 187 (1946). In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), and *Duren* v. *Missouri*, 439 U.S. 357 (1979), male defendants were permitted to challenge the exclusion of women as a Sixth Amendment violation.

state courts, it was firmly established that if a State chose to provide juries they must be impartial ones.[4]

Impartiality is a two-fold requirement. First, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment." [5] "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [6] Thus, in one case, the Court voided a selection system under which no woman would be called for jury duty unless she had previously filed a written declaration of her desire to be subject to service, and, in another, it invalidated a state selection system granting women who so requested an automatic exemption from jury service.[7] While disproportion alone is insufficient to establish a prima facie showing of unlawful exclusion, a statistical showing of disparity combined with a demonstration of the easy manipulability of the selection process can made out a prima facie case.[8]

Second, there must be assurance that the jurors chosen are unbiased, willing to decide the case on the basis of the evidence presented. The Court has held that in the absence of an actual showing of bias, a defendant in the District of Columbia is not denied an impartial jury when he is tried before one composed primarily of

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[4] *Turner* v. *Louisiana*, 379 U.S. 466 (1965).

[5] *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975). *See also Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *Brown* v. *Allen*, 344 U.S. 443, 474 (1953). In *Fay* v. *New York*, 332 U.S. 261 (1947), and *Moore* v. *New York*, 333 U.S. 565 (1948), the Court in 5-to-4 decisions upheld state use of "blue ribbon" juries from which particular groups, such as laborers and women, had been excluded. With the extension of the jury trial provision and its fair cross section requirement to the States, the opinions in these cases must be considered tenuous, but the Court has reiterated that defendants are not entitled to a jury of any particular composition. *Taylor*, *supra*, 538. Congress has implemented the constitutional requirement by statute in federal courts by the Federal Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 53, 28 U.S.C. § 1861 *et seq.*

[6] *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979).

[7] *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Duren* v. *Missouri*, 439 U.S. 357 (1979).

[8] *Castaneda* v. *Partida*, 430 U.S. 482 (1977) (Mexican-American defendant successfully made out prima facie case of intentional exclusion of persons of his ethnic background by showing a substantial underrepresentation of Mexican-Americans based on a comparison of the group's proportion in the total population of eligible jurors to the proportion called, and this in the face of the fact that Mexican-Americans controlled the selection process).

government employees.[9] It is a violation of a defendant's right to an impartial jury when it or any member of it is subjected to pressure or influence which could impair freedom of action and the trial judge should conduct a hearing in which the defense participates to determine whether impartiality has been undermined.[10] Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and must be inquired into.[11] Private communications, contact, or tampering with a jury, or the creation of circumstances raising the dangers thereof, is not to be condoned.[12] When the locality of the trial has been saturated with publicity about a defendant, so that it is unlikely that he can obtain a disinterested jury, it is a violation of his constitutional right to deny him a change of venue so he can have his impartial tribunal.[13] It is undeniably a violation of due process to subject a defendant to trial in an atmosphere of mob or threatened mob domination.[14]

Because it is too much to expect that jurors can remain uninfluenced by evidence they receive even though they are instructed to use it for only a limited purpose and to disregard it for other purposes, the Court will not permit a confession to be submitted to the jury, without a determination by the trial judge that it is ad-

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[9] *Frazier* v. *United States*, 335 U.S. 497 (1948); *Dennis* v. *United States*, 339 U.S. 162 (1950). On common-law grounds, the Court in *Crawford* v. *United States*, 212 U.S. 183 (1909), disqualified such employees, but a statute removing the disqualification because of the increasing difficulty in finding jurors in the District of Columbia was sustained in *United States* v. *Wood*, 299 U.S. 123 (1936).

[10] *Remmer* v. *United States*, 350 U.S. 377 (1956) (attempted bribe of a juror reported by him to authorities); *Smith* v. *Phillips*, 455 U.S. 209 (1982) (during trial one of the jurors had been actively seeking employment in the District Attorney's office).

[11] E.g., *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). Exposure of the jurors to knowledge about defendant's prior criminal record and activities is not alone sufficient to presume reversible prejudice, but on *voir dire* jurors should be questioned about their ability to judge impartially. *Murphy* v. *Florida*, 421 U.S. 794 (1975). The Court indicated that under the same circumstances in a federal trial it would have overturned the conviction pursuant to its supervisory power. Id., 797–798, citing *Marshall* v. *United States*, 360 U.S. 310 (1959). Essentially, the defendant must make a showing of prejudice which the court then may inquire into. *Chandler* v. *Florida*, 449 U.S. 560, 575, 581 (1981); *Smith* v. *Phillips*, 455 U.S. 209, 215–218 (1982).

[12] *Remmer* v. *United States*, 347 U.S. 227 (1954). *See Turner* v. *Louisiana*, 379 U.S. 466 (1965) (placing jury in charge of two deputy sheriffs who were principal prosecution witnesses at defendant's jury trial denied him his right to an impartial jury); *Parker* v. *Gladden*, 385 U.S. 363 (1966) (influence on jury by prejudiced bailiff). *Cf. Gonzales* v. *Beto*, 405 U.S. 1052 (1972).

[13] *Irvin* v. *Dowd*, 366 U.S. 717 (1961) (felony); *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971) (misdemeanor).

[14] *Frank* v. *Mangum*, 237 U.S. 309 (1915); *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

missible, for the jury to determine its admissibility and to disregard it if it is inadmissible [15] nor will it permit in a joint trial the confession of one defendant admissible against him but not against the co-defendant which it implicates to go to the jury with instructions to consider it only with regard to the defendant against whom it is admissible.[16]

In *Witherspoon* v. *Illinois*,[17] the Court held that the exclusion in capital cases of jurors conscientiously scrupled about capital punishment, without inquiring whether they could consider the imposition of the death penalty in the appropriate case, violated a defendant's constitutional right to an impartial jury. Inasmuch as the jury is given broad discretion whether or not to fix the penalty at death, the Court ruled, the jurors must reflect "the conscience of the community" on the issue and the automatic exclusion of all scrupled jurors "stacked the deck" and made of the jury a tribunal "organized to return a verdict of death." [18]

It is the function of the *voir dire* to give the defense and the prosecution the opportunity to inquire into, or have inquired into in instances in which the trial judge conducts the process, possible grounds of bias or prejudice that potential jurors may have and to acquaint the parties with the potential jurors.[19] It is good ground for challenge for cause that a juror has formed an opinion on the issue to be tried, but every opinion which a juror may entertain does not necessarily disqualify him. The judge must determine whether the nature and strength of the opinion are such as in law is necessary to raise a presumption against impartiality.[20] Under

[15] *Jackson* v. *Denno*, 378 U.S. 368 (1964), overruling *Stein* v. *New York*, 346 U.S. 156 (1953).

[16] *Bruton* v. *United States*, 391 U.S. 123 (1968), overruling *Delli Paoli* v. *United States*, 352 U.S. 232 (1957). The rule applies to the States. *Roberts* v. *Russell*, 392 U.S. 293 (1968). *But see Nelson* v. *O'Neil*, 402 U.S. 622 (1971).

[17] 391 U.S. 510 (1968).

[18] Id., 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death scrupled persons had been excluded was more prone to convict than were juries on which such person sat. *Cf. Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968). The *Witherspoon* case was given added significance when in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976), the Court held mandatory death sentences unconstitutional and ruled that the jury as a representative of community mores must make the determination as guided by legislative standards. *See also Adams* v. *Texas*, 448 U.S. 38 (1980) (holding *Witherspoon* applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).

[19] *Lewis* v. *United States*, 146 U.S. 370 (1892); *Pointer* v. *United States*, 151 U.S. 396 (1894).

[20] *Reynolds* v. *United States*, 98 U.S. 145 (1879). *See Witherspoon* v. *Illinois*, 391 U.S. 510, 513–515, 522 n. 21 (1968).

some circumstances, it may be constitutionally required that on *voir dire* questioning of prospective jurors, questions specifically directed to the existence of racial bias must be asked. Thus, in a situation in which defendant, a black man, alleged that he was being prosecuted on false charges because of his civil rights activities in an atmosphere perhaps open to racial appeals, prospective jurors must be asked about their racial prejudice, if any.[21] But in circumstances not suggesting a significant likelihood of racial prejudice infecting a trial, as when the facts are merely that the defendant is a Negro and the victim white, the Constitution is satisfied by a more generalized but thorough inquiry into the impartiality of the veniremen.[22]

Although government is not obligated to do so, typically a system of peremptory challenges exists in criminal trials, in which both prosecution and defense may, without stating any reason, excuse a certain number of prospective jurors.[23] While, in *Swain* v. *Alabama*,[24] the Court held that proved instances of a prosecutor excluding members of a specific racial group from the jury would violate the equal protection clause, it posited so difficult a standard of proof that defendants seldom ever succeed. With the extension of the cross-section of the community obligation of the Sixth Amendment to the States, the conformity of the peremptory challenge practice to the Amendment's requirements may soon be presented.[25]

[21] *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

[22] *Ristaino* v. *Ross*, 424 U.S. 589 (1976). The Court noted that under its supervisory power it would require a federal court faced with the same circumstances to propound appropriate questions to identify racial prejudice if requested by the defendant. Id., 597 n. 9. *See Aldridge* v. *United States*, 283 U.S. 308 (1931). *But see Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), in which the trial judge refused a defense request to inquire about possible bias against Mexicans. A plurality apparently adopted a rule that, all else being equal, the judge should inquire about racial or ethnic prejudge necessarily only in cases of violent crimes in which the defendant and victim are members of different racial or ethnic groups, id., 192, a rule rejected by two concurring Justices. Id., 194. Three dissenting Justices thought the judge must always ask when defendant requested it. Id., 195.

[23] *Cf.* an older case holding that it is no violation of the guarantee to limit the number of peremptory challenges to each defendant in a multi-party trial. *Stilson* v. *United States*, 250 U.S. 583, 586 (1919).

[24] 380 U.S. 202 (1965).

[25] *See People* v. *Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978), in which the court held that a proven case of racial bias in the use of peremptories, as shown by use of a disproportionate number against members of a certain group or the striking of all or most of a certain group, denied a defendant a jury composed of a fair cross section of the community.

## PLACE OF TRIAL—JURY OF THE VICINAGE

It was provided in Article III, § 2, for a trial by jury in federal cases in the State in which the offense was committed,[1] but much criticism arose over the absence of any guarantee that the jury be drawn from the "vicinage" or neighborhood of the crime.[2] Madison's efforts to write into the Bill of rights an express vicinage provision was rebuffed by the Senate and the present language was adopted as a compromise.[3] The provisions limit the Federal Government only.[4]

An accused cannot be tried in one district under an indictment showing that the offense was committed in another;[5] the place where the offense is charged to have been committed determines the place of trial.[6] In a prosecution for conspiracy, the accused may be tried in any State and district where an overt act was performed.[7] Where a United States Senator was indicted for agreeing to receive compensation for services to be rendered in a proceeding before a government department, and it appeared that a tentative arrangement for such services was made in Illinois and confirmed in St. Louis, the defendant was properly tried in St. Louis, although he was not physically present in Missouri when notice of ratification was dispatched.[8] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates,[9] or the sending of excluded matter through the mails,[10] may be made triable in any district through which the for-

[1] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

[2] "Vicinage" means neighborhood and "vicinage of the jury" means jury of the neighborhood or, in medieval England, jury of the County. 4 W. Blackstone, *Commentaries on the Laws of England*, T. Cooley ed. (Chicago: 4th ed. 1899), *350–351. *See* 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), §§ 1775–1785.

[3] The controversy is conveniently summarized in *Williams* v. *Florida*, 399 U.S. 78, 92–96 (1970).

[4] *Nashville, C. & S.L. Ry.* v. *Alabama*, 128 U.S. 96, 101 (1888).

[5] *Salinger* v. *Loisel*, 265 U.S. 224 (1924).

[6] *Beavers* v. *Henkel*, 194 U.S. 73, 83 (1904). For some recent controversies about the place of the commission of the offense, *see United States* v. *Cores*, 356 U.S. 405 (1958), and *Johnston* v. *United States*, 351 U.S. 215 (1956).

[7] *Brown* v. *Elliott*, 225 U.S. 392 (1912); *Hyde* v. *United States*, 225 U.S. 347 (1912); *Haas* v. *Henkel*, 216 U.S. 462 (1910).

[8] *Burton* v. *United States*, 202 U.S. 344 (1906).

[9] *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908).

[10] *United States* v. *Johnson*, 323 U.S. 273, 274 (1944).

bidden transportation is conducted. By virtue of a presumption that a letter is delivered in the district to which it is addressed, the offense of scheming to defraud a corporation by mail was held to have been committed in that district although the letter was posted elsewhere.[11] The Constitution does not require any preliminary hearing before issuance of a warrant for removal of an accused to the court having jurisdiction of the charge.[12] The assignment of a district judge from one district to another, conformably to statute, does not create a new judicial district whose boundaries are undefined nor subject the accused to trial in a district not established when the offense with which he is charged was committed.[13] For offenses against federal laws not committed within any State, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate.[14] The place of trial may be designated by statute after the offense has been committed.[15]

## NOTICE OF ACCUSATION

The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge.[1] No indictment is sufficient if it does not allege all of the ingredients which constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology,[2] but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute. The facts necessary to bring the case within the statutory definition must also be alleged.[3] If an offense cannot be accurately and clearly described

[11] *Hagner* v. *United States*, 285 U.S. 427, 429 (1932).

[12] *United States ex rel. Hughes* v. *Gault*, 271 U.S. 142 (1926). *Cf. Tinsley* v. *Treat*, 205 U.S. 20 (1907); *Beavers* v. *Henkel*, 194 U.S. 73, 84 (1904).

[13] *Lamar* v. *United States*, 241 U.S. 103 (1916).

[14] *Jones* v. *United States*, 137 U.S. 202, 211 (1890); *United States* v. *Dawson*, 15 How. (56 U.S.) 467, 488 (1853).

[15] *Cook* v. *United States*, 138 U.S. 157, 182 (1891). *See also United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 250–254 (1940); *United States* v. *Johnson*, 323 U.S. 273 (1944).

[1] *United States* v. *Cruikshank*, 92 U.S. 542, 544, 558 (1876); *United States* v. *Simmons*, 96 U.S. 360 (1878); *Bartell* v. *United States*, 227 U.S. 427 (1913); *Burton* v. *United States*, 202 U.S. 344 (1906).

[2] *Potter* v. *United States*, 155 U.S. 438, 444 (1894).

[3] *United States* v. *Carll*, 105 U.S. 611 (1882).

without an allegation that the accused is not within an exception contained in the statutes, an indictment which does not contain such allegation is defective.[4] Despite the omission of obscene particulars, an indictment in general language is good if the unlawful conduct is described so as reasonably to inform the accused of the nature of the charge sought to be established against him.[5] The Constitution does not require the Government to furnish a copy of the indictment to an accused.[6] The right to notice of accusation is so fundamental a part of procedural due process that the States are required to observe it.[7]

## CONFRONTATION

"The primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief" [1] The right of confrontation is"[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." [2] Before 1965, when the Court held the right to be protected against state abridgment,[3] it had had little need to clarify the relationship between the right of confrontation and the hearsay rule [4] inasmuch as its supervisory

[4] *United States* v. *Cook*, 17 Wall. (84 U.S.) 168, 174 (1872).

[5] *Rosen* v. *United States*, 161 U.S. 29, 40 (1896).

[6] *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891).

[7] *In re Oliver*, 333 U.S. 257, 273 (1948); *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *Rabe* v. *Washington*, 405 U.S. 313 (1972).

[1] *Mattox* v. *United States*, 156 U.S. 237, 242–243 (1895).

[2] *Kirby* v. *United States*, 174 U.S. 47, 55, 56 (1899). *Cf. Pointer* v. *Texas*, 380 U.S. 400, 404—405 (1965). The right may be waived but it must be a knowing, intelligent waiver uncoerced from defendant. *Brookhart* v. *Janis*, 384 U.S. 1 (1966).

[3] *Pointer* v. *Texas*, 380 U.S. 400 (1965), overruling *West* v. *Louisiana*, 194 U.S. 258 (1904); *see also Stein* v. *New York*, 346 U.S. 156, 195–196 (1953).

[4] Hearsay is the prior out-of-court statements of a person, offered affirmatively for the truth of the matters asserted, presented at trial either orally by another person or in written form. *Hickory* v. *United States*, 151 U.S. 303, 309 (1894); *Southern R. Co.* v. *Gray*, 241 U.S. 333, 337 (1916); *Bridges* v. *Wixon*, 326 U.S. 135 (1945).

powers over the inferior federal courts permitted it to control the admission of hearsay on this basis.[5] Thus, on the basis of the confrontation clause, it had concluded that evidence given at a preliminary hearing could not be used at the trial if the absence of the witness was attributable to the negligence of the prosecution,[6] but that if a witness' absence had been procured by the defendant testimony given at a previous trial on a different indictment could be used at the subsequent trial.[7] It had also recognized the admissibility of dying declarations [8] and of testimony given at a former trial by a witness since deceased.[9] The prosecution was not permitted to use a judgment of conviction against other defendants on charges of theft in order to prove that the property found in the possession of defendant now on trial was stolen.[10]

In a series of decisions beginning in 1965, the Court seemed to equate the confrontation clause with the hearsay rule and to posit a rule that the clause had as "a major reason" for its existence the purpose "to give the defendant charged with crime an opportunity to cross-examine the witnesses against him" [11] with regard to any incriminating testimony offered at trial, unless one of the hearsay exceptions applied. Thus, in *Pointer* v. *Texas*,[12] the complaining

[5] Thus, while it had concluded that the co-conspirator exception to the hearsay rule was consistent with the confrontation clause, *Delaney* v. *United States*, 263 U.S. 586, 590 (1924), the Court's formulation of the exception and its limitations was pursuant to its supervisory powers. *Lutwak* v. *United States*, 344 U.S. 604 (1953); *Krulewitch* v. *United States*, 336 U.S. 440 (1949).

[6] *Motes* v. *United States*, 178 U.S. 458 (1900).

[7] *Reynolds* v. *United States*, 98 U.S. 145 (1879).

[8] *Kirby* v. *United States*, 174 U.S. 47, 61 (1899); *Robertson* v. *Baldwin*, 165 U.S. 275, 282 (1897).

[9] *Mattox* v. *United States*, 156 U.S. 237, 240 (1895).

[10] *Kirby* v. *United States*, 174 U.S. 47 (1899), and *Dowdell* v. *United States*, 221 U.S. 325 (1911), recognized the inapplicability of the clause to the admission of documentary evidence to establish collateral facts, admissible under the common law, to permit certification as an additional record to the appellate court of the events of the trial.

[11] *Pointer* v. *Texas*, 380 U.S. 400, 406–407 (1965); *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber* v. *Page*, 390 U.S. 719, 725 (1968). Unjustified limitation of defendant's right to cross-examine witnesses presented against him at trial may constitute a confrontation clause violation. *Smith* v. *Illinois*, 390 U.S. 129 (1968), or a denial of due process. *Alford* v. *United States*, 282 U.S. 687 (1931); *In re Oliver*, 333 U.S. 257 (1948).

[12] 380 U.S. 400 (1965). Justices Harlan and Stewart concurred on due process grounds, rejecting the "incorporation" holding. Id., 408, 409. *See also Barber* v. *Page*, 390 U.S. 719 (1968), in which the Court refused to permit the State to use the preliminary hearing testimony of a witness in a federal prison in another State at the time of trial. The Court acknowledged the hearsay exception permitting the use of such evidence when a witness was unavailable but refused to find him "unavailable" when the State had made no effort to procure him; *Mancusi* v. *Stubbs*, 408

witness had testified at a preliminary hearing at which defendant was not represented by counsel and was not cross-examined; by the time of trial, he had moved to another State and the prosecutor made no effort to obtain his return. Offering the preliminary hearing testimony violated defendant's right of confrontation. In *Douglas* v. *Alabama*,[13] the prosecution called as a witness the defendant's alleged accomplice and when the accomplice refused to testify, pleading his privilege against self-incrimination, the prosecutor read to him to "refresh" his memory a confession in which he implicated defendant. Because defendant could not cross-examine the accomplice with regard to the truth of the confession, the Court held the confrontation clause had been violated. In *Bruton* v. *United States*,[14] the use at a joint trial of a confession made by one of the defendants was held to violate the confrontation rights of the other defendant who was implicated by it because he could not cross-examine the codefendant not taking the stand.[15]

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U.S. 204 (1972), in which the Court permitted the State to assume the unavailability of a witness because he now resided in Sweden and to use the transcript of the witness' testimony at a former trial.

[13] 380 U.S. 415 (1965). *See also Smith* v. *Illinois*, 390 U.S. 129 (1968) (informer as prosecution witness permitted to identify himself by alias and to conceal his true name and address; confrontation clause violated because defense could not effectively cross-examine); *Davis* v. *Alaska*, 415 U.S. 308 (1974) (state law prohibiting disclosure of identity of juvenile offenders could not be applied to preclude cross-examination of witness about his juvenile record when object was to allege possible bias on part of witness). *Cf. Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *United States* v. *Nobles*, 422 U.S. 233, 240–241 (1975).

[14] 391 U.S. 123 (1968). The Court seemed clearly in this case to equate confrontation with the hearsay rule, first emphasizing "that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence", id., 128 n. 3 and then observing that "[t]he reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter." Id., 136 n. 12 (emphasis by Court). *Bruton* was applied retroactively in a state case in *Roberts* v. *Russell*, 392 U.S. 293 (1968). Where, however, the codefendant takes the stand in his own defense, denies making the alleged out-of-court statement implicating defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has not been denied his right of confrontation under *Bruton*, *Nelson* v. *O'Neil*, 402 U.S. 622 (1971). In two cases, violations of the rule in *Bruton* have been held to be "harmless error" in the light of the overwhelming amount of evidence supporting conviction legally admitted at trial. *Harrington* v. *California*, 395 U.S. 250 (1969); *Schneble* v. *Florida*, 405 U.S. 427 (1972).

[15] In *Parker* v. *Randolph*, 442 U.S. 62 (1979), the Court was evenly divided on the question whether interlocking confessions may be admitted without violating the clause. Four Justices held that admission of such confessions is proper, even though neither defendant testifies, if the judge gives the jury a limiting instruction. Four Justices held that a harmless error analysis should be applied, although they then divided over its meaning in this case.

In its more recent confrontation cases, however, the Court has moved away from these cases. With regard to the hearsay rule and confrontation, it has noted that while the two "are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception . . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." [16] Further, *California* v. *Green*,[17] permitted the use at trial as substantive evidence of two statements made by a witness who at the trial claimed that he was under the influence of LSD at the time of the occurrence of the events in question and that he could therefore neither deny nor affirm the truth of his prior statements.

One of the earlier statements was sworn testimony given at a preliminary hearing at which the defendant was represented by counsel with the opportunity to cross-examine the witness; the statement was admissible because it had been subjected to cross-examination earlier, the Court held, and that was all that was required. The other statement had been made to policemen during custodial interrogation, had not been under oath, and, of course, had not been subject to cross-examination, but the Court deemed it admissible because the witness had been present at the trial and could have been cross-examined then. "[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." [18] But in *Dutton* v. *Evans*,[19] the Court upheld the use as substantive

[16] *California* v. *Green*, 399 U.S. 149, 155–156 (1970); *Dutton* v. *Evans*, 400 U.S. 74, 80–86 (1970). *Compare* id., 93, 94, 95 (Justice Harlan concurring), *with* id., 100, 105 n. 7 (Justice Marshall dissenting).

[17] 399 U.S. 149 (1970).

[18] Id., 164. Justice Brennan dissented. Id., 189. *See also Nelson* v. *O'Neil*, 402 U.S. 622 (1971).

[19] 400 U.S. 74 (1970). The statement was made by an alleged co-conspirator of the defendant on trial and was admissible under the co-conspirator exception to the hearsay rule permitting the use of a declaration by one conspirator against all his fellow conspirators. The state rule permitted the use of a statement made during

evidence at trial of a statement made by a witness whom the prosecution could have produced but did not. Presentation of the statement the truth of which is at issue under oath, in the presence of the jury, and subject to cross-examination by defendant is only one way of complying with the confrontation clause, four Justices concluded. Thus, at least in the absence of prosecutorial misconduct or negligence and where the evidence is not "crucial" or "devastating," the confrontation clause is satisfied if the circumstances of presentation of out-of-court statements are such that "the trier of fact [has] a satisfactory basis for evaluating the truth of the [hearsay] statement," and this is to be ascertained in each case by focusing on the reliability of the profferred hearsay statement, that is, by an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception, or memory.[20]

Finally, in *Ohio* v. *Roberts*,[21] the Court explained that it had construed the clause "in two separate ways to restrict the range of admissible hearsay." First, there is a rule of "necessity," under which in the usual case "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Second, "once a witness is shown to be unavailable . . ., the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' "[22] That is, if the

the concealment stage of the conspiracy while the federal rule permitted use of a statement made only in the course of and in furtherance of the conspiracy, Id., 78, 81–82.

[20] Id., 86–89. The quoted phrase is at id., 89, quoting *California* v. *Green*, 399 U.S. 149, 161 (1970). Justice Harlan concurred to carry the case, on the view that (1) the confrontation clause requires only that any testimony actually given at trial must be subject to cross-examination, but (2) in the absence of countervailing circumstances introduction of prior recorded testimony—"trial by affidavit"—would violate the clause. Id., 93, 95, 97. Justices Marshall, Black, Douglas, and Brennan dissented, id., 100, arguing for adoption of a rule that: "The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule." Id., 110–111.

[21] 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The State's sole effort to locate her was to deliver a series of subpoenas to her parents' home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id., 74–77.

[22] Id., 65 (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934)).

hearsay declarant is not present for cross-examination at trial, the "statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." [23]

## COMPULSORY PROCESS

The provision requires, of course, that the defendant be afforded legal process to compel witnesses to appear,[1] but it appears that the provision was included as well to make inapplicable in federal trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all.[2] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." [3] The provision was violated by a state law which made ineligible to testify for a defendant a person charged or convicted as a coparticipant in the same crime.[4]

## ASSISTANCE OF COUNSEL

### Development of an Absolute Right to Counsel at Trail

Neither in the Congress which proposed what became the Sixth Amendment guarantee that the accused is to have the assistance of counsel nor in the state ratifying conventions is there any indication of the understanding which these men brought to the language employed. The development of the common-law principle in England had denied to anyone charged with a felony the right to retain counsel, while the right was afforded in misdemeanor cases, a rule ameliorated in practice, however, by the judicial practice of allowing counsel to argue points of law and then generously inter-

[23] Id., 66.

[1] *United States* v. *Cooper*, 4 Dall. (4 U.S.) 341 (C.C.Pa. 1800) (Justice Chase on circuit).

[2] 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1786. *See Rosen* v. *United States*, 245 U.S. 467 (1918).

[3] *Washington* v. *Texas*, 388 U.S. 14, 19 (1967) (applying the clause to the States).

[4] Id., 19–23. Justice Harlan concurred on due process grounds, disagreeing with the incorporation holding of the Court. Id., 23.

preting the limits of "legal questions." The colonial and early state practice in this country was varied, ranging from the existent English practice to appointment of counsel in a few States where needed counsel could not be retained.[1] Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions which seemed to indicate an understanding that the guarantee was limited to assuring that a person wishing and able to afford counsel would not be denied that right.[2] It was not until the 1930's that the Supreme Court began expanding the clause to its present scope.

***Powell* v. *Alabama*.**—The expansion began in *Powell* v. *Alabama* [3] in which the court set aside the convictions of eight youths under sentence of death because there had not been an adequate appointment of counsel to represent them in a hastily carried-out trial. Due process, Justice Sutherland said for the Court, referring to that clause in the Fourteenth Amendment, always requires the observance of certain fundamental personal rights associated with a hearing and "the right to the aid of counsel is of this fundamental character." This observation was made with regard to the right to retain counsel of one's choice and at one's expense and included an eloquent statement of the necessity of counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceed-

[1] W. Beaney, *The Right to Counsel in American Courts* (Ann Arbor: 1955), 8–26.

[2] In § 35 of the Judiciary Act of 1789, 1 Stat. 73, it was provided that in federal courts parties could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. Act of April 30, 1790, 1 Stat. 118, provided: "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours." It was apparently the practice almost invariably to appoint counsel for indigent defendants charged with noncapital crimes, although it may be assumed that the practice fell short often of what is now constitutionally required. W. Beaney, *The Right to Counsel in American Courts* (Ann Arbor: 1955), 29–30.

[3] 287 U.S. 45 (1932).

ings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." [4]

The failure to afford the defendants an opportunity to retain counsel violated due process, but the Court acknowledged that as indigents the youths could not have retained counsel and said therefore that in the circumstances—"the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives"—"the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." The holding was specifically narrow. "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . ." [5]

***Johnson* v. *Zerbst*.**—Next step in the expansion came in *Johnson* v. *Zerbst* [6] in which the Court announced an absolute rule requiring appointment of counsel for defendants who could not afford to retain a lawyer on trial in federal courts. The right to assistance of counsel, Justice Black wrote for the Court, "is necessary to insure fundamental human rights of life and liberty." Without stopping to distinguish between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Justice quoted Justice Sutherland's invocation of the necessity of legal counsel for even the intelligent and educated layman and said: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." [7] Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from a silent record, and must be determined by the trial court before proceeding in the absence of counsel.[8]

[4] Id., 68–69.
[5] Id., 71.
[6] 304 U.S. 458 (1938).
[7] Id., 462, 463.
[8] Id., 464–465. The standards for a valid waiver were tightened in *Walker* v. *Johnston*, 312 U.S. 275 (1941), in which a guilty plea was set aside because not made

***Betts* v. *Brady and Progeny.***—An effort to obtain the same rule in the state courts in all criminal proceedings was rebuffed in *Betts* v. *Brady*.[9] Justice Roberts for the Court observed that the Sixth Amendment would compel the result only in federal courts but that in state courts the due process clause of the Fourteenth Amendment "formulates a concept less rigid and more fluid" than those guarantees embodied in the Bill of Rights, although a state denial of a right protected in one of the first eight Amendments might "in certain circumstances" be a violation of due process. The question was rather "whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." [10] Examining the common-law rules, the English practice, and the state constitutions, laws and practices, the Court concluded that it was the "considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to a fair trial." Want of counsel in a particular case might result in a conviction lacking in fundamental fairness and so necessitate the interposition of constitutional restriction upon state practice but this was not the general rule.[11] Justice Black in dissent argued that the Fourteenth Amendment made the Sixth applicable to the States and required the appointment of counsel but that even on the Court's term counsel was a fundamental right and appointment was required by due process.[12]

Over time the Court abandoned the "special circumstances" language of *Powell* v. *Alabama* [13] when capital cases were involved and finally in *Hamilton* v. *Alabama* [14] it held that in a capital case

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with assistance of counsel, by a ruling that required that a defendant appearing in court be advised of his right to counsel and asked whether he wished to waive the right or not. *See also Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *Carnley* v. *Cochran*, 369 U.S. 506 (1962).

[9] 316 U.S. 455 (1942).

[10] Id., 461–462, 465.

[11] Id., 471, 473.

[12] Id., 474 (joined by Justices Douglas and Murphy).

[13] 287 U.S. 45, 71 (1932).

[14] 368 U.S. 52 (1961). Earlier cases employing the "special circumstances" language were *Williams* v. *Kaiser*, 323 U.S. 471 (1945); *Tompkins* v. *Missouri*, 323 U.S. 485 (1945); *Hawk* v. *Olson*, 326 U.S. 271 (1945); *De Meerleer* v. *Michigan*, 329 U.S. 663 (1947); *Marino* v. *Ragen*, 332 U.S. 561 (1947); *Haley* v. *Ohio*, 332 U.S. 596 (1948). Dicta appeared in several cases thereafter suggesting an absolute right to counsel in capital cases. *Bute* v. *Illinois*, 333 U.S. 640, 674 (1948); *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441 (1948). A state court decision finding a waiver of the right in a capital case was upheld in *Carter* v. *Illinois*, 329 U.S. 173 (1946).

a defendant need make no showing of particularized need nor of prejudice resulting from absence of counsel; henceforth, assistance of counsel was a constitutional requisite in capital cases. In noncapital cases, the progress of the cases was such that Justice Harlan could assert that "the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded." [15] The rule was designed to afford some certainty in the determination when failure to appoint counsel would result in a trial lacking in "fundamental fairness." Generally, the Court developed three categories of prejudicial factors, often overlapping in individual cases, which required the furnishing of assistance of counsel. There were (1) the personal characteristics of the defendant which made it unlikely he could obtain an adequate defense of his own,[16] (2) the nature of the crime or the defenses possible to the charges with regard to how technical was the character of one or the other,[17] and (3) factors unrelated to the first two and generally related to the events occurring at trial that raised problems of prejudice.[18] Especially the last characteristic had been so utilized by the Court to set aside convictions occurring in the absence of counsel [19] and the last case rejecting a claim of denial of assistance of counsel had been decided in 1950.[20]

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[15] *Gideon* v. *Wainwright*, 372 U.S. 335, 350 (1963).

[16] Youth and immaturity, *Moore* v. *Michigan*, 355 U.S. 155 (1957); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956); *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948); *Wade* v. *Mayo*, 334 U.S. 672 (1948); *Marino* v. *Ragen*, 332 U.S. 561 (1947); *De Meerleer* v. *Michigan*, 329 U.S. 663 (1947), inexperience, *Moore* v. *Michigan*, *supra* (limited education), *Uveges* v. *Pennsylvania*, *supra*, and insanity or mental abnormality, *Massey* v. *Moore*, 348 U.S. 105 (1954); *Palmer* v. *Ashe*, 342 U.S. 134 (1951), were commonly-cited characteristics of the defendant which demonstrated the necessity for assistance of counsel.

[17] Technicality of the crime charged, *Moore* v. *Michigan*, 355 U.S. 155 (1957); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956); *Williams* v. *Kaiser*, 323 U.S. 471 (1945); or the technicality of a possible defense, *Rice* v. *Olson*, 324 U.S. 786 (1945); *McNeal* v. *Culver*, 365 U.S. 109 (1961), were commonly cited.

[18] The deliberate or careless overreaching by the court or the prosecutor, *Gibbs* v. *Burke*, 337 U.S. 772 (1949); *Townsend* v. *Burke*, 334 U.S. 736 (1948); *Palmer* v. *Ashe*, 342 U.S. 134 (1951); *White* v. *Ragen*, 324 U.S. 760 (1945), prejudicial developments during the trial, *Cash* v. *Culver*, 358 U.S. 633 (1959); *Gibbs* v. *Burke*, *supra*, and questionable proceedings at sentencing, *Townsend* v. *Burke*, *supra*, were commonly cited.

[19] *Hudson* v. *North Carolina*, 363 U.S. 697 (1960), held that an unrepresented defendant had been prejudiced when his co-defendant's counsel plead his client guilty in the presence of the jury and the applicable state rules to avoid prejudice in such situation were unclear and the defendant in any event had taken no steps to protect himself. The case seemed to require reversal of any conviction when the record contained a prejudicial occurrence that under state law might have been prevented or ameliorated in effect. *Carnley* v. *Cochran*, 369 U.S. 506 (1962), reversed a conviction because the unrepresented defendant failed to follow some advantageous procedure that a lawyer might have utilized. *Chewning* v. *Cunningham*, 368 U.S. 443 (1962), found that a lawyer might have developed several defenses and adopted sev-

***Gideon* v. *Wainwright*.**—Against this background, a unanimous Court in *Gideon* v. *Wainwright* [21] overruled *Betts* v. *Brady* and held "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." [22] Justice Black, a dissenter in the 1942 decision, asserted that the earlier case was an "abrupt break" with the earlier precedents of the Court, citing *Powell* and *Johnson* v. *Zerbst*, and rejected the reasoning of the earlier case. The right to assistance of counsel was "fundamental" and the Fourteenth Amendment did make the right constitutionally required in state courts.[23] The Court's opinion in *Gideon* left unanswered the question whether the right to assistance of counsel was claimable by defendants charged with misdemeanors or serious misdemeanors as well as with felonies and it was not until recently that the Court held the right to be present in any misdemeanor case in which imprisonment is imposed, that no person may be sentenced to jail who was convicted in the absence of counsel, unless he validly waived his right.[24] The right to the assistance of counsel exists in juvenile proceedings also.[25]

Because the absence of counsel when a defendant is convicted or pleads guilty goes to the fairness of the proceedings and undermines the presumption of reliability that attaches to a judgment of a court, *Gideon* has been held fully retroactive, so that not only convictions obtained in the absence of counsel without a valid waiver are voidable,[1] but such convictions may not be subsequently

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eral tactics to defeat a charge under a state recidivist statute and that therefore the unrepresented defendant had been prejudiced.

[20] *Quicksal* v. *Michigan*, 339 U.S. 660 (1950). *See also Canizio* v. *New York*, 327 U.S. 82 (1946); *Foster* v. *Illinois*, 332 U.S. 134 (1947); *Gayes* v. *New York*, 332 U.S. 145 (1947); *Bute* v. *Illinois*, 333 U.S. 640 (1948); *Gryger* v. *Burke*, 334 U.S. 728 (1948). *Cf. White* v. *Ragen*, 324 U.S. 760 (1945).

[21] 372 U.S. 335 (1963).

[22] Id., 344.

[23] Id., 342-343, 344, Justice Black, of course, believed the Fourteenth Amendment made applicable to the States all the provisions of the Bill of Rights, *Adamson* v. *California*, 332 U.S. 46, 71 (1947), but for purposes of delivering the opinion of the Court followed the due process absorption doctrine. Justice Douglas, concurring, maintained the position. *Gideon*, *supra*, 345. Justice Harlan concurred, objecting both to the Court's manner of overruling *Betts* v. *Brady* and to the incorporation implications of the opinion. Id., 349.

[24] *Scott* v. *Illinois*, 440 U.S. 367 (1979), adopted a rule of actual punishment and thus modified *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), which had held counsel required if imprisonment were possible.

[25] *In re Gault*, 387 U.S. 1 (1967). *See also Specht* v. *Patterson*, 386 U.S. 605 (1967).

[1] *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963); *Doughty* v. *Maxwell*, 376 U.S. 202 (1964); *Kitchens* v. *Smith*, 401 U.S. 847 (1971). *See Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965).

used either to support guilt in a new trial or to enhance punishment upon a valid conviction.[2]

***Protection of the Right to Retained Counsel.***—The Sixth Amendment has also been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice. Thus, in *Chandler* v. *Fretag* [3] when a defendant appearing to plead guilty on a housebreaking charge was orally advised for the first time that, because of three prior convictions for felonies, he would be tried also as an habitual criminal and if convicted would be sentenced to life imprisonment, the court's denial of his request for a continuance in order to consult an attorney was a violation of his Fourteenth Amendment due process rights. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. . . . A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."[4]

Whenever defense counsel is representing two or more defendants and asserts in timely fashion to the trial judge that because of possible conflicts of interest between or among his clients he is unable to render effective assistance, the judge must examine the claim carefully and unless he finds the risk too remote he must permit or appoint separate counsel.[5] Subsequently, the Court elaborated upon this opinion and extended it.[6] First, the Sixth Amendment right to counsel grants such protection to defendants who retain private counsel as well as to defendants served by appointed counsel. Second, judges are not automatically required to initiate

[2] *Burgett* v. *Texas*, 389 U.S. 109 (1967) (admission of record of prior counselless conviction at trial with instruction to jury to regard it only for purposes of determining sentence if it found defendant guilty but not to use it in considering guilt inherently prejudicial); *United States* v. *Tucker*, 404 U.S. 443 (1972) (error for sentencing judge in 1953 to have relied on two previous convictions at which defendant was without counsel); *Loper* v. *Beto*, 405 U.S. 473 (1972) (error to have permitted counseled defendant in 1947 trial to have his credibility impeached by introduction of prior uncounseled convictions in the 1930's; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented); *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (although under *Scott* v. *Illinois*, 440 U.S. 367 (1979), an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may nonetheless not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term).

[3] 348 U.S. 3 (1954).

[4] Id., 9, 10. *See also House* v. *Mayo*, 324 U.S. 42 (1945); *Hawk* v. *Olson*, 326 U.S. 271 (1945); *Reynolds* v. *Cochran*, 365, U.S. 525 (1961).

[5] *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). Counsel had been appointed by the court.

[6] *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980).

an inquiry into the propriety of multiple representation, being able to assume in the absence of undefined "special circumstances" that no conflict exists. Third, to establish a violation, a defendant must show an "actual conflict of interest which adversely affected his lawyer's performance." Once it is established that a conflict affected the lawyer's action, however, prejudice need not be proved.[7]

"[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." [8] So saying, the Court invalidated a statute empowering every judge in a nonjury criminal trial to deny the parties the right to make a final summation before rendition of judgment which had been applied in the specific case to prevent defendant's counsel from making a summation. The opportunity to participate fully and fairly in the adversary factfinding process includes counsel's right to make a closing argument. And, in *Geders* v. *United States*,[9] the Court held that a trial judge's order preventing defendant from consulting his counsel during a 17-hour overnight recess in the trial between his direct and cross-examination, in order to prevent tailoring of testimony or "coaching," deprived defendant of his right to assistance of counsel and was invalid. Other direct and indirect restraints upon counsel and his discretion have been found to be in violation of the Amendment.[10] Governmental investigative agents may interfere as well with the relationship of defense and counsel.[11]

***Effective Assistance of Counsel.***—"[T]he right to counsel is the right to the effective assistance of counsel." [12] From the beginning

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[7] Id., 348–350. *See also*, for earlier cases presenting more direct violations of defendant's rights, *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Hayman*, 342 U.S. 205 (1952); *Ellis* v. *United States*, 365 U.S. 674 (1958).

[8] *Herring* v. *New York*, 422 U.S. 853, 857 (1975).

[9] 425 U.S. 80 (1976).

[10] E.g., *Ferguson* v. *Georgia*, 365 U.S. 570 (1961) (where defendant was prevented by statute from giving sworn testimony in his defense, the refusal of a state court to permit defense counsel to question him to elicit his unsworn statement denied due process because it denied him assistance of counsel); *Brooks* v. *Tennessee*, 406 U.S. 605 (1972) (alternative holding) (statute requiring defendant to testify prior to any other witness for defense or to forfeit the right to testify denied him due process by depriving him of decision of counsel on questions whether to testify and when).

[11] *United States* v. *Morrison*, 449 U.S. 361 (1981) (Court assumed that investigators who met with defendant, on another matter, without knowledge or permission of counsel and who disparaged counsel and suggested she could do better without him interferred with counsel, but held that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).

[12] *McMann* v. *Richardson*, 397 U.S. 759, 771 n. 14 (1970).

of the cases holding that counsel must be appointed for defendants unable to afford to retain a lawyer, the Court has indicated that appointment must be made in a manner that affords "effective aid in the preparation and trial of the case." [13] Of course, the government must not interfere with representation, either through the manner of appointment or through the imposition of restrictions upon appointed or retained counsel that would impede his ability fairly to provide a defense,[14] but the Sixth Amendment goes further than that. "The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance." [15] That is, a criminal trial initiated and conducted by government is state action which may be so fundamentally unfair that no conviction obtained thereby may be allowed to stand, irrespective of the possible fact that government did nothing itself to bring about the unfairness. Thus, ineffective assistance provided by *retained* counsel provides a basis for finding a Sixth Amendment denial in a trial.[16]

It is not only the trial judge's responsibility not to create a situation of ineffective assistance, but he may well be obligated under certain circumstances to inquire whether defendant's counsel, because of a possible conflict of interest or otherwise, is rendering or may render ineffective assistance.[17] A much more difficult issue is presented when a defendant on appeal or in a collateral proceeding alleges that his counsel was incompetent or was not competent enough to provide effective assistance. The Supreme Court has touched only tangentially on the question of standards by which as-

[13] *Powell* v. *Alabama*, 287 U.S. 45, 71–72 (1932); *Glasser* v. *United States*, 315 U.S. 60, 70 (1942).

[14] E.g., *Glasser* v. *United States*, 315 U.S. 60 (1942) (trial court required defendant and codefendant to be represented by same appointed counsel despite divergent interests); *Geders* v. *United States*, 425 U.S. 80 (1976) (trial judge barred consultation between defendant and attorney overnight); *Herring* v. *New York*, 422 U.S. 853 (1975) (application of statute to bar defense counsel from making final summation).

[15] *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980).

[16] Id., 342–345. *But see Wainwright* v. *Torna*, 455 U.S. 586 (1982) (summarily holding that defendant may not raise ineffective assistance claim in context of proceeding in which he had no constitutional right to counsel ).

[17] *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (public defender representing three defendants alerted trial judge to possibility of conflicts of interest; he should have either appointed different counsel or made inquiry into possibility of conflicts); *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980) (trial judge had no obligation to inquire into adequacy of multiple representation, with possible conflict of interest, in absence of raising of issue by defendant or counsel); *Wood* v. *Georgia*, 450 U.S. 261 (1981) (where counsel retained by defendants' employer had conflict between their interests and employer's, and all the facts were known to trial judge, he should have inquired; prosecution had raised question, but it is unclear whether in any event under the circumstances judge should have inquired).

sistance of counsel is to be judged,[18] and the lower federal courts over the years have subscribed to and applied a multiplicity of tests.[19] In general, it appears that the federal courts, and a large number of state courts, require a showing that an attorney's representation fell below a standard of minimum competency and, further, that, in the event it did, a showing must be made that prejudice resulted to the defendant therefrom.[20] A totality of the circumstances test appears to be the practice.

***Self-Representation.***—The Court has held that the Sixth Amendment, in addition to guaranteeing the right to retained or appointed counsel, also guarantees a defendant the right to represent himself.[21] It is a right the defendant must adopt knowingly and intelligently and under some circumstances the trial judge may deny him the authority to exercise it, as when the defendant simply lacks the competence to make a knowing or intelligent waiver of counsel or when his self-representation is so disruptive of orderly procedures that the judge may curtail it.

**Right to Assistance of Counsel in Nontrial Situations**

***Judicial Proceedings Before Trial.***—Dicta in *Powell* v. *Alabama* [1] indicated that "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself." This language has gradually been expanded upon and the Court has developed a concept of "a critical stage in a criminal proceeding" as indicating when the defendant must be represented by counsel. Thus, in *Hamilton* v. *Alabama,*[2] the Court noted that arraignment under state law there

[18] In *McMann* v. *Richardson,* 397 U.S. 759, 768–771 (1970), the Court observed that whether defense counsel provided adequate representation, in advising a guilty plea, depended not on whether a court would retrospectively consider his advice right or wrong "but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *See also Tollett* v. *Henderson,* 411 U.S. 258, 266–269 (1973); *United States* v. *Agurs,* 427 U.S. 97, 102 n. 5 (1976).

[19] *See Maryland* v. *Marzullo,* 435 U.S. 1011 (1978) (Justice White dissenting from denial of *certiorari,* categorizing positions of courts of appeal).

[20] *See,* e.g., the variety of opinions, but especially the plurality opinion of Judge Leventhal, in *United States* v. *DeCoster,* 624 F.2d 196 (C.A.D.C. 1979) (*en banc*); and *see Washington* v. *Strickland,* 693 F.2d 1243 (C.A. 5, 1982) (*en banc*).

[21] *Faretta* v. *California,* 422 U.S. 806 (1975). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. Id., 834–835 n. 46.

[1] 287 U.S. 45, 57 (1932).

[2] 368 U.S. 52 (1961).

was a "critical stage" because the defense of insanity had to be pleaded then or lost, pleas in abatement had to be made then, and motions to quash on the ground of racial exclusion of grand jurors or that the grand jury was improperly drawn had to be made then. *White* v. *Maryland* [3] set aside a conviction obtained at a trial at which defendant's plea of guilty entered at a preliminary hearing where he was without counsel was introduced as evidence against him at trial. Finally in *Coleman* v. *Alabama*,[4] the Court denominated a preliminary hearing a "critical stage" necessitating counsel even though the only function of the hearing was to determine probable cause to warrant presenting the case to a grand jury and to fix bail and no defense was required to be presented at that point or be lost and nothing occurring at the hearing could be used against defendant at trial. The Court hypothesized that a lawyer could by skilled examination and cross-examination expose weaknesses in the prosecution's case which could result in defendant not being bound over and could in any event preserve for use in cross-examination at trial and impeachment purposes testimony he could elicit at the hearing, he could discover as much as possible of the prosecution's case against defendant for better trial preparation, and he could influence the court in such matters as bail and psychiatric examination. The result seems to be that reached in pre-*Gideon* cases in which if a lawyer might have made a difference then a defendant was entitled to counsel.[5]

***Custodial Interrogation.***—At first, the Court followed the rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel that his subsequent trial was tainted.[6] It was held in *Spano* v. *New York* [7] that under the totality of circumstances a confession

[3] 373 U.S. 59 (1963).

[4] 399 U.S. 1 (1970). Justice Harlan concurred solely because he thought the precedents compelled him to do so, id., 19, while Chief Justice Burger and Justice Stewart dissented. Id., 21, 25. Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the factfinding process as the role of counsel at trial, *Coleman* was denied retroactive effect in *Adams* v. *Illinois*, 405 U.S. 278 (1972). Justice Blackmun joined Chief Justice Burger in pronouncing *Coleman* wrongly decided. Id., 285, 286. *Hamilton* and *White*, however, were held to be retroactive in *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968).

[5] *Compare*, *Hudson* v. *North Carolina*, 363 U.S. 697 (1960); *Chewning* v. *Cunningham*, 368 U.S. 443 (1962); *Carnley* v. *Cochran*, 369 U.S. 506 (1962).

[6] *Crooker* v. *California*, 357 U.S. 433 (1958) (five-to-four decision); *Cicenia* v. *Lagay*, 357 U.S. 504 (1958) (five-to-three).

[7] 360 U.S. 315 (1959).

obtained in a post-indictment interrogation was involuntary and four Justices wished to place the holding solely on the basis that post-indictment interrogation in the absence of defendant's lawyer was a denial of his right to assistance of counsel, a holding which was made in *Massiah* v. *United States*,[8] in which federal officers caused an informer to elicit from the already indicted defendant, who was represented by a lawyer, incriminating admissions which were secretly overheard over a broadcasting unit. Then, in *Escobedo* v. *Illinois*,[9] the Court held that preindictment interrogation was a violation of the Sixth Amendment. But *Miranda* v. *Arizona* [10] switched from reliance on the Sixth Amendment to the Fifth Amendment's self-incrimination clause, although that case still placed great emphasis upon police warnings with regard to counsel and foreclosure of interrogation in the absence of counsel without a valid waiver by defendant.

*Massiah* was reaffirmed and in some respects expanded by the Court. Thus, in *Brewer* v. *Williams*,[11] the right of counsel was found violated when police elicited from defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on defendant's known weakness in order to obtain the admissions. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to the attorney that defendant would not be questioned in his absence. *United States* v. *Henry* [12] held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would "pay attention" to incriminating remarks initiated by the defendant and others. The Court concluded that even if the government agents did not intend the informant to take affirmative steps to elicit incriminating statements from the defendant in the absence of counsel, the agents must have known that result would follow.

[8] 377 U.S. 201 (1964). *See also McLeod* v. *Ohio*, 381 U.S. 356 (1965) (applying *Massiah* to the States, in a case not involving trickery but in which defendant was endeavoring to cooperate with the police). *But see Hoffa* v. *United States*, 385 U.S. 293 (1966). *Cf. Milton* v. *Wainwright*, 407 U.S. 371 (1972).

[9] 378 U.S. 478 (1964).

[10] 384 U.S. 436 (1966).

[11] 430 U.S. 387 (1977). Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. Id., 415, 429, 438. *Compare Rhode Island* v. *Innis*, 446 U.S. 291 (1980), decided on self-incrimination grounds under similar facts.

[12] 447 U.S. 264 (1980) Justices Blackmun, White, and Rehnquist dissented. Id., 277, 289. *But compare Weatherford* v. *Bursey*, 429 U.S. 545 (1977).

***Lineups and Other Identification Situations.***—The concept of the "critical stage" was again expanded and its rationale formulated in *United States* v. *Wade*,[13] which, with *Gilbert* v. *California*,[14] held that lineups were such a stage and that in-court identification of defendants based on out-of-court lineups or show-ups without the presence of defendant's counsel was inadmissible. The Sixth Amendment guarantee, said Justice Brennan, was intended to do away with the common-law limitation of assistance of counsel to matters of law and excluding matters of fact. The abolition of the fact-law distinction took on new importance by the changes in investigation and prosecution since adoption of the Sixth Amendment. "When the Bill of Rights was adopted there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.' " [15]

"It is central to [the principle of *Powell* v. *Alabama*] that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." [16] Thus, because the lineup stage is filled with numerous possibilities for errors, both inadvertent and intentional, which the defendant at trial later either himself or his attorney through cross-examination can never hope to discover and to present in a light to cast doubt upon the accuracy of the identifications there made, counsel's presence was constitutionally necessary.[17] However, because

[13] 388 U.S. 218 (1967).

[14] 388 U.S. 263 (1967).

[15] *United States* v. *Wade*, 388 U.S. 218, 224-225 (1967) (footnote citations omitted).

[16] Id., 226 (footnote citations omitted).

[17] Id., 227-239. Previously, the manner of an extra-judicial identification affected only the weight, not the admissibility, of identification testimony at trial. Justices White, Harlan, and Stewart dissented, denying any objective need for the Court's *per se* rule and doubting its efficacy in any event. Id., 250.

there was less certainty and frequency of possible injustice at this stage, the Court held that the two cases were to be given prospective effect only but it further held that the due process clause would void identification based upon lineups which were conducted in a manner that was unnecessarily suggestive and conducive to irreparable mistaken identification.[18] The *Wade-Gilbert* rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwriting exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from his right to a fair trial.[19]

In *United States* v. *Ash*,[20] the Court redefined and modified its "critical stage" analysis. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." [21] Therefore, unless at the pretrial stage there was involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Since the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, since therefore there was no trial-like confrontation, and since the possibilities of abuse in a photographic display are discoverable and reconstructa-

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[18] *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[19] *Gilbert* v. *California*, 388 U.S. 263, 265–267 (1967) (handwriting exemplars); *Schmerber* v. *California*, 384 U.S. 757, 765–766 (1966) (blood samples).

[20] 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. Id., 326.

[21] Id., 309–310, 312–313. Justice Stewart, concurring on other grounds, rejected this analysis, id., 321, as did the three dissenters. Id., 326, 338–344. "The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness of *the trial itself*.' " Id., 339 (Justice Brennan dissenting). Examination of defendant by court-appointed psychiatrist to determine his competency to stand trial, after his indictment, was a "critical" stage, and he was entitled to the assistance of counsel before submitting to it. *Estelle* v. *Smith*, 451 U.S. 454, 469–471 (1981).

ble at trial by an examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.[22]

Both Wade and Gilbert had already been indicted and had had counsel appointed to represent them when their lineups were conducted, a fact noted in the opinions and in subsequent ones,[23] but the case in which the rulings were denied retroactively as well as subsequent applications of the rulings involved preindictment lineups.[24] Nevertheless, in *Kirby* v. *Illinois* [25] the Court held that no right to counsel existed with respect to lineups that precede some formal act of charging a suspect because the Sixth Amendment did not become operative until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearings, indictment, information, or arrangement."

"The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." [1] The Court's distinguishing of the underlying basis for *Miranda* v. *Arizona* [2] left that case basically unaffected by *Kirby*, but it appears that *Escobedo* v. *Illinois*,[3] and perhaps other cases, is greatly restricted thereby.

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[22] Id., 413 U.S., 317–321. On the due process standards of identification procedure, *see infra* 1651–1652.

[23] *United States* v. *Wade*, 388 U.S. 218, 219, 237 (1967); *Gilbert* v. *California*, 388 U.S. 263, 269, 272 (1967); *Simmons* v. *United States*, 390 U.S. 377, 382–383 (1968).

[24] *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Foster* v. *California*, 394 U.S. 440 (1969); *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

[25] 406 U.S. 682 (1972).

[1] Id., 689–690. Justices Brennan, Douglas, and Marshall, dissenting, argued that it had never previously been doubted that *Wade* and *Gilbert* applied in preindictment lineup situations and that in any event the rationale of the rule was no different whatever the formal status of the case. Id., 691. Justice White, a dissenter in *Wade* and *Gilbert*, dissented simply on the basis that those two cases controlled this one. Id., 705. Indictment, as the quotation from *Kirby* indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. E.g., *Brewer* v. *Williams*, 430 U.S. 387 (1977) (suspect had been seized pursuant to an arrest warrant, arraigned, and committed by court).

[2] "[T]he *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive." 406 U.S. 688, (Emphasis by Court).

[3] "But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the

***Post-Conviction Proceedings.***—Counsel is required at the sentencing stage,[4] and the Court has held that where sentencing was deferred after defendant's conviction and he was placed on probation, he must be afforded counsel at the hearing on revocation of probation and imposition of the deferred sentence.[5] Beyond this stage, however, it would appear that the issue of counsel at hearings on the granting of parole or probation, the revocation of parole which has been imposed following sentencing, and prison disciplinary hearings will be determined according to due process and equal protection standards rather than by further expansion of the Sixth Amendment.[6]

***Noncriminal and Investigatory Proceedings.***—Commitment proceedings which lead to the imposition of essentially criminal punishment are subject to the due process clause and require the assistance of counsel.[7] A state administrative investigation by a fire marshal inquiring into the causes of a fire was held not to be a criminal proceeding and hence, despite the fact that the petitioners had been committed to jail for noncooperation, not the type of hearing at which counsel was requisite.[8] Another decision refused to extend the right to counsel to investigative proceedings antedating a criminal prosecution and sustained the contempt conviction of private detectives who appeared before a judge, authorized to conduct a non-prosecutorial, fact-finding inquiry akin to a grand jury proceeding and who based their refusal to testify on the ground that their counsel were required to remain outside the hearing room.[9]

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constitutional right to counsel as such, but, like *Miranda*., 'to guarantee full effectuation of the privilege against self-incrimination. . . . ' *Johnson* v. *New Jersey*, 384 U.S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, *Johnson* v. *New Jersey*, *supra*, at 733-734, and those facts are not remotely akin to the facts of the case before us." Id., 689. *But see* id, 693 n. 3. (Justice Brennan dissenting).

[4] *Townsend* v. *Burke*, 334 U.S. 736 (1948).

[5] *Mempa* v. *Rhay*, 389 U.S. 128 (1967), applied retroactively in *McConnell* v. *Rhay*, 393 U.S. 2 (1968).

[6] Counsel is not a guaranteed right in prison disciplinary proceedings. *Wolff* v. *McDonnell*, 418 U.S. 539, 560-570 (1974); *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976). Other cases are assembled under the Fourteenth Amendment due process clause.

[7] *Specht* v. *Patterson*, 386 U.S. 605 (1967).

[8] *In re Groban*, 352 U.S. 330 (1957). Four Justices dissented.

[9] *Anonymous* v. *Baker*, 360 U.S. 287 (1959). Four Justices dissented.

# SEVENTH AMENDMENT

## CIVIL TRIALS

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## SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### TRIAL BY JURY IN CIVIL CASES

#### The Right and the Characteristics of the Civil Jury

***History.***—On September 12, 1787, as the Convention was in its final stages, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." The comment elicited some support and the further observation that because of the diversity of practice in civil trials in the States it would be impossible to draft a suitable provision.[1] When on September 15 it was moved that a clause be inserted in Article III, § 2, to guarantee that "a trial by jury shall be preserved as usual in civil cases," this objection seems to have been the only one urged in opposition and the motion was defeated.[2] The omission, however, was cited by many opponents of ratification and "was pressed with an urgency and zeal . . . well-nigh preventing its ratification." [3] A guarantee of right to jury in civil cases was one of the amendments urged on Congress by the ratifying conventions [4] and it was included from the first among Madison's proposals to the House.[5] It does not appear that the text

[1] 2 M. Farrand, *Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 587.

[2] Id., 628.

[3] J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1757. "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." Id., § 1762.

[4] J. Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: 2d ed. 1836), 326 (New Hampshire); 2 id., 399–414 (New York); 3 id., 658 (Virginia).

[5] 1 *Annals of Congress* 436 (1789). "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."

of the proposed amendment or its meaning was debated during its passage.[6]

***Composition and Functions of Civil Jury.***—Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted."[7] The right was to "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[8] Decision of the jury must be by unanimous verdict.[9] In *Colgrove* v. *Battin*,[10] the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."[11] The Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."[12] But it "does not exact the

[6] It is simply noted in 1 *Annals of Congress* 760 (1789), that on August 18 the House "considered and adopted" the committee version: "In suits at common law, the right of trial by jury shall be preserved," On September 7, the *Senate Journal* states that this provision was adopted after insertion of "where the consideration exceeds twenty dollars." 2 B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 1150.

[7] *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 657 (1913); *Parsons* v. *Bedford*, 3 Pet. (28 U.S.) 433, 446–448 (1830).

[8] *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13 (1899).

[9] *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *American Pub. Co.* v. *Fisher*, 166 U.S. 464 (1897); *Springville* v. *Thomas*, 166 U.S. 707 (1897); *cf. Andres* v. *United States*, 333 U.S. 740 (1948).

[10] 413 U.S. 140 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, id., 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. Id., 165, 188.

[11] Id., 155–156. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment's requirements. "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals, . . ." Id., 160 n. 16.

[12] *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 657 (1935); *Walker* v. *New Mexico & S.P.R. Co.*, 105 U.S. 593, 596 (1897); *Gasoline Prods. Co.* v. *Champlin Co.*, 283 U.S. 494, 497–499 (1931); *Dimick* v. *Schiedt*, 293 U.S. 474, 476, 485–486 (1935).

retention of old forms of procedure" nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue" or new rules of evidence.[13] Those matters which were tried to a jury in England in 1791 are to be so tried today and those matters which, as in equity, were tried to the judge in England in 1791 are to be so tried today,[14] and when new rights and remedies are created "the right of action should be analogized to its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.[15]

***Courts in Which the Guarantee Applies.***—The Amendment governs only courts which sit under the authority of the United States,[16] including courts in the territories[17] and the District of Columbia,[18] but it does not apply to state courts.[19] But when a state court is enforcing a federally created right, of which the right to trial by jury is a substantial part, the States may not eliminate trial by jury as to one element while allowing jury trial as to all other issues.[20] Ordinarily, a federal court enforcing a state-created right will follow its own rules with regard to the allocation of functions between judge and jury, a rule the Court based on the "interests" of the federal court system, eschewing reliance on the Seventh Amendment but noting its influence.[21]

***Waiver of the Right.***—Parties may enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, even without any legislative provision for

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[13] *Gasoline Prods. Co.* v. *Champlin Co.*, 283 U.S. 494, 498 (1931); *Ex parte Peterson*, 253 U.S. 300, 309 (1920).

[14] *Parsons* v. *Bedford*, 3 Pet. (28 U.S.) 433, 446–447 (1830); *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 377–378 (1913); *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 657 (1935); *Dimick* v. *Schiedt*, 293 U.S. 474, 476 (1935). *But see Ross* v. *Bernhard*, 396 U.S. 531 (1970), which may foreshadow a new analysis.

[15] *Luria* v. *United States*, 231 U.S. 9, 27–28 (1913).

[16] *Pearson* v. *Yewdall*, 95 U.S. 294, 296 (1877); *Edwards* v. *Elliott*, 21 Wall. (88 U.S.) 532, 557 (1874); *The Justices* v. *Murray*, 9 Wall. (76 U.S.) 274, 277 (1870); *Walker* v. *Sauvinet*, 92 U.S. 90 (1876); *St. Louis & K.C. Land Co.* v. *Kansas City*, 241 U.S. 419 (1916).

[17] *Webster* v. *Reid*, 11 How. (52 U.S.) 437, 460 (1851); *Kennon* v. *Gilmer*, 131 U.S. 22, 28 (1889).

[18] *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 5 (1899).

[19] *Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U.S. 211 (1916). *See also Melancon* v. *McKeithen*, 345 F. Supp. 105 (D.C.E.D.La.) (three-judge court), *aff'd. per curiam*, 409 U.S. 943 (1972); *Alexander* v. *Virginia*, 413 U.S. 836 (1973).

[20] *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952). Four dissenters contended the ruling was contrary to the unanimous decision in *Bombolis*.

[21] *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), citing *Herron* v. *Southern Pacific Co.*, 283 U.S. 91 (1931).

waiver.[22] Prior to adoption of the Federal Rules, Congress had, "by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing." [23] Under the Federal Rules of Civil Procedure, any party may make a timely demand for a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing and failure so to serve a demand constitutes a waiver of the right.[24] However, a waiver is not to be implied from a request for a directed verdict.[25]

**Application of the Amendment**

***Cases "at Common Law".***—The coverage of the Amendment is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law." [1] The term "common law" was used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing of the Amendment and equitable remedies were administered.[2] Illustrative of the Court's course of decision on this subject are two unanimous decisions holding that civil juries were required in a suit by a landlord to recover possession of real property from a tenant allegedly behind on rent and in a suit for damages for alleged racial discrimination in the rental of housing in violation of federal law. In the former case, the Court reasoned that its Seventh Amendment precedents "require[ed] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty." [3] The statutory cause of

[22] *Henderson's Distilled Spirits*, 14 Wall. (81 U.S.) 44, 53 (1872); *Rogers* v. *United States*, 141 U.S. 548, 554 (1891); *Parsons* v. *Armor*, 3 Pet. (28 U.S.) 413 (1830); *Campbell* v. *Boyreau*, 21 How. (62 U.S.) 223 (1859).

[23] *Baylis* v. *Travellers' Ins. Co.*, 113 U.S. 316, 321 (1885). The provision did not preclude other kinds of waivers, *Duignan* v. *United States*, 274 U.S. 195, 198 (1927), though every reasonable presumption was indulged against a waiver. *Hodges* v. *Easton*, 106 U.S. 408, 412 (1883).

[24] Federal Rules of Civil Procedure 38.

[25] *Aetna Life Ins. Co.* v. *Kennedy*, 301 U.S. 389 (1937); Federal Rules of Civil Procedure 50(a).

[1] *Shields* v. *Thomas*, 18 How. (59 U.S.) 253, 262 (1856).

[2] *Parsons* v. *Bedford*, 3 Pet. (28 U.S.) 443, 447 (1930); *Barton* v. *Barbour*, 104 U.S. 126, 133 (1881). Formerly, it did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. *Clark* v. *Wooster*, 119 U.S. 322, 325 (1886); *Pease* v. *Rathbun-Jones Eng. Co.*, 243 U.S. 273, 279 (1917). *But see Dairy Queen* v. *Wood*, 369 U.S. 469 (1962), discussed *infra*, *pp.* 1382–1383.

[3] *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974).

action, the Court found, had several counterparts in the common law, all of which involved a right to trial by jury. In the latter case, the plaintiff had argued that the Amendment was inapplicable to new causes of action created by congressional action, but the Court disagreed. "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." [4]

The amendment does not apply to cases in admiralty and maritime jurisdiction, in which the trial is by a court without a jury,[5] nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an order of an administrative body.[6] Thus, when Congress committed to administrative determination the finding of a violation of the Occupational Safety and Health Act with a discretion to fix a fine for a violation, the charged party being able to obtain judicial review of the administrative proceeding in a federal court of appeal and the fine being collectible in a suit in federal court, the argument that the absence of a jury trial in the process for a charged party violated the Seventh Amendment was unanimously rejected. "At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." [7]

Omission of provision for a jury has been upheld in a number of cases on the ground that the suit in question was not a suit at common law within the meaning of the Amendment.[8]

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[4] *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). "A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law." Id., 195.

[5] *Parsons* v. *Bedford*, 3 Pet. (28 U.S.) 443 (1830); *Waring* v. *Clarke*, 5 How. (46 U.S.) 441, 460 (1847); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959). *But see also Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963).

[6] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). *See also ICC* v. *Brimson*, 154 U.S. 447, 488 (1894); *Yakus* v. *United States*, 321 U.S. 414, 447 (1944).

[7] *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450 (1977).

[8] E.g., (1) suits to enforce claims against the United States, *McElrath* v. *United States*, 102 U.S. 426, 440 (1880); *see also Galloway* v. *United States*, 319 U.S. 372, 388 (1943); (2) suits authorized by territorial law against a municipality, based upon a moral obligation only, *Guthrie National Bank* v. *Guthrie*, 173 U.S. 528, 534 (1899). *See also United States* v. *Realty Co.*, 163 U.S. 427, 439 (1896); *New Orleans* v. *Clark*, 95 U.S. 644, 653 (1877); (3) suit to cancel a naturalization certificate for fraud, *Luria* v. *United States*, 231 U.S. 9, 27 (1913); (4) order of deportation of an alien, *Gee Wah*

***The Continuing Law-Equity Distinction.***—The use of the term "common law" in the Amendment as indicating those cases in which the right to jury trial was to be preserved reflected, of course, the division of the English and United States legal systems into separate law and equity jurisdictions, in which actions cognizable in courts of law generally were triable to a jury while in equity there was no right to a jury. In the federal court system there were unitary courts having jurisdiction in both law and equity but distinct law and equity procedures, including the use or nonuse of the jury, were applied in the federal courts. Adoption of the Federal Rules of Civil Procedure in 1938 merged law and equity into a single civil jurisdiction and established uniform rules of procedure. Legal and equitable claims which had previously had to be brought as separate causes of action on different "sides" of the court could now be joined in a single action and in some instances, such as compulsory counterclaims, had to be joined in one action.[9] But the

*Lee* v. *United States*, 25 F.2d 107 (C.A. 5, 1928), *cert. den.*, 277 U.S. 608 (1928); (5) assessment of damages in patent infringement suit, *Filer & Stowell Co.* v. *Diamond Iron Works*, 270 F. 489 (C.A. 2, 1921), *cert. den.*, 256 U.S 691 (1921); (6) Longshoremen's and Harbor Workers' Compensation Act, *Crowell* v. *Benson*, 285 U.S. 22, 45 (1932); (7) jurisdiction of bankruptcy court to examine into reasonableness of fees paid by person for legal services in contemplation of bankruptcy, *In re Wood and Henderson*, 210 U.S. 246 (1908); (8) final decision of customs appraisers in regard to value of imports. *Auffmordt* v. *Hedden*, 137 U.S. 310, 329 (1890); (9) a territorial statute requiring specific answers to special interrogations, in addition to a general verdict. *Walker* v. *New Mexico & S.P.R. Co.*, 165 U.S. 593, 598 (1897); (10) a rule of a District of Columbia court authorizing judgment by default in an action *ex contractu*, on failure to show by affidavit a good defense. *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 320 (1902); (11) a federal court's observance of a state statute making a certified copy of a coroner's verdict *prima facie* evidence of the facts stated. *Jensen* v. *Continental Life Ins. Co.*, 28 F.2d 545 (C.A. 3, 1928), *cert. den.*, 279 U.S. 842 (1929); (12) a federal statute giving *prima facie* effect to findings of the Interstate Commerce Commission, *Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 434, 439 (1915); (13) An order of a District of Columbia court appointing an auditor in a law case to examine books and papers, make computations, hear testimony, and render a report which will serve as *prima facie* evidence of the facts found and conclusions reached, unless rejected by the court. *Ex parte Peterson*, 253 U.S. 300 (1920); (14) a decree of the Supreme Court enjoining, in the exercise of its original jurisdiction, the State of Louisiana from continuing to trespass upon lands under the ocean beyond its coasts and requiring the State to account for the money derived from that area. *United States* v. *Louisiana*, 339 U.S. 699 (1950); (15) a summary disposition by referee in bankruptcy proceeding, pursuant to the Bankruptcy Act, of issues regarding voidable preferences as asserted and proved by the trustee. *Katchen* v. *Landy*, 382 U.S. 323 (1966). (16) in a federal eminent domain proceeding, a determination by a judge, rather than the jury, of the issue as to whether the condemned lands were originally within the scope of the government's project or were adjacent lands later added to the plan, the determination of which was necessary in order to calculate just compensation. *United States* v. *Reynolds*, 397 U.S. 14 (1970).

[9] 5 J. Moore, *Federal Practice* (New York: 2d ed. 1971), §§ 38.01–38.05.

traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury remained and led to some difficulty.[10]

[10] Under the old equity rules it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. *Hipp* v. *Babin*, 19 How. (60 U.S.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. *Scott* v. *Neely*, 140 U.S. 106, 109 (1891); *Bennett* v. *Butterworth*, 11 How. (52 U.S.) 669 (1850); *Lewis* v. *Cocks*, 23 Wall. (90 U.S.) 466, 470 (1874); *Killian* v. *Ebbinghaus*, 110 U.S. 568, 573 (1884); *Buzard* v. *Houston*, 119 U.S. 347, 351 (1886). Where an action at law evoked an equitable counterclaim the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, *res judicata* and collateral estoppel could operate so as to curtail the litigant's right to a jury finding on factual issues common to both claims. But priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity where the remedy was complete at law served to guard the right of trial by jury and were liberally construed. *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94 (1932).

Nor was the distinction between law and equity to be obliterated by state legislation. *Thompson* v. *Railroad Companies*, 6 Wall. (73 U.S.) 134 (1868). So, where state law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction upon removal. Ascertainment of plaintiff's demand being properly by action at law, however, the fact that the equity court had power to summon a jury on occasion did not afford an equivalent of the right of trial by jury secured by the Seventh Amendment. *Whitehead* v. *Shattuck*, 138 U.S. 146 (1891); *Buzard* v. *Houston*, 119 U.S. 347 (1886); *Greeley* v. *Lowe*, 155 U.S. 58, 75 (1894). But where state law gave an equitable remedy, such as to quiet title to land, the federal courts enforced it, if it did not obstruct the rights of the parties as to trial by jury *Clark* v. *Smith*, 13 Pet. (38 U.S.) 195 (1839); *Holland* v. *Challen*, 110 U.S. 15 (1884); *Reynolds* v. *Crawfordsville Bank*, 112 U.S. 405 (1884); *Chapman* v. *Brewer*, 114 U.S. 158 (1885); *Cummings* v. *National Bank*, 101 U.S. 153, 157 (1879); *United States* v. *Landram*, 118 U.S. 81 (1886); *More* v. *Steinbach*, 127 U.S. 70 (1888); *Cf. Ex parte Simons*, 247 U.S. 321 (1918).

By the inclusion in the Law and Equity Act of 1915 of § 274 (b) of the Judicial Code, 38 Stat. 956, the transfer of cases to the other side of the court was made possible. The new procedure permitted legal questions arising in an equity action to be determined therein without sending the case to the law side. This section also permitted equitable defenses to be interposed in an action at law. The same order was preserved as under the system of separate courts. The equitable issues were disposed of first, and if a legal issue remained, it was triable by a jury. *Enelow* v. *N.Y. Life Ins. Co.*, 293 U.S. 379 (1935). *See also Liberty Oil Co.* v. *Condon Bank*, 260 U.S. 235 (1922). There was no provision for legal counterclaims in an equitable action, for the reason that Equity Rule 30, requiring the answer to a bill in equity to state any counterclaim arising out of the same transaction, was not intended to change the line between law and equity and was construed as referring to equitable counterclaims only. *American Mills Co.* v. *American Surety Co.*, 260 U.S. 360, 364 (1922); *Stamey* v. *United States*, 37 F.2d 188 (D.C. W.D. Wash. 1929). Equitable jurisdiction existing at the time of the filing of the bill was not disturbed by the subsequent availability of legal remedies, and the scheduling was discretionary. *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203 (1937).

This difficulty has been resolved by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres* v. *Westover,*[11] A brought an action seeking a declaratory judgment and an injunction barring B from instituting any antitrust action against it and B filed a counterclaim, alleging violation of the antitrust laws and asking for treble damages. The trial court decided to try all the issues itself, inasmuch as the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. The Supreme Court held this to be error, asserting that defendant could not be deprived of his jury right merely because the other claim was filed first and that even if the complaint did present grounds for equitable relief it would be error, unless there was the danger of irreparable injury or the lack of an adequate legal remedy, to try the common issues first to the court, since jury trial of these issues subsequently would probably be precluded by collateral estoppel. "[O]nly under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now antipicate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[12] Then in *Dairy Queen* v. *Wood,*[13] in which plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried to a jury, because the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and to a jury if the litigant so wished.

Then, in *Ross* v. *Bernhard,*[14] the Court further held that the right to a jury trial depends on the nature of the issue to be tried rather than on the procedural framework in which it is raised. The case involved a st[illegible]holder derivative action[15] which has always

[11] 359 U.S. 500 (1959).

[12] Id., 510–511.

[13] 369 U.S. 469 (1962).

[14] 396 U.S. 531 (1970).

[15] The stockholders' derivative action is a creation of equity made necessary by the traditional concept of "the corporate entity" or the "concept of separate personality." That is, the corporation is an entity distinct and separate from its shareholders. Thus, while shareholders were relieved from unlimited liability for corporate liabilities, the complementary result was that harm to the corporation did not confer any right of action upon a shareholder to sue to right that harm. But if the harm were caused by the abuse of those who managed and controlled the corporation, the corporation naturally would not proceed against them and the common law courts would not allow the shareholders to bring an action running to the "sep-

been considered to be a suit in equity. The Court agreed that the action was equitable but asserted that it involved two separable claims: first, the standing of a stockholder to sue for a corporation is an equitable issue; second, the corporation's claim which the stockholder asserts may be either equitable or legal. Because the 1938 merger of law and equity in the federal courts eliminated any procedural obstacles to transferring jurisdiction to the law side once the equitable issue of standing was decided, the Court continued, if the corporation's claim being asserted by the stockholder was legal in nature, it should be heard on the law side and before a jury.[16] Whether this analysis will be followed in other areas so that the right to a jury trial on all legal issues in actions formerly within equity's concurrent jurisdiction is a question now open.[17]

***Line Drawn by the Common Law.***—As was noted above, the primary purpose of the Amendment was to preserve the historic line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement which did not transgress this line. Elucidating this formula, the Court has achieved the following results: It is constitutional for a federal judge, in the course of trial, to express his opinion upon the facts, provided all questions of fact are ultimately submitted to the jury,[18] to call the jury's attention to parts of the evidence he deems of special importance,[19] being careful to distinguish between matters of law and matters of opinion in relation thereto,[20] to inform

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arate personality" of the corporation; equity thus permitted a derivative action in which the shareholder is permitted to set in motion the adjudication of a cause of action belonging to the corporation. Prunty, "The Shareholders' Derivative Suit: Notes on Its Derivation," 32 N.Y.U. L. Rev. 980 (1957).

[16] Justices Stewart and Harlan and Chief Justice Burger dissented, arguing that the Seventh Amendment did not expand the right to a jury trial, that the Rules simply preserved the right as it had existed, and that it was error to think that the two could somehow "magically interact" to enlarge the right in a way that neither did alone. *Ross* v. *Bernhard*, 396 U.S. 531, 543 (1970).

[17] Among the possibilities in which a legal right was enforceable in equity in the absence of an adequate remedy at law are suits to compel specific performance of a contract, suits, for cancellation of a contract, and suits to enjoin tortious action. On *Ross*' implications, *see* J. Moore, *Federal Practice* (New York: 2d ed. 1971), §§ 38.11[8.-8], 38.11[9].

[18] *Vicksburg & Meridian Railroad Co.* v. *Putnam*, 118 U.S. 545, 553 (1886); *United States* v. *Philadelphia & R.R. Co.*, 123 U.S. 113, 114 (1887).

[19] *Vicksburg & Meridian Railroad Co.* v. *Putnam*, 118 U.S. 545 (1886); where are cited *Carver* v. *Jackson ex dem. Astor et al.*, 4 Pet. (29 U.S.) 1, 80 (1830); *Magniac* v. *Thompson*, 7 Pet. (32 U.S.) 348, 390 (1833); *Mitchell* v. *Harmony*, 13 How. (54 U.S.) 115, 131 (1852); *Transportation Line* v. *Hope*, 95 U.S. 297, 302 (1877).

[20] *Games* v. *Dunn*, 14 Pet. (39 U.S.) 322, 327 (1840).

the jury when there is not sufficient evidence to justify a verdict, that such is the case,[21] to direct the jury, after the plaintiff's case is all in, to return a verdict for the defendant on the ground of the insufficiency of the evidence,[22] to set aside a verdict which in his opinion is against the law or the evidence, and order a new trial,[23] to refuse defendant a new trial on the condition, accepted by plaintiff, that the latter remit a portion of the damages awarded him,[24] but not, on the other hand, to deny plaintiff a new trial on the converse condition, although defendant accepted it.[25] Nor can a Court of Appeals reverse the jury's finding on the issue of reasonableness of petitioner's conduct, in an indemnity action for damages respondent had paid petitioner's employee, on the ground that as a matter of law petitioner had not acted reasonably; "[u]nder the Seventh Amendment, that issue should have been left to the jury's determination." [1]

***Directed Verdicts.***—In 1913 the Court held, in *Slocum* v. *New York Life Ins. Co.*,[2] that where upon the evidence a federal trail court, sitting in New York, ought to have directed a verdict for one party but the jury found for the other contrary to the evidence, the amendment rendered it improper for a federal appeals court to order, in accordance with New York practice, the entry of a judgment contrary to the verdict; the only course open to either court was to order a new trial. While plainly in accordance with the common law as it stood in 1791, the decision was five-to-four and was subjected to a heavy fire of professional criticism urging the convenience of the thing and the theory of the capacity of the common law for growth.[3] It has, moreover, been impaired, if not

[21] *Sparf and Hansen* v. *United States*, 156 U.S. 51, 99–100 (1895); *Pleasants* v. *Fant*, 22 Wall, (89 U.S.) 116, 121 (1875); *Randall* v. *Baltimore & Ohio R.R. Co.*, 109 U.S. 478, 482 (1883); *Meehan* v. *Valentine*, 145 U.S. 611, 625 (1892); *Coughran* v. *Bigelow*, 164 U.S. 301 (1896).

[22] *Treat Mfg. Co.* v. *Standard Steel & Iron Co.*, 157 U.S. 674 (1895); *Randall* v. *Baltimore & Ohio R.R. Co.*, 109 U.S. 478, 482 (1883) and cases there cited.

[23] *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13 (1889).

[24] *Arkansas Cattle Co.* v. *Mann*, 130 U.S. 69, 74 (1889).

[25] *Dimick* v. *Schiedt*, 293 U.S. 474, 476–478 (1935).

[1] *International Terminal Operating Co., Inc.* v. *N. V. Nederl. Amerik Stoomv. Maats.*, 393 U.S. 74, 75 (1968). *But see Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317 (1967), where the Court held that the Seventh Amendment does not bar an appellate court from granting a judgment *n. o. v.* insofar as "there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does." Id., 322.

[2] 228 U.S. 364 (1913).

[3] F. James, *Civil Procedure* (Boston: 1965), 332–333, and material cited, id., 333 n. 8.

completely undermined, by certain more recent holdings. In the first of these,[4] in which the same Justice spoke for the Court as in the *Slocum* case, it was held that a trial court had had the right to enter a judgment on the verdict of the jury for the plaintiff after overruling a motion by defendant for dismissal on the ground of insufficient evidence.

The Court noted that its ruling was out of line with some of its expressions in the *Slocum* case.[5] In the second case [6] the Court sustained a United States district court, in an action between parties of diverse citizenship, in rejecting a motion by defendant for dismissal and peremptorily directing a verdict for the plaintiff. The Supreme Court held that there was ample evidence to support the verdict and that the trial court, in following Arkansas procedure, had acted consistently with the Federal Conformity Act.[7] In the third case,[8] which involved an action against the Government for benefits under a war risk insurance policy which had been allowed to lapse, the trial court directed a verdict for the Government on the ground of the insufficiency of the evidence and was sustained in so doing by both the circuit court of appeals and the Supreme Court. Three Justices, speaking by Justice Black, dissented in an opinion in which it is asserted that "today's decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." [9] That the Court should experience occasional difficulty in harmonizing the idea of preserving the historic common law covering the relations of judge and jury with the notion of a developing common law is not surprising.[10]

[4] *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654 (1935).

[5] Id., 661.

[6] *Lyon* v. *Mutual Benefit Assn.*, 305 U.S. 484 (1939).

[7] 17 Stat. 197, now superseded by the Federal Rules of Civil Procedure.

[8] *Galloway* v. *United States*, 319 U.S. 372, 389 (1943), wherein the Court said "the practive has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure," citing *Berry* v. *United States*, 312 U.S. 450 (1941). In the latter case the Court remarked that the new rule has given "district judges, under certain circumstances, . . . the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of facts—a jury being the constitutional tribunal provided for trying facts in courts of law." Id., 452-453.

[9] 319 U.S. 372, 397. The case, being a claim against the United States, need not have been tried by a jury except for the allowance of Congress.

[10] *See, e.g., Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317 (1967), interpreting Rules 50(b), 50(c)(2) and 50(d) of the Federal Rules of Civil Procedure, as well as the Seventh Amendment.

***Jury Trial Under the Federal Employers' Liability Act.***—One aspect of the problem of delineating the respective provinces of judge and jury divided the Justices for a lengthy period but now appears quiescent—cases arising under the Federal Employers' Liability Act. The argument was frequently couched by the majority in terms of protecting the function of the jury from usurpation by judges intent on subverting and limiting remedial legislation enacted by Congress [11] and by the minority in terms of the costs to the Supreme Court in time and effort spent in evaluating the quantum of evidence necessary to create a jury question.[12]

Although the considerations present in the FELA cases were not inherently different from those in any civil case where the direction of a verdict or a decision of an issue by the court may raise *sub silentio* the issue whether the Seventh Amendment right to a jury trial has been impaired by court usurpation of the jury function, cases under the FELA, which retained the common-law requirements of negligence as a prerequisite to recovery, involved peculiarly difficult decisions as to the adequacy of proof of negligence. "Special and important reasons for the grant of certiorari in these cases are certainly present," the Court wrote in a leading case, "when lower federal and state courts persistently deprive litigants of their right to a jury determination." [13] The operating test was: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on ground of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be

[11] E.g., *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943), in which Justice Black's opinion of the Court initiated the line of cases here considered; *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350 (1943); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944). *See Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 507–510 (1957). Trial by jury is "part and parcel of the remedy afforded railroad workers" under the FELA. *Bailey* v. *Central Vermont Ry.*, *supra*, 354. "The difference between the majority and minority of the Court in our treatment of FELA cases concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment." *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15, 17 (1959) (Justice Douglas concurring). "[T]his Court is vigilant to exercise its power of review . . . to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. Co.*, *supra*, 509.

[12] *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting), is a lengthy review and critique of the Court's practice.

[13] *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 510 (1957).

drawn that negligence of the employer played any part at all in the injury or death.

"Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." [14] A persistent dissent in the line of cases expressed the fear that in FELA cases "anything that a jury says goes, with the consequences that all meaningful judicial supervision over jury verdicts in such cases has been put at an end. . . . If so, . . . the time has come when the Court should frankly say so. If not, then the Court should at least give expression to the standards by which the lower courts are to be guided in these cases." [15] This problem arising when litigants challenge either the action of the trial court in withholding the case from the jury or of the appellate or trial court in overturning a jury verdict is not confined to the FELA but has arisen as well under such statutes as the Jones Act [16] and the Safety Appliance Act.[17] Whether the failure in the last several years of this kind of case to receive plenary consideration by the Court indicates a compliance by the lower courts with the philosophy undergirding these decisions or whether the Court itself has withdrawn from its active role only a close scrutiny of decided lower court cases could determine.

**Appeals From State Courts to the Supreme Court**

The clause of the Amendment prohibiting the re-examination of any fact found by a jury is not restricted in its application to suits at common law tried before juries in courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court on appeal.[1] Note, howev-

[14] Id., 506–507. The cases are collected id., 510 n. 26. The cases are tabulated and categorized in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 68–73 (1949) (Justice Douglas concurring), and *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15, 16–25 (1959). *See also Harrison* v. *Missouri Pacific R. Co.*, 372 U.S. 248 (1963); *Basham* v. *Pennsylvania R. Co.*, 372 U.S. 699 (1963).

[15] *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15, 27–28 (1959) (Justice Harlan dissenting); *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 447 (1959) (Justice Frankfurter dissenting).

[16] *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523 (1956); *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521 (1957); *Michalic* v. *Cleveland Tankers*, 364 U.S. 325 (1960). *See also Senko* v. *La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962).

[17] *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 525 n. 2 (1957) (Justice Frankfurter dissenting).

[1] *The Justices* v. *Murray*, 9 Wall. (76 U.S.) 274, 278 (1870); *Chicago, B. & Q. R.* v. *City of Chicago*, 166 U.S. 226, 242–246 (1897).

er, that the Court has frequently indicated that in cases involving a claim of a denial of constitutional rights it is free to examine and review the evidence upon which lower court conclusions are based, a position that under some circumstances could conflict with the principle of jury autonomy.[2]

[2] *See Time, Inc.* v. *Pape*, 401 U.S. 279, 284–292 (1971), and cases cited.

# EIGHTH AMENDMENT

## FURTHER GUARANTEES IN CRIMINAL CASES

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## FURTHER GUARANTEES IN CRIMINAL CASES

### EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### EXCESSIVE BAIL

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." [1] "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept." [2] These two contrasting views of the "excessive bail" provision, uttered by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment.[3]

Crucial to understanding why the ambiguity exists if not to its resolution is knowledge of the history of the bail controversy in England.[4] The Statue of Westminster the First of 1275 [5] set forth a

[1] *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951). Note that in *Bell* v. *Wolfish*, 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[2] *Carlson* v. *Landon*, 342 U.S. 524, 545 (1952). Justice Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." Id., 556.

[3] The only recorded comment of a Member of Congress with regard to the "excessive bail" provision was that of Mr. Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 *Annals of Congress* 754 (1789).

[4] Still the best and most comprehensive treatment is Foote, "The Coming Constitutional Crisis in Bail: I," 113 U. Pa. L. Rev. 959, 965–989 (1965), reprinted in C. Foote, *Studies on Bail* (Philadelphia: 1966), 181, 187–211.

[5] 3 Edw. 1, c. 12.

detailed enumeration of the offenses which were bailable and which were not and though supplemented by later statutes it served for something like five-and-a-half centuries as the basic authority.[6] *Darnel's Case*[7] in which the judges permitted the continued imprisonment of persons merely upon the order of the King, without bail, was one of the moving factors in the enactment of the Petition of Right in 1628[8] in which Magna Carta was cited as the law contrary to the detention of persons as permitted in *Darnel's Case*. The right to bail was again subverted a half-century later[9] by various technical subterfuges by whch petitions for *habeas corpus* could not be presented and Parliament reacted by enacting the Habeas Corpus Act of 1679[10] which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high it could not be met and Parliament responded by including in the Bill of Right of 1689[11] a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment was included within the Virginia Declaration of Rights,[12] was picked up in the Virginia recommendations for inclusion in a federal bill of right by the state ratifying convention,[13] and was introduced verbatim by Madison in the House of Representatives.[14]

Thus, in England the right to bail generally was conferred by the basic 1275 statute, as supplemented, the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679, and protection against abridgement through the fixing of an excessive bail was conferred by the Bill of Right of 1689. *Habeas corpus* was here protected in Article I, § 9, of the Constitution and the question is, therefore, whether the First Congress knowingly or inadvertently provided only against abridgement of a right which

[6] 1 J. Stephen, *A History of the Criminal Law of England* (London: 1883), 233–243. The statute is summarized at id., 234–235.

[7] 3 How. St. Tr. 1 (1627).

[8] 3 Charles 1, c. 1. Debate on the Petition, as precipitated by *Darnel's Case*, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on *habeas corpus* to effectuation of the right to bail. Id., 69.

[9] *Jenkes' Case*, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[10] 31 Charles 2, c. 2. The text is in 2 Z. Chaffee (ed.), *Documents on Fundamental Human Rights* (Cambridge: 1951), 327–340.

[11] 1 W. & M. st. 2, c.2, clause 10.

[12] 7 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d sess. (Washington: 1909), 3813. "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[13] 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Constitution* (Philadelphia: 2d ed. 1836), 658.

[14] 1 *Annals of Congress* 438 (1789).

they did not confer or protect in itself or whether the phrase "excessive bail" was intended to or thought to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States which had its origin in a provision of the Massachusetts Body of Liberties of 1641,[15] guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions,[16] this guarantee was contained in the congressional enactment of the Northwest Ordinance in 1787,[17] along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789 [18] enacted contemporaneously with the passage through Congress of the Bill of Rights. It would thus appear that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

Upon a resolution of this ambiguity arising from the text of the Eighth Amendment depends a determination whether "preventive detention," the denial of bail to an accused, unconvicted defendant because it is feared or it is found probable that if released he will be a danger to the community, is constitutionally permissible.[19] Although dicta in one Supreme Court case suggests that Con-

[15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." Reprinted in 1 Z. Chafee (ed.), *Documents on Fundamental Human Rights* (Cambridge: 1951), 79, 82.

[16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, *The Federal and State Constitutions*, H. Doc. No. 357, 59th Congress, 2d sess. (Washington: 1909), 3061 (Pennsylvania, 1682). The 1776 Pennsylvania constitution contained the same clause in Sect. 28 and in Sect. 29 was a clause guaranteeing against excessive bail. Id., 3089.

[17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 *Journals of the Continental Congress* 334 (1787), reprinted in 1 Stat. 50 n.

[18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein. . . ." § 33, 1 Stat. 91 (1789).

[19] Congress has provided for pretrial detention without bail of certain persons and certain classes of persons in the District of Columbia. D.C. Code, § 23-1321 *et seq.*, held constitutional in *United States* v. *Edwards*, 430 A. 2d 1321 (D.C. App. 1981), *cert. den.*, 455 U.S. 1022 (1982). The law applies only to persons charged with violating statutes applicable exclusively in the District of Columbia, *United States* v. *Thompson*, 452 F. 2d 1333 (C.A.D.C. 1971), *cert. den.*, 405 U.S. 998 (1978), while in

gress has discretion to determine whether persons or classes of persons may be admitted to bail,[20] dicta in other cases appear to be contrary.[21] Resolution of this question would similarly determine whether an application of the guarantee to the States would represent a meaningful limitation or merely one which a state legislature could change at will.[22]

With regard to the issue of excessiveness, the Court has held that bail is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure that one accused will stand trial and submit to sentence if found guilty.[23] If bail is set at an excessive figure, one must move for a reduction and if the motion is denied appeal to the Court of Appeals and then to the Supreme Court Justice sitting for that circuit if unsuccessful.[24] The Amendment is apparently inapplicable to postconviction release pending appeal but the practice has apparently been to grant such releases.[25]

## EXCESSIVE FINES

The Supreme Court has had little to say with reference to excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the

other federal courts, the Bail Reform Act of 1966, 80 Stat. 214, 18 U.S.C. §§ 3146–3152, providing generally for bail or other pretrial release, governs. Proposals for a federal preventive detention statute have been frequently made but it yet is unenacted, see, e.g., *Hearings on Preventive Detention*, Hearings before the Senate Judiciary Subcommittee on Constitutional Rights, 91st Congress, 2d sess. (1970) (which contains extensive legal arguments and a bibliography), while such laws have been adopted in some States. *Parker* v. *Roth*, 202 Nebr. 850, 278 N.W. 2d 106, *cert. den.*, 444 U.S. 920 (1979).

[20] *Carlson* v. *Landon*, 342 U.S. 524 (1952) (case actually involved aliens being held for deportation and ruling was they could be denied bail). For actual holdings favoring preventive detention, *see United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981), *cert. den.*, 455 U.S. 1022 (1982); *Parker* v. *Roth*, 202 Nebr. 850, 278 N.W. 2d 106, *cert. den.*, 444 U.S. 920 (1979).

[21] *Stack* v. *Boyle*, 342 U.S. 1 (1951). *Cf. Bandy* v. *United States*, 82 Sup. Ct. 11 (1961) (Justice Douglas as Circuit Justice); *United States* v. *Motlow*, 10 F.2d 657 (C.A. 7, 1926) (Justice Butler as Circuit Justice). For a recent rejection of preventive detention, *see Hunt* v. *Roth*, 648 F.2d 1148 (C.A. 8, 1981), *vacated and remanded to dismiss as moot*, 455 U.S. 478 (1982).

[22] "Bail, of course, is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. *Pilkinton* v. *Circuit Court*, 324 F.2d 45, 46 (C.A. 8, 1963); *see Robinson* v. *California*, 370 U.S. 660, 666 (1962), and id., at 675 (Douglas, J., concurring). But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness." *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971) (concerning an equal protection clause attack on a state bail statute).

[23] *Stack* v. *Boyle*, 342 U.S. 1, 4–6 (1951).

[24] Id., 6–7.

[25] *Hudson* v. *Parker*, 156 U.S. 277 (1895).

excessiveness of the fines was apparent on the face of the record.[26] In a dissent, Justice Brandeis once contended that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct imposed additional mailing cost, a fine in effect, which, since the costs grew indefinitely each day, was an unusual punishment proscribed by this Amendment.[27] The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the equal protection clause,[28] thus obviating any necessity to develop the meaning of "excessive fines" as applied to the person sentenced. The meaning of the phrase as applied to the quantum of punishment for any particular offense, independent of the ability to pay the offender, is something which may await litigation.

## CRUEL AND UNUSUAL PUNISHMENTS

During congressional consideration of this provision one Member objected to "the import of [the words] being too indefinite" and another Member said: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind." [1] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants [2] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates as well some concern with arbitrary and disproportionate punishments.[3] Though

[26] *Ex parte Watkins*, 7 Pet. (32 U.S.) 568, 574 (1833).

[27] *Milwaukee Pub. Co.* v. *Burleson*, 255 U.S. 407, 435 (1921).

[28] *Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970).

[1] 1 *Annals of Congress* 754 (1789).

[2] E.g., 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Constitution* (Philadelphia : 2d ed., 1836), 111; 3 id., 447-452.

[3] *See* Granucci, " 'Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning," 57 Calif. L. Rev. 839 (1969). Disproportionality, in any event, was utilized by the Court in *Weems* v. *United States*, 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty," *but see Furman* v. *Georgia*, 408 U.S. 238, 276 n. 20 (1972) (Justice Brennan concurrring), although it may have figured in *Weems*, *supra*, 377, and in *Trop* v. *Dulles*, 356 U.S. 86, 100 n. 32 (1958) (plurality opinion).

few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

***Style of Interpretation.***—At first, the Court was inclined to an historical style of interpretation, determining whether or not a punishment was "cruel and unusual" by looking to see if it or a sufficiently similar variant was considered "cruel and unusual" in 1789.[4] But in *Weems* v. *United States* [5] it was concluded that the framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789 but had intended to prevent the authorization of "a coercive cruelty being exercised through other forms of punishment." The Amendment therefore was of an "expansive and vital character" [6] and, in the words of a later Court, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [7] The proper approach to an interpretation of this provision has been one of the major points of difference among the Justices in the capital punishment cases.[8]

***"Cruel and Unusual Punishments".***—"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture [such as drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." [9] In thus upholding capital punishment inflicted by a firing squad, the Court not only looked to traditional practices but examined the history of executions in the territory concerned, the military practice and current writings on the death penalty.[10] The Court next approved, under the Fourteenth Amendment's due process clause rather than under the Eighth Amendment, electrocution as a permissible method of administering punishment.[11]

[4] *Wilkerson* v. *Utah*, 99 U.S. 130 (1878); *In re Kemmler*, 136 U.S. 436 (1890); *cf. Weems* v. *United States*, 217 U.S. 349, 368-372 (1910). On the present Court, Justice Rehnquist appears to be the only Member to subscribe to basically a purely historical approach. E.g., *Woodson* v. *North Carolina*, 428 U.S. 280, 308 (1976) (dissenting). *Cf. McGautha* v. *California*, 402 U.S. 183, 225–226 (1971) (Justice Black concurring).

[5] 217 U.S. 349 (1910).

[6] Id., 376-377.

[7] *Trop* v. *Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion).

[8] *See* Radin, "The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause," 126 U. Pa. L. Rev. 989 (1978).

[9] *Wilkerson* v. *Utah*, 99 U.S. 130, 135 (1878).

[10] Ibid. *See also Pervear* v. *Commonwealth*, 5 Wall. (72 U.S.) 475, 479–480 (1867).

[11] *In re Kemmler*, 136 U.S. 436 (1890).

Many years later, a divided Court, assuming the applicability of the Eighth Amendment to the States, held that a second electrocution following a mechanical failure at the first which injured but did not kill the condemned man did not violate the proscription.[12]

Divestiture of the citizenship of a natural born citizen was held in *Trop* v. *Dulles*,[13] again by a divided Court, to be constitutionally forbidden as a penalty more cruel and "more primitive than torture," inasmuch as it entailed statelessness or "the total destruction of the individual's status in organized society," exposed him to banishment. "The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." A punishment must be examined "in light of the basic prohibition against inhuman treatment," and the Amendment was intended to preserve the "basic concept . . . [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilized standards." [14]

***Capital Punishment.***—In *Trop*, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the agruments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." [15] But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, which eventually resulted in the Court's confronting the issues involved, although the answers were not, it is fair to say, consistent one with another.

A series of cases testing the means by which the death penalty was imposed first came to the Court,[16] culminating in what ap-

[12] *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947). Justice Frankfurter tested the issue by due process standards. Id., 470 (concurring).

[13] 356 U.S. 86 (1958). Four Justices joined the plurality opinion while Justice Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. Id., 114. Four Justices dissented, denying that denationalization was a punishment but was a means by which Congress regulated discipline in the armed forces. Id., 121, 124–127.

[14] Id., 99–100.

[15] Id., 99. In *Rudolph* v. *Alabama*, 375 U.S. 889 (1963), Justices Goldberg, Douglas, and Brennan, dissenting from a denial of *certiorari*, argued that the Court should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken or endangered human life," and presented a line of argument questioning the validity of the death penalty in any event, under the Eighth Amendment.

[16] E.g., *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (exclusion of death-scrupled jurors); *see also Davis* v. *Georgia*, 429 U.S. 122 (1976), and *Adams* v. *Texas*, 448 U.S. 38 (1980) (explicating *Witherspoon*). The Eighth Amendment was the basis for grant of review in *Boykin* v. *Alabama*, 395 U.S. 238 (1969) and *Maxwell* v. *Bishop*, 398 U.S.

peared to be a decisive rejection of the attack on the death in *McGautha* v. *California*.[17] Nonetheless, the Court then did agree to hear a series of cases directly raising the question of the validity of capital punishment under the cruel and unusual punishments clause, and to considerable surprise, occasioned by the shift of Justices Stewart and White, the Court in *Furman* v. *Georgia* [18] held that the death penalty, at least as administered, did violate the Eighth Amendment. The five Justices in the majority each wrote a concurring opinion which approached the matter from a different angle so that categorization is impossible. Two Justices concluded that the death penalty *per se* was "cruel and unusual" because the imposition of capital punishment "does not comport with human dignity" [19] or because it is "morally unacceptable" and "excessive." [20] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.[21] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner [22] and so infrequently that it served no justifying end.[23]

262 (1970), but membership changes in the Court resulted in decisions on other grounds.

[17] 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with *Crampton* v. *Ohio*. *McGautha* raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the due process clause; *Crampton* raised the question whether due process was violated when both guilt or innocence and the imposition of possibly a death penalty upon a finding of guilt were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity what defendant should live and who die; while bifurcated proceedings might be desirable, they were not required by due process.

[18] 408 U.S. 238 (1972).

[19] Id., 257 (Justice Brennan).

[20] Id., 314 (Justice Marshall).

[21] Id., 240 (Justice Douglas).

[22] Id., 306 (Justice Stewart).

[23] Id., 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases, that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." Id., 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.

Inasmuch as only two of the *Furman* Justices thought the dealth penalty to be *per se* invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would comport with the varying expressions in the other three majority opinions as to what was wrong with the system.[24] Enactment of death penalty statutes by 35 States following *Furman* and renewed litigation led to a series of cases in which the elucidation which is supposed to be the result of litigation did not come about.[25] Instead, while the Court seems firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[1] it has chosen several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court has found that the penalty of death for deliberate murder is not *per se* cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Furman*.[2] The Court is profoundly divided and it is only by combining the points of agreements among the varying groupings of Justices that

[24] Collectors of judicial "put downs" of colleagues should note Justice Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." *Woodson* v. *North Carolina*, 428 U.S. 280, 317 (1976) (dissenting).

[25] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." *International Assn. of Machinists* v. *Gonzales*, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See*, e.g., Chief Justice Burger, *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher."); Justice White, id., 622 (concurring in result) ("The Court has now completed its about-face since *Furman* . . . ."); and Justice Rehnquist, id., 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed."), and id., 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years.").

[1] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see Coker* v. *Georgia*, 433 U.S. 584 (1977) (rape); *Enmund* v. *Florida*, 458 U.S. 782 (1982) (felony murder committed by confederate).

[2] Justice Brennan and Marshall adhere to the view that the death penalty is *per se* unconstitutional. E.g., *Coker* v. *Georgia*, 433 U.S. 584, 600 (1977); *Lockett* v. *Ohio*, 438 U.S. 586, 619 (1978); *Enmund* v. *Florida*, 458 U.S. 782, 801 (1982).

it is possible to ascertain the form which permissible statutory schemes may take.[3]

Inasmuch as the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[4] legislatures turned to enactment of statutes that purported to do away with these difficulties by, on the one hand, choosing certain offenses, various kinds of murders, and providing automatically for imposition of the death penalty upon conviction, or, more commonly, providing specified aggravating and mitigating factors that the sentencing authority should consider in imposing sentence and establishing special procedures to follow in capital cases. In five cases in 1976, the Court approved the latter approach and refined its analysis of the necessary procedures, and it rejected the former approach.[5]

[3] A comprehensive evaluation of the multiple approaches followed in the Court and the doctrinal position of the Justices may be found in Radin, "The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause," 126 U. Pa. L. Rev. 989 (1978). Basically, the Court is divided on two large issues. First, the Justices disagree with respect to the degree of deference to give legislative judgments in this area. Id., 1001-1030. Justices Brennan and Marshall among the present Justices are least deferential, while Chief Justice Burger and Justice Rehnquist are extremely deferential. Justices Stewart and White, the "swing" Justices during most of the period, varied in degrees of deference. *Compare Gregg* v. *Georgia*, 428 U.S. 153, 168-187 (1976) (plurality opinion of Justice Stewart), *with Woodson* v. *North Carolina*, 428 U.S. 280 (1976) (plurality opinion of Justice Stewart); *compare Roberts* v. *Louisiana*, 428 U.S. 325, 337 (1976) (Justice White dissenting), *with Coker* v. *Georgia*, 433 U.S. 584 (1977) (plurality opinion of Justice White), and *Enmund* v. *Florida* 458 U.S. 782 (1982) (opinion of the Court by Justice White). Second, the Justices disagree with respect to the substantive interpretation of the cruel and unusual punishments clause. Radin, *supra*, 1030-1064. Only Justice Rehnquist appears to view the clause as proscribing only what was proscribed in 1789, but while the other Justices apply the "evolving standards of decency" test of *Trop*, they apply it differently. Justices Brennan and Marshall apply a normative standard by which they identify principles determinative of a constitutional concept of cruelty, while Chief Justice Burger and, to a lesser extent, Justices Powell and Blackmun, adopt a positivist approach, looking to see what legislative enactments, jury verdicts, referenda, and public opinion polls say about modern concepts of cruelty. Justices Stewart and White apply both tests in different degrees of mixture. Justice O'Connor, replacing Justice Stewart, appears to apply, first, the deference standard, and, second, the positivist approach, to decisionmaking in this area. *See Enmund* v. *Florida*, *supra*, 801 (dissenting); *Eddings* v. *Oklahoma*, 455 U.S. 104, 117 (1982) (concurring).

[4] Thus, Justice Douglas thought the penalty had been applied discriminatorily, *Furman* v. *Georgia*, 408 U.S. 238 (1972), Justice Stewart thought it had been applied in an arbitrary, "wanton," and "freakish" manner id., 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. 313.

[5] The principal opinion was in *Gregg* v. *Georgia*, 428 U.S. 153 (1976). Statutes of two other States were similarly sustained, *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Jurek* v. *Texas*, 428 U.S. 262 (1976), while those of two other States were invalidated. *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); *Roberts* v. *Louisiana*, 428 U.S. 325 (1976).

First, the Court concluded that the death penalty as a punishment for murder did not itself constitute cruel and unusual punishment. While there are differences of degree among the seven Justices in the majority on this point, they do all seem to concur in the position that reenactment of capital punishment statutes by 35 States precludes the Court from concluding that this form of penalty is no longer acceptable to a majority of the American people; rather, it is concluded, a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, for it to decide that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as do all other statutes, comes before the courts bearing a presumption of validity which can only be overcome upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Neither is the punishment of death disproportionate to the crime being punished, murder.[6]

Second, a different majority, however, concluded that a statute making mandatory the imposition of death for certain crimes involving the taking of human life was violative of the Eighth Amendment. In order to make its determination, the plurality looked to history and traditional usage, to legislative enactment, and to jury determinations. Because death is a unique punishment, the sentencing process must provide an opportunity for individual consideration of the character and record of each convicted defend-

[6] *Gregg* v. *Georgia*, 428 U.S. 153, 168-187 (1976) (Justices Stewart, Powell, and Stevens); *Roberts* v. *Louisiana*, 428 U.S. 325, 350-356 (1976) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment; it was not clear in this opinion (although he did in later opinions) that he accepted the proportionality analysis, but see id., 353, and the separate dissent of Justice Rehnquist in *Woodson* v. *North Carolina*, 428 U.S. 280, 308 (1976), and his dissent and those of Chief Justice Burger and Justice Blackmun in *Furman* show a rejection of proportionalty analysis. Justices Brennan and Marshall dissented, reiterating their *Furman* views. *Gregg*, *supra*, 227, 231.

ant and his crime along with mitigating and aggravating circumstances.[7]

Third, while the imposition of death is constitutional *per se*, the procedure by which sentence is passed must be so structured as to reduce arbitrariness and capriciousness as much as possible.[8] What emerges from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge,[9] be given standards to govern its exercise of discretion and the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[10] (2) that to prevent

[7] *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); *Roberts* v. *Louisiana*, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens composed the plurality utilizing the analysis stated in the text, id., 288–303, with Justices Brennan and Marshall concurring on the basis of their own views of the death penalty. Id., 306, 307, 336. The dissents basically argued that adoption of mandatory sentencing structures demonstrated that they did comport with civilized standards and thus did not violate the cruel and unusual punishments clause. *Woodson*, *supra*, 308 (Justice Rehnquist); *Roberts*, *supra*, 337 (Justice White). In *Roberts* v. *Louisiana*, 431 U.S. 633 (1977), the Court, again 5-to-4, held unconstitutional a provision of law making mandatory the imposition of death upon conviction of first-degree murder of a police officer engaged in the performance of his lawful duties. The Court has specifically reserved the question of mandatory death for a prisoner—or escapee—under a life sentence who murders. *Robert*, *supra*, 428 U.S., 334 n. 9; *Roberts*, *supra*, 431 U.S., 637 n. 5; *Lockett* v. *Ohio*, 438 U.S. 586, 604 n. 11 (1978).

[8] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg* v. *Georgia*, 428 U.S. 153, 169 n. 15 (1976), a comment directed to the *Furman* opinions but equally applicable to these cases and to *Lockett*. *See Marks* v. *United States*, 430 U.S. 188, 192–194 (1977). Thus, two Justices would reject capital punishment outright, four Justices would find the practice valid, at least where intentional homicide is the crime and perhaps insofar as the legislature provides adequate standards to avoid arbitrariness. Therefore, whether a sentencing structure meets Court approval depends upon that structure's conformance to the Stewart plurality's concept.

[9] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system. *Gregg* v. *Georgia*, 428 U.S. 153, 190 (1976), but agreed that sentencing may constitutionally be vested in the trial judge. *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976). The argument was noted in *Lockett* v. *Ohio*, 438 U.S. 586, 609 n. 16 (1978), but not reached. *See Gardner* v. *Florida*, 430 U.S. 349 (1977) (jury advised life sentence but judge imposed death upon basis of undisclosed presentence report, due process violated by nondisclosure but no indication in Court's opinions that overriding jury recommendation objectionable).

[10] *Gregg* v. *Georgia*, 428 U.S. 153, 188–195 (1976). Justice White seemed close to the plurality on the question of standards, id., 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with *Furman*, at least Justice Rehnquist denied the constitutional requirement of standards in any event. *Woodson* v. *North Carolina*, 428 U.S. 280, 319–321 (1976) (dissenting). In *McGautha* v. *California*, 402 U.S. 183, 207–208 (1971), the Court had rejected the argument that the absence of standards violated the due process clause. On the vitiation of *McGautha*, see *Gregg*, *supra*, 195 n. 47, and *Lockett* v. *Ohio*, 438 U.S. 586, 598–599 (1978).

jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, will be presented rather than a unitary proceeding at which everything is presented together;[11] (3) that special forms of appellate review be provided not only of the conviction but of the sentence to ascertain that it was in fact fairly imposed both on the facts of the individual case and by comparison with the penalties imposed in similar cases.[12]

One of the principal points of *Furman* and of the *Gregg* series of cases, perhaps the overarching principle, was that the jury not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime."[13] Dis-

[11] *Gregg* v. *Georgia*, 428 U.S. 153, 163, 190–192, 195 (1976) (plurality opinion). *McGautha* v. *California*, 402 U.S. 183 (1971), had also rejected as a due process requisite bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. In its discussion of *McGautha* in *Gregg*, *supra*, 195 n. 47, it noted both holdings but limited the previous case explicitly only insofar as the difference on standards was relevant. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters, in Justice White's opinion, *Roberts* v. *Louisiana*, 428 U.S. 325, 337, 358 (1976), rejected bifurcation and viewed the plurality as requiring it.

[12] *Gregg* v. *Georgia*, 428 U.S. 153, 195, 198 (1976) (plurality); *Proffitt* v. *Florida*, 428 U.S. 242, 250–251, 253 (1976) (plurality); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (plurality). The Stewart plurality does not expressly mandate this form of appellate review but it does seem to suggest that a system absent something like it would be suspect. Justice White's opinion approves the system's fairness without appearing to suggest that the process would fall without it. *Gregg*, *supra*, 211–212, 222–224. It should be noted that *Lockett* v. *Ohio*, 438 U.S. 586 (1978), by giving juries greater discretion with respect to mitigating factors to consider, makes difficult the appellate comparison of individual sentences.

[13] *Gregg* v. *Georgia*, 428 U.S. 153, 197–198 (1976) (plurality). The standards must be relatively precise and instructive in providing guidance, *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), but the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. *Jurek* v. *Texas*, 428 U.S. 262, 275–276 (1976). *Cf. Estelle* v. *Smith*, 451 U.S. 454 (1981) (holding self-incrimination and counsel clauses applicable to psychiatric examination, at least when doctor testifies about his conclusions with respect to future dangerousness). Government may not enhance the risk of an unwarranted conviction and death sentence through its structuring of its capital system. *Beck* v. *Alabama*, 447 U.S. 625 (1980), held unconstitutional a statute which did not permit the jury the option of convicting on a lesser included offense, when that would be justified by the evidence. *Cf. Hopper* v. *Evans*, 456 U.S. 605 (1982). Because the jury had to choose between conviction or acquittal, the statute created the risk that it would convict because it felt defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when the jury should concentrate on determining whether the prosecution had proved beyond a reasonable doubt defendant's guilt of the offense.

cretion was channeled and rationalized. But in *Lockett* v. *Ohio*,[14] the state law was invalidated because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law; in other words, the jury's discretion was curbed too much. "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [15] Thus, a great measure of discretion is again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[16]

In *Coker* v. *Georgia*,[17] the Court held that the state may not impose a death sentence upon a rapist who does not take a human life.[18] The Court announced that the standard under the Eighth Amendment was that punishments are barred when they are "excessive" in relation to the crime committed. A "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." [19] In order that judgment not be or appear to be the subjec-

[14] 438 U.S. 586 (1978). The opinion of the Court by Chief Justice Burger was joined only by Justices Stewart, Powell, and Stevens. Justices Blackmun, Marshall, and White concurred in the result on separate and conflicting grounds. Id., 613, 619, 621. Justice Rehnquist dissented. Id., 628. *See also Eddings* v. *Oklahoma*, 455 U.S. 104 (1982).

[15] 438 U.S., 604 (plurality).

[16] "I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.' " Id., 623 (Justice White).

[17] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is *per se* invalid, id., 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id., 601. Chief Justice Burger and Justice Rehnquist dissented. Id., 604.

[18] Although the Court states the issue in the context of the rape of an adult woman, id., 592, the opinion at no point seeks to distinguish between adults and children. Justice Powell's concurrence expressed the view that death is ordinarily disproportionate for the rape of an adult woman, but that some rapes might be so brutal or heinous as to justify it. Id., 601.

[19] Id., 592.

tive conclusion of individual Justices, attention must be given to objective factors, predominantly "to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions. . . ." [20] While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole State providing for death for the rape of an adult woman and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of injury to the person and the public." [21]

Death was ruled an unconstitutional penalty for felony murder, where the defendant did not himself kill, or attempt to take life, or intend that anyone be killed.[22] The Court applied the *Coker* analysis. It determined that while a few more States imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus similarly opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took life nor intended to do so. Because the death penalty is a likely deterrence only when murder is the result of premeditation and deliberation, and because the justification of retribution depends upon the degree of the defendant's culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and not as a result of his intention serves neither of the purposes underlying the penalty.[23]

Thus, the law of capital punishment remains in flux. It appears that at least some of the Justices feel that the Court has created too many procedural and substantive opportunities for delay

[20] Ibid.

[21] Id., 598.

[22] *Enmund* v. *Florida*, 458 U.S. 782 (1982). Justice White wrote the opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, with Justices Powell and Rehnquist and Chief Justice Burger, dissented. Id., 801.

[23] Assessing the evidence of contemporary standards, Justice O'Connor thought the evidence did not support a finding that capital punishment was not appropriate in felony murder situations. Id., 816–823. She also objected to finding the penalty disproportionate, first because of the degree of participation of defendant in the underlying crime, id., 823–826, but because the Court appeared to be constitutionalizing a standard of intent required under state law.

of and even defeat of the carrying out of death sentences and that the Court ought to afford the States more leeway.[24] On the other hand, the Court continues to treat death as "different," surrounding its imposition with greater safeguards than systems for other sentencings.[25] It continues to narrow, to perhaps only the actual taking of life, the offenses for which death may be the penalty, although those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception.[1] But the end does not appear to be in sight for judicial tinkering with the procedures by which death in appropriate cases may be imposed, and the ruling in *Lockett*, concerning mitigating factors, may yet presage an opening up of the aggravating factors side of the matter.[2] In any event, the number of executions have been small since the 1976 series of cases,[3] and with large numbers of convicted defendants on "death row" a continuation of litigation is assured.

***Proportionality.***—Justice Field in *O'Neil* v. *Vermont*[4] argued in dissent that in addition to prohibiting punishments deemed barbarous and inhumane the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In *Weems* v. *United States*,[5] this view was adopted by the Court in striking down a sentence in the Philippine Islands of 15 years incarceration at hard labor with chains on his ankles, loss of all civil rights, and perpetual surveillance for the offense of falsifying public documents. The

[24] E.g., *Estelle* v. *Jurek*, 450 U.S. 1014 (1981) (Justice Rehnquist dissenting from denial of *certiorari*); *Coleman* v. *Balkcom*, 451 U.S. 949, 956 (1981) (Justice Rehnquist dissenting from denial of *certiorari*).

[25] E.g., *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Green* v. *Georgia*, 442 U.S. 95 (1979); *Estelle* v. *Smith*, 451 U.S. 454 (1981). *But see Dobbert* v. *Florida*, 432 U.S. 282 (1977) (imposition of death sentence under valid statute on one who committed murder while State was without law in interval between invalidation of old and enactment of new did not violate ex post facto clause of equal protection clause); *Gilmore* v. *Utah*, 429 U.S. 1012 (1976) (State could execute one who has made a knowing and intelligent waiver of his rights, even though substantive validity of state penalty statute has not been passed on).

[1] The federal law, 49 U.S.C. § 1472, imposes death only when death occurs during commission of the hijacking. But the treason statute does not require a death to occur and represents a situation in which great and fatal danger might be presented. 18 U.S.C. § 238.

[2] *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

[3] *Compare Coleman* v. *Balkcom*, 451 U.S. 949 (1981) (Justice Stevens concurring) *with* id., 956 (Justice Rehnquist dissenting).

[4] 144 U.S. 323, 339–340 (1892). *See also Howard* v. *Fleming*, 191 U.S. 126, 135–136 (1903).

[5] 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines which it interpreted as having the same meaning. Id., 367.

Court compared the sentence with those meted out for other offenses and concluded: "This contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." [6] Excessive punishments are therefore condemned.[7]

The principle has been carried to as yet undefined new lengths by the Court. In *Robinson* v. *California* [8] the Court set aside the conviction under a law which made it a crime to "be addicted to the use of narcotics" on Eighth Amendment grounds. The statute was bad because it punished the "mere status" of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the State or had committed any act at all within the State's power to proscribe and because addiction is an illness which however it is acquired physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act [9] or it could stand for the principle that if one lacks the will to do or not to do what the law charges one to do or not to do it is cruel and unusual to punish him for this omission or commission, a holding of far-reaching importance.[10] Then, in *Powell* v. *Texas*,[11] a majority of the Justices took

[6] Id., 381.

[7] Proportionality in the context of capital punishment is considered *supra*, pp. 1404–1405.

[8] 370 U.S. 660 (1962).

[9] A different approach to essentially the same problem was *Thompson* v. *Louisville*, 362 U.S. 199 (1960), in which a conviction for loitering and disorderly conduct was set aside as being supported by "no evidence whatever" that defendant had done anything. *Cf. Johnson* v. *Florida*, 391 U.S. 596 (1968).

[10] Fully applied, the principle would raise to constitutional status the concept of *mens rea*, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, *see Lambert* v. *California*, 355 U.S. 225 (1957). More recently, this controversy has become a due process matter, with the holding that the due process clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. *See Rivera* v. *Delaware*, 429 U.S. 877 (1976), elaborated in *Patterson* v. *New York*, 432 U.S. 197, 202–205 (1977).

[11] 392 U.S. 514 (1968). The plurality opinion by Justice Marshall, joined by Justices Black and Harlan and Chief Justice Warren, interpreted *Robinson* as distinguishing between punishment of "status" and of "acts" and holding only that "mere status" could not be made punishable, and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as *actus reus*, *mens rea*, insanity, mistake, justification, and duress. Id., 532–537. Justice White concurred, finding that the record did not show that Powell had to be drunk in public, but like the dissent was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to

the latter view as the doctrine of *Robinson* but the result, because of a view of the facts held by one Justice, was a refusal to hold that under the circumstances a conviction of an alcoholic for public drunkenness was impermissible. Whether the Eighth Amendment or the due process clauses will govern the requirement of the recognition of capacity defenses to criminal charges, or whether either will, remains to be decided in future cases.

Turning from application of proportionality analysis to determine whether government may punish an act at all, one must evaluate the limitations the cruel and unusual punishments clause places upon the severity of sentences in noncapital cases. It appears that such analysis has been closely cabined in *Rummell* v. *Estelle*,[12] but the close division of the Court makes difficult the projection of future application of the doctrine. Defendant received a mandatory life sentence under a recidivist statute following his third felony conviction. The three nonviolent felonies had netted him a total of less than $230. Proportionality analysis appeared in the first part of the opinion to have been abandoned; the Court observed that because of the unique quality of the death penalty the attention in such cases to the gross disproportion of the sentence to the seriousness of the crime was of limited assistance and *Weems* was distinguished on the basis that the length of the sentence was of considerably less concern to the Court than were the brutal prison conditions and the postrelease denial of significant rights imposed under the peculiar Philippine penal code. Thus, in order to avoid improper judicial interference into state penal systems, Eighth Amendment judgments must be informed by objective factors to the maximum extent possible. But when the challenge to punishment goes to its length as compared to the seriousness of the offense, the choice is necessarily subjective. Therefore, the rule ap-

narcotics or to alcohol, be made criminal. Id., 548 Justices Fortas, Douglas, Brennan, and Stewart wished to adopt a rule that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." That is, one under an irresistable compulsion to drink or to take narcotics may not be punished for those acts. Id., 554, 567.

[12] 445 U.S. 263 (1980). The opinion, by Justice Rehnquist, was concurred in by Chief Justice Burger and Justices Stewart, White, and Blackmun. Dissenting were Justices Powell, Brennan, Marshall, and Stevens. Id., 285. The lower federal courts had begun developing proportionality standards largely like those considered and rejected in *Rummell*. *See*, e.g., *Hart* v. *Coiner*, 483 F.2d 136 (C.A. 4, 1972), *cert den.*, 415 U.S. 983 (1974); *Davis* v. *Zahradnick*, 432 F. Supp. 444 (D.C.W.D.Va. 1977), *rev'd sub nom. Davis* v. *Davis*, 585 F.2d 1226 (C.A.4, 1978), *opinion vacated and district court opinion adopted*, 601 F.2d 153 (C.A.4, 1979) (*en banc*), *vacated and remanded for reconsideration in light of Rummell*, 445 U.S. 947 (1980), *adhered to by an equally divided court*, 646 F.2d 123 (C.A.4, 1981), *rev'd per curiam sub. nom., Hutto* v. *Davis*, 445 U.S. 370 (1982).

pears to be that States may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter of legislative grace.[13]

Nonetheless, the Court did turn to treat the factors relied on by the defendant as demonstrating the disproportionality of the sentence and found them unavailing. First, the fact that the nature of the offense was nonviolent was found not necessarily relevant to the seriousness of a crime and the determination of what is a "small" amount of money, being so subjective, was a legislative task. In any event, the State could focus on recidivism, not the specific acts. Second, the comparison of punishment imposed for the same offenses in other jurisdictions was found unhelpful, differences and similarities being more subtle than gross, and in any case in a federal system one jurisdiction would always be more severe than the rest. Third, the comparison of punishment imposed for other offenses in the same State ignored the recidivism aspect.[14]

Efforts will no doubt be made to distinguish the facts of *Rummell* from other cases involving severe sentences, but the Court so far appears intent on forsaking all but the most lenient review of the length of sentences.[15]

***Prisons and Punishment.***—"It is unquestioned that '[c]onfinement' in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards." [16] "Conditions in prison must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions . . ., alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." [17] The context of the ap-

[13] *Rummell* v. *Estelle*, 445 U.S. 263, 271-275 (1980).

[14] Id., 275-282. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. Id., 285, 295-303.

[15] In *Hutto* v. *Davis*, 454 U.S. 370 (1982), on the authority of *Rummell*, the Court summarily reversed a decision holding disproportionate a prison term of 40 years and a fine of $20,000 for defendant's possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

[16] *Rhodes* v. *Chapman*, 452 U.S. 337, 345 (1981) (quoting *Hutto* v. *Finney*, 437 U.S. 678, 685 (1978)).

[17] Id., 347.

plication includes both the treatment of individuals [18] and the creation or maintenance of prison conditions that are inhumane to inmates generally.[19]

Beginning with *Holt* v. *Sarver*,[20] federal courts have found a prison or entire prison systems to violate the cruel and unusual punishments clause. More than two dozen States have had imposed broad remedial orders directed to improving prison conditions and ameliorating prison life.[21] But while the Supreme Court has in general agreed with the thrust of the lower court actions, it has in two recent cases set aside rather extensive decrees and cautioned the federal courts to proceed with deference to the decisions of state legislatures and prison administrators.[22] In both cases, however, the prisons involved were of fairly recent vintage and the conditions, while harsh, did not approach the conditions described in many of the lower court decisions that have been left undisturbed.[23] Thus, it may well be that concerns of federalism and of judicial restraint have actuated the Court to begin to curb the lower federal courts from moving with respect to systems in which the prevailing circumstances, given the resources States choose to devote to them, "cannot be said to be cruel and unusual under contemporary standards." [24]

***Limitation of the Clause to Criminal Punishments.***—The Court has held that the Eighth Amendment does not apply to the infliction of corporal punishment upon schoolchildren for disciplinary purposes, restraint there to be found in the due process clause. The provisions of the Amendment, the Court thought, in all three respects have been associated with the criminal process and should not be extended out of it.[25]

[18] E.g., *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (deliberate medical neglect of a prisoner violates Eighth Amendment); *Jackson* v. *Bishop*, 404 F.2d 571 (C.A. 8, 1968) (beating prisoner with leather strap violates Amendment).

[19] E.g., *Hutto* v. *Finney*, 437 U.S. 678 (1978).

[20] 309 F. Supp. 362 (D.C.E.D. Ark. 1970), *aff'd*., 442 F.2d 304 (C.A. 8, 1971), *district court ordered to retain jurisdiction until unconstitutional conditions corrected*, 505 F.2d 194 (C.A. 8, 1974). The Supreme Court sustained the decisions of the lower courts ultimately in *Hutto* v. *Finney*, 437 U.S. 678 (1978).

[21] *Rhodes* v. *Chapman*, 452 U.S. 337, 353–354 n. 1 (1981) (Justice Brennan concurring) (collecting cases). See Note, "Complex Enforcement: Unconstitutional Prison Conditions," 94 Harv. L. Rev. 626 (1981). Congress encouraged the bringing of much litigation by enacting the Civil Rights of Institutionalized Persons Act, P.L. 96–247, 94 Stat. 349, 42 U.S.C. § 1997 *et seq*.

[22] *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Rhodes* v. *Chapman*, 452 U.S. 337 (1981).

[23] The primary issue in both *Wolfish* and *Chapman* was that of "double-celling," the confinement of two or more prisoners in a cell designed for one. In both cases, the Court found the record did not support orders ending the practice.

[24] *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981).

[25] *Ingraham* v. *Wright*, 430 U.S. 651 (1977).

# NINTH AMENDMENT

## RIGHTS RETAINED BY THE PEOPLE

## UNENUMERATED RIGHTS

### NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

#### RIGHTS RETAINED BY THE PEOPLE

Aside from contending that a bill of rights was unnecessary, the Federalists responded to those opposing ratification of the Constitution because of the lack of a declaration of fundamental rights by arguing that inasmuch as it would be impossible to list all rights it would be dangerous to list some because there would be those who would seize on the absence of the omitted rights to assert that government was unrestrained as to those.[1] Madison adverted to this argument in presenting his proposed amendments to the House of Representatives. "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution."[2] It is clear from its text and from Madi-

[1] *The Federalist* No. 84 (Modern Library ed. 1937).

[2] 1 *Annals* of Congress 439 (1789). Earlier, Madison had written to Jefferson: "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." 5 *Writings of James Madison*, G. Hunt ed. (Philadelphia: 1904), 271–272. *See also* 3 J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833), § 1898.

son's statement that the Amendment states but a rule of construction, making clear that a Bill of Rights might not by implication be taken to increase the powers of the national government in areas not enumerated, and that it does not contain within itself any guarantee of a right or a proscription of an infringement.[3] Recently, however, the Amendment has been construed to be positive affirmation of the existence of rights which are not enumerated but which are nonetheless protected by other provisions.

The Ninth Amendment had been mentioned infrequently in decisions of the Supreme Court[4] until it became the subject of some exegesis by several of the Justices in *Griswold* v. *Connecticut*.[5] There an anticontraceptive statute was voided as an infringement of the right of marital privacy. Justice Douglas, writing the opinion of the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Thus, while privacy is nowhere mentioned, it is one of the values served and protected by the First Amendment, through its protection of associational rights, by the Third, the Fourth, and the Fifth, and the Justice recurred to the text of the Ninth Amendment, apparently to support the thought that these penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference.[6] Justice Goldberg, concurring, devoted several pages to the Amendment.

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, *protected from governmental infringement*, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . To

[3] To some extent, the Ninth and Tenth Amendment overlap with respect to the question of unenumerated powers, one of the two concerns expressed by Madison, more clearly in his letter to Jefferson but also present in his introductory speech. *Supra*, n. 2 and *text*.

[4] In *United Public Workers* v. *Mitchell*, 330 U.S. 75, 94–95 (1947), upholding the Hatch Act, the Court said: "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth, and Tenth Amendments." *See Ashwander* v. *TVA*, 297 U.S. 288, 300–311 (1936), and *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 143–144 (1939). *See also* Justice Chase in *Calder* v. *Bull*, 3 Dall. (3 U.S.) 386, 388 (1798), and Justice Miller for the Court in *Loan Assn.* v. *Topeka*, 20 Wall. (87 U.S.) 655, 662–663 (1875).

[5] 381 U.S. 479 (1965).

[6] Id., 484. Justice Clark joined this opinion without comment.

hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . . Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[7] While, therefore, neither opinion sought to make of the Ninth Amendment a substantive source of constitutional guarantees, both did read it as indicating a function of the courts to interpose a veto with regard to legislative and executive efforts to abridge other fundamental rights. In this case, both opinions seemed to concur that the fundamental right claimed and upheld was derivative of several express rights and in this case, really, the Ninth Amendment added almost nothing to the argument. But if there is a claim of a fundamental right which cannot reasonably be derived from one of the provisions of the Bill of Rights, even with the Ninth Amendment, how is the Court to determine, first, that it is fundamental, and second, that it is protected from abridgment?[8]

[7] Id., 488, 491, 492. Chief Justice Warren and Justice Brennan joined this opinion. *See* id., 507 (Justices Black and Stewart dissenting). Justice Black viewed the Ninth Amendment ground as essentially a variation of the due process argument under which Justices claimed the right to void legislation as irrational, unreasonable, or offensive, without finding any violation of an express constitutional provision.

Justices Harlan and White concurred in *Griswold*, id., 499, 502, without alluding to the Ninth Amendment but basing their conclusions on substantive due process, finding that the state statute "violates basic values implicit in the concept of ordered liberty," (citing *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)) Id., 500. It would appear that the source of the fundamental rights to which both Justices Douglas and Goldberg referred must be found in a concept of substantive due process, despite the former's express rejection of this ground. Id., 481–482.

[8] Notice the recurrence to the Ninth Amendment as a "constitutional 'saving clause'" in Chief Justice Burger's plurality opinion in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579–580 & n. 15 (1980). Scholarly efforts to establish the clause as a substantive protection of rights include J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, 1980), 34–41; C. Black, *Decision According to Law* (New York, 1981), critically reviewed in Van Alstyne, "Slouching Toward Bethlehem with the Ninth Amendment," 91 Yale L. J. 207 (1981).

# TENTH AMENDMENT

# RESERVED POWERS

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## RESERVED POWERS

### TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

### RESERVED POWERS

**Scope and Purpose**

"The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified." [1] "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." [2] That this provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the States was firmly settled by the refusal of both Houses of Congress to insert the word "expressly" before the word "delegated" [3] and confirmed by Madison's remarks in the course of the debate which took place while the proposed amendment was pending concerning Hamilton's plan to establish a national bank. "Interference with the power of the States was no constitutional

[1] *United States* v. *Sprague*, 282 U.S. 716, 733 (1931).

[2] *United States* v. *Darby*, 312 U.S. 100, 124 (1941). "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' [citing *Darby*], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U.S. 542, 547 n. 7 (1975). This policy was effectuated, at least for a time, in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

[3] *Annals of Congress* 767-768 (1789) (defeated in House 17 to 32); 2 B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 1150-1151 (defeated in Senate by unrecorded vote).

criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States." [4] Nevertheless, for approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes.

In *McCulloch* v. *Maryland*,[5] Marshall rejected the proffer of a Tenth Amendment objection and offered instead an expansive interpretation of the necessary and proper clause [6] to counter the argument. The counsel for the State of Maryland cited fears of opponents of ratification of the Constitution about the possible swallowing up of states' rights and referred to the Tenth Amendment to allay these apprehensions, all in support of his claim that the power to create corporations was reserved by that Amendment to the States.[7] Stressing the fact that the Amendment, unlike the cognate section of the Articles of Confederation, omitted the word "expressly" as a qualification of granted powers, Marshall declared that its effect was to leave the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument." [8]

**Effect of Provision on Federal Powers**

***Federal Taxing Power.***—Not until after the Civil War was the idea that the reserved powers of the States comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify, in part, an act of Congress. This result was first reached in a tax case—*Collector* v. *Day*.[1] Holding that a national income tax, in itself valid, could not be constitutionally levied upon the official salaries of state officers, Justice Nelson made the sweeping statement that "the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general govern-

[4] 2 *Annals of Congress* 1897 (1791).

[5] 4 Wheat. (17 U.S.) 316 (1819).

[6] *Supra*, *pp.* 370–375.

[7] *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 372 (1819) (argument of counsel).

[8] Id., 406. "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby*, 312 U.S. 100, 124 (1941).

[1] 11 Wall. (78 U.S.) 113 (1871).

ment as that government within its sphere is independent of the States." [2] In 1939, *Collector* v. *Day* was expressly overruled.[3] Nevertheless, the problem of reconciling state and national interest still confronts the Court occasionally, and was elaborately considered in *New York* v. *United States*,[4] where, by a vote of six-to-two, the Court upheld the right of the United States to tax the sale of mineral waters taken from property owned by a State. Speaking for four members of the Court, Chief Justice Stone justified the tax on the ground that "[t]he national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it." [5] Justices Frankfurter and Rutledge found in the Tenth Amendment "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." [6] Justices Douglas and Black dissented, saying: "If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have." [7]

***Federal Police Power.***—A year before *Collector* v. *Day* was decided, the Court held invalid, except as applied in the District of Columbia and other areas over which Congress has exclusive authority, a federal statute penalizing the sale of dangerous illuminating oils.[8] The Court did not refer to the Tenth Amendment. Instead, it asserted that the "express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested." [9] Similarly, in the *Employers' Liability Cases*,[10] an act of Congress making every carrier

[2] Id., 124.

[3] *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939). The Internal Revenue Service is authorized to sue a state Auditor personally and recover from him an amount equal to the accrued salaries which, after having been served with notice of levy, he paid to state employees delinquent in their federal income tax. *Sims* v. *United States*, 359 U.S. 108 (1959).

[4] 326 U.S. 572 (1946).

[5] Id., 589.

[6] Id., 584.

[7] Id., 595. Most recently, the issue was canvassed, but inconclusively, in *Massachusetts* v. *United States*, 435 U.S. 444 (1978).

[8] *United States* v. *Dewitt*, 9 Wall. (76 U.S.) 41 (1870).

[9] Id. 44.

[10] 207 U.S. 463 (1908). *See also Keller* v. *United States*, 213 U.S. 138 (1909).

engaged in interstate commerce liable to "any" employee, including those whose activities related solely to intrastate activities, for injuries caused by negligence, was held unconstitutional by a closely divided Court, without explicit reliance on the Tenth Amendment. Not until it was confronted with the Child Labor Law, which prohibited the transportation in interstate commerce of goods produced in establishments in which child labor was employed, did the Court hold that the state police power was an obstacle to adoption of a measure which operated directly and immediately upon interstate commerce. In *Hammer* v. *Dagenhart*,[11] five members of the Court found in the Tenth Amendment a mandate to nullify this law as an unwarranted invasion of the reserved powers of the States. This decision was expressly overruled in *United States* v. *Darby*.[12]

During the twenty years following *Hammer* v. *Dagenhart*, a variety of measures designed to regulate economic activities, directly or indirectly, were held void on similar grounds. Excise taxes on the profits of factories in which child labor was employed,[13] on the sale of grain futures on markets which failed to comply with federal regulations,[14] on the sale of coal produced by nonmembers of a coal code established as a part of a federal regulatory scheme,[15] and a tax on the processing of agricultural products, the proceeds of which were paid to farmers who complied with production limitations imposed by the Federal Government,[16] were all found to invade the reserved powers of the States. In *Schechter Corp.* v. *United States*,[17] the Court, after holding that the commerce power did not extend to local sales of poultry, cited the Tenth Amendment to refute the argument that the existence of an economic emergency justified the exercise of what Chief Justice Hughes called "extraconstitutional authority."[18]

In 1941, the Court came full circle in its exposition of this Amendment. Having returned to the position of John Marshall four years earlier when it sustained the Social Security[19] and Na-

[11] 247 U.S. 251 (1918).
[12] 312 U.S. 100 (1941).
[13] *Child Labor Tax Case*, 259 U.S. 20, 36, 38 (1922).
[14] *Hill* v. *Wallace*, 259 U.S. 44 (1922). *See also Trusler* v. *Crooks*, 269 U.S. 475 (1926).
[15] *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).
[16] *United States* v. *Butler*, 297 U.S. 1 (1936).
[17] 295 U.S. 495 (1935).
[18] Id., 529.
[19] *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937).

tional Labor Relations Act,[20] it explicitly restated Marshall's thesis in upholding the Fair Labor Standards Act in *United States* v. *Darby*.[21] Speaking for a unanimous Court, Chief Justice Stone wrote: "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attended the exercise of the police power of the states. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered." [22]

But even prior to 1937 not all measures taken to promote objectives which had traditionally been regarded as the responsibilities of the States had been held invalid. In *Hamilton* v. *Kentucky Distilleries Co.*,[23] a unanimous Court, speaking by Justice Brandeis, upheld "War Prohibition," saying: "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power." [24] And in a series of cases, which today seem irreconcilable with *Hammer* v. *Dagenhart*, it sustained federal laws penalizing the interstate transportation of lottery tickets,[25] of women for immoral purposes,[1] of stolen automobiles,[2] and of tick-infected cattle,[3] as well as a statute prohibiting the mailing of obscene matter.[4] It affirmed the power of Congress to punish the forgery of bills of lading purporting to cover interstate shipments of merchandise,[5] to subject

[20] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
[21] 312 U.S. 100 (1941). *See also United States* v. *Carolene Products Co.*, 304 U.S. 144, 147 (1938); *Case* v. *Bowles*, 327 U.S. 92, 101 (1946).
[22] 312 U.S. 100, 114, 123, 124 (1941). *See also Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945).
[23] 251 U.S. 146 (1919).
[24] Id., 156.
[25] *Lottery Case (Champion* v. *Ames)*, 188 U.S. 321 (1903).
[1] *Hoke* v. *United States*, 227 U.S. 308 (1913).
[2] *Brooks* v. *United States*, 267 U.S. 432 (1925).
[3] *Thornton* v. *United States*, 271 U.S. 414 (1926).
[4] *Roth* v. *United States*, 354 U.S. 476 (1957).
[5] *United States* v. *Ferger*, 250 U.S. 199 (1919).

prison-made goods moved from one State to another to the laws of the receiving State,[6] to regulate prescriptions for the medicinal use of liquor as an appropriate measure for the enforcement of the Eighteenth Amendment [7] and to control extortionate means of collecting and attempting to collect payments on loans, even when all aspects of the credit transaction took place within one State's boundaries.[8]

Notwithstanding these federal inroads into powers otherwise reserved to the States, the Court has held that Congress could not itself undertake to punish a violation of state law by discriminatory taxation, and in *United States* v. *Constantine*,[9] a grossly disproportionate excise tax imposed on retail liquor dealers carrying on business in violation of local law was held unconstitutional. However, Congress does not contravene reserved state police powers when it levies an occupation tax on persons engaged in the business of accepting wagers, coupled with severe penalties for failure to register and pay the tax.[10]

***Federal Regulations Affecting State Activities and Instrumentalities.***—It is not at all clear today to what extent principles derived from the Tenth Amendment limits federal legislative power to regulate state activities and instrumentalities.[11] The uncertainty stems from the ambiguous status of *National League of Cities* v. *Usery* [12] and the ambivalent attitude of the opinion in that case to the Tenth Amendment as a bar upon certain federal legislative powers. The Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was "undoubtedly within the scope of the Commerce Clause," [13] but it cautioned that "there are attributes of

[6] *Kentucky Whip & Collar Co.* v. *I.C.R. Co.*, 299 U.S. 334 (1937).

[7] *Everard's Breweries* v. *Day*, 265 U.S. 545 (1924).

[8] *Perez* v. *United States*, 402 U.S. 146 (1971).

[9] 296 U.S. 287 (1935). The Civil Rights Act of 1875, which made it a crime for one person to deprive another of equal accommodations at inns, theaters or public conveyances was found to exceed the powers conferred on Congress by the Thirteenth and Fourteenth Amendments and hence to be an unlawful invasion of the powers reserved to the States by the Tenth. *Civil Rights Cases*, 109 U.S. 3, 15 (1883). Congress has now accomplished this end under its commerce powers. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), but it is clear that the rationale of the *Civil Rights Cases* has been greatly modified if not severely impaired. *Cf. Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (13th Amendment); *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) (13th Amendment); *United States* v. *Guest*, 383 U.S. 745 (1966) (14th Amendment).

[10] *United States* v. *Kahriger*, 345 U.S. 22 (1953); *Lewis* v. *United States*, 348 U.S. 419 (1955).

[11] The matter is discussed more fully *supra*, *pp.* 156, 920–925.

[12] 426 U.S. 833 (1976).

[13] Id., 841.

sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[14] The Court approached but did not reach the conclusion that the Tenth Amendment was the prohibition here, not that it directly interdicted federal power because power which is delegated is *not* reserved, but that it implicitly embodied a policy against impairing the States' integrity or ability to function.[15] But, in the end, the Court held that the legislation was invalid, not because it violated a prohibition found in the Tenth Amendment or elsewhere, but because the law was "not within the authority granted Congress."[16] In subsequent cases, the Court and dissenters have written as if the Tenth Amendment was the prohibition, and dissenters have expressly declared that legislation did "violate" the Amendment.[17] Even if, however, the case does stand for some substantial limitation upon Congress' commerce power, it does not limit the exercise of power under the Reconstruction Amendments,[18] and other powers may be unaffected as well.[19]

[14] Id., 845.

[15] Id., 843.

[16] Id., 852.

[17] E.g., *FERC* v. *Mississippi*, 456 U.S. 742, 771 (1982) (Justice Powell dissenting); id., 775 (Justice O'Connor dissenting).

[18] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *City of Rome* v. *United States*, 446 U.S. 156 (1980); *Fullilove* v. *Klutznick*, 448 U.S. 448, 476–478 (1980) (plurality opinion of Chief Justice Burger).

[19] *See*, e.g., *United States* v. *Gillock*, 445 U.S. 360 (1980) (*League of Cities* no barrier to federal criminal prosecution of state legislator for activities and using evidence of activities clearly protected as to federal legislators by speech or debate clause).

# ELEVENTH AMENDMENT

## SUITS AGAINST STATES

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## SUITS AGAINST STATES

### ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### STATE IMMUNITY

#### Purpose and Early Interpretation

Eleventh Amendment jurisprudence has become over the years esoteric and abstruse and the decisions internally inconsistent one with another and sometimes within the same decision. At the same time, it is a vital element of federal jurisdiction that "go[es] to the very heart of [the] federal system and affect[s] the allocation of power between the United States and the several states." [1] Because of the centrality of the Amendment at the intersection of federal judicial power and the accountability of the States and their officers to federal constitutional standards, it has occasioned considerable dispute within and without the Court.[2]

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another State in 1793 [3] provoked

[1] C. Wright, *The Law of Federal Courts* (St. Paul: 4th ed. 1983), § 48 at 286.

[2] An extraordinary amount of writing on the Amendment and its interpretation has appeared in recent years. *See, e.g.*, Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One," 126 U. Pa. L. Rev. 515 (1978); Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States," 126 U. Pa. L. Rev. 1203 (1978); Baker, "Federalism and the Eleventh Amendment," 48 U. Colo. L. Rev. 139 (1977); Tribe, "Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism," 89 Harv. L. Rev. 682 (1976); Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," 83 Colum. L. Rev. 1889 (1983); Fletcher, "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction," 35 Stan. L. Rev. 1033 (1983); Orth, "The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power," 1983 U. Ill. L. Rev. 423; Nowak, "The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments," 75 Colum. L. Rev. 1413 (1975).

[3] *Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 419 (1793).

such angry reaction in Georgia and such anxieties in other States that at the first meeting of Congress following the decision the Eleventh Amendment was proposed by an overwhelming vote of both Houses and ratified with, what was for that day, "vehement speed."[4] *Chisholm* had been brought under that part of the jurisdictional provision of Article III that had authorized cognizance of "controversies . . . between a State and Citizens of another State." At the time of the ratification debates, opponents of the proposed Constitution had objected to the subjection of a State to suits in federal courts and had been met with conflicting responses, on the one hand, an admission that the accusation was true and that it was entirely proper so to provide, and, on the other hand, that the accusation was false and the clause applied only when a State was the party plaintiff.[5] So matters stood when in enacting the Judiciary Act of 1789, Congress in section 13 of the Act gave, without recorded controversy, the Supreme Court original jurisdiction of suits between States and citizens of other States.[6] *Chisholm* v. *Georgia* was brought under this jurisdictional provision to recover under a contract for supplies executed with the State during the execution. Four of the five Justices agreed that a State could be sued under this Article III jurisdictional provision and that under section 13 the Supreme Court properly had original jurisdiction.[7]

[4] The phrase is Justice Frankfurter's, from *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (dissenting), a federal sovereign immunity case. The amendment was proposed on March 4, 1794, when it passed the House and ratification occurred on February 7, 1795, when the twelfth State acted, there then being fifteen States in the Union.

[5] The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 423–425. In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making States subject to suit, 3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: 1836), 526–527, but both Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied States could be made party defendants, id., 533, 555–556, while Randolph (who had been a delegate, as well as a member of the Committee on Detail) granted that States could be and ought to be subject to suit. Id., 573. James Wilson, a delegate and member of the Committee on Detail, in the Pennsylvania ratifying convention, seemed to say that States would be subject to suit. 2 id., 491. *See* Hamilton, in *The Federalist* (Modern Library ed. 1937), No. 81, also denying state suability. *See* Fletcher, *op. cit.*, p. 1427 n. 2, 1045–1053 (discussing sources and citing other discussions).

[6] Id., 1053–1054. For a thorough consideration of passage of the Act itself, *see* J. Goebel, *History of The Supreme Court of the United States: Vol. I, Antecedents and Beginnings to 1801* (New York: 1971), 457–508.

[7] Id., 723–734; Fletcher, *op. cit.*, p. 1427 n. 2, 1054–1058.

The Amendment proposed by Congress and ratified by the States was directed specifically toward overturning the result in *Chisholm* and prevent suits against States by citizens of other States or by citizens or subjects of foreign jurisdictions. It did not, as other possible versions of the Amendment would have done, bar suits against States in the federal courts altogether.[8] That is, it barred suits against States based on the status of the party plaintiff and did not address the instance of suits based on the nature of the subject matter,[9] and so the early decisions seemed to understand the Amendment, although the point was not necessary to the decisions and thus the language is dicta.[10] In *Cohens* v. *Virginia*,[11] Chief Justice Marshall ruled for the Court that the prosecution of a writ of error to review a judgment of a state court, alleged to be in violation of the Constitution of laws of the United States did not commence or prosecute a suit against the State but simply was a continuation of one commenced by the State, and thus it could be brought under § 25 of the Judiciary Act of 1789.[12] But in the course of the opinion, the Chief Justice attributed adoption of the Eleventh Amendment not to objections to subjecting States to suits *per se* but to well-founded concerns about creditors being able to maintain suits in federal courts for payment [13] and stated his view that

[8] Id., 1058–1063; Goebel, *op. cit.*, p. 1428 n. 6, 736.

[9] Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

[10] One square holding, however, was that of Justice Washington, on Circuit, in *United States* v. *Bright*, 24 Fed. Cas. 1232 (No. 14,647) (C.C.D.Pa. 1809), that the Eleventh Amendment's reference to "any suit in law or equity" excluded admiralty cases, so that States were subject to suits in admiralty. This understanding, *see Governor of Georgia* v. *Madrazo*, 1 Pet. (26 U.S.) 110, 124 (1828); 3 J. Story, *Commentaries of the Constitution of the United States* (Boston: 1833), 560–561, did not receive a holding of the Court during this period, *see Madrazo, supra*; *United States* v. *Peters*, 5 Cr. (9 U.S.) 115 (1809); *Ex parte Madrazo*, 7 Pet. (32 U.S.) 627 (1833), and was held to be in error in *Ex parte New York* (No. 1), 256 U.S. 490 (1921).

[11] 6 Wheat. (19 U.S.) 264 (1821).

[12] 1 Stat. 73, 85, *supra*, pp. 718–720, 735–738.

[13] "It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted, and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced

the Eleventh Amendment did not bar suits against the States under federal question jurisdiction[14] and did not in any case reach suits against a State by its own citizens.[15]

In *Osborn* v. *Bank of the United States*,[16] the Court, again through Chief Justice Marshall, held that the Bank of the United States[17] could sue the Treasurer of Ohio, over Eleventh Amendment objections, because the plaintiff sought relief against a state officer rather than against the State itself. This ruling embodied two principles one of which has survived and one of which the Marshall Court itself abandoned presently. The latter holding was that a suit is not one against a State unless the State is a named party of record.[18] The former holding, the primary rationale

before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." 6 Wheat., 406–407.

[14] "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." Id., 382–383.

[15] "If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." Id., 412.

[16] 9 Wheat. (22 U.S.) 738 (1824).

[17] The Bank of the United States was treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it were a suit by the individual shareholders. *Bank of the United States* v. *Deveaux*, 5 Cr. (9 U.S.) 61 (1809).

[18] 9 Wheat., 850–858. For a reassertion of the Chief Justice's view of the limited effect of the Amendment, *see* id., 857–858. *But compare* id., 849. The holding was repudiated in *Governor of Georgia* v. *Madrazo*, 1 Pet. (26 U.S.) 110 (1828), in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now well settled that in determining whether a suit is prosecuted against a State "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." *In re Ayers*, 123 U.S. 443, 487 (1887).

through which the strictures of the Amendment are escaped, is that a state official possesses no official capacity when acting illegally and thus can derive no protection from an unconstitutional statute of a State.[19]

***Expansion of the Immunity of the States.***—Until the period following the Civil War, Chief Justice Marshall's understanding of the Amendment generally prevailed. But in the aftermath of that conflict, Congress for the first time, effectively gave the federal courts general federal question jurisdiction,[20] and a large number of States in the South defaulted upon their revenue bonds in violation of the contracts clause of the Constitution.[21] As bondholders sought relief in federal courts, the Supreme Court gradually worked itself into the position of holding that the Eleventh Amendment, or more properly speaking the principles "of which the Amendment is but an exemplification,"[22] is a bar not only of suits against a State by citizens of other States but by individuals generally, including citizens of the State against which suit is brought.[23]

Expansion as a formal holding occurred in *Hans* v. *Louisiana*,[24] a suit against the State by a resident of that State brought in federal court under federal question jurisdiction, alleging a violation of the contracts clause in the State's repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only the entertaining of a suit against a State by citizens of another State, or citizens or subjects of a foreign state, the Court nonetheless thought the literal language was an insufficient basis for decision. Rather, wrote Justice Bradley for the Court, the Eleventh Amendment was a result of the "shock of surprise throughout the country" at the *Chisholm* decision and reflected the determination that that decision was wrong and that federal jurisdiction did not extend to making defendants of unwill-

[19] 9 Wheat., 858–859, 868. For the flowering of the principle, *see Ex parte Young*, 209 U.S. 123 (1908).

[20] Act of March 3, 1875, 1, 18 Stat. 470. *Supra*, *pp.* 727–728.

[21] *See, e.g.*, Orth, "The Eleventh Amendment and the North Carolina State debt," 59 N.C. L. Rev. 747 (1981); Orth, "The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction," 2 Tul. Law. 2 (1980); Orth, "The Virginia State Debt and the Judicial Power of the United States," in D. Bodenhamer & J. Ely (eds.) *Ambivalent Legacy: A Legal History of the South* (Nashville 1983), 106.

[22] *Ex parte New York (No. 1)*, 256 U.S. 490, 497 (1921).

[23] E.g., *In re Ayers*, 123 U.S. 443 (1887); *Hagood* v. *Southern*, 117 U.S. 52 (1886); *The Virginia Coupon Cases*, 114 U.S. 269 (1885); *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446 (1883); *Louisiana* v. *Jumel*, 107 U.S. 711 (1882). In *Antoni* v. *Greenhow*, 107 U.S. 769, 783 (1883), three concurring Justices propounded the broader reading of the Amendment which soon prevailed.

[24] 134 U.S. 1 (1890).

ing States.[25] The amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. The views of the opponents of subjecting States to suit "were most sensible and just" and those views "apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. the reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." [1] "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law." [2] Thus, while the literal terms of the Amendment did not so provide, "the manner in which [*Chisholm*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing," [3] led the Court, unanimously, to hold that States could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

Then, in *Ex parte New York (No. 1)*,[4] the Court held that, absent consent to suit, a State was immune to suit in admiralty, the Eleventh Amendment's reference to "any suit in law or equity" notwithstanding. "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplication. . . . It is true the Amendment speaks only of suits in law or equity; but this is because . . . the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm* v. *Georgia* . . . from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case." [5] Just as *Hans* v. *Louisiana* had demonstrated the "impropriety of construing the Amendment" so as to permit federal question suits against a State, so "it seems to us equally clear that it cannot with propriety be construed to leave open a

[25] Id., 11.

[1] Id., 14–15.

[2] Id., 15–16.

[3] Id., 18–19. The Court acknowledged that Chief Justice Marshall's opinion in *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 382–383, 406–407, 410–412 (1821), was to the contrary, but observed that the language was unnecessary to the decision and thus dictum, "and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion." Id., 134 U.S., 20.

[4] 256 U.S. 490 (1921).

[5] Id., 497–498.

suit against a State in the admiralty jurisdiction by individuals, whether its citizens or not." [6]

And in extending protection against suits brought by foreign governments, the Court made clear the immunity flowed not from the Eleventh Amendment but from concepts of state sovereign immunity generally. "Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' " [7]

**The Nature of the States' Immunity**

A great deal of the difficulty in interpreting and applying the Eleventh Amendment stems from the fact that the Court has not been clear, or at least has not been consistent, with respect to what the Amendment really does and how it relates to the other parts of the Constitution. One view of the Amendment, set out above in the discussion of *Hans* v. *Louisiana, Ex parte New York,* and *Principality of Monaco* is that *Chisholm* was erroneously decided and that the Amendment's effect, its express language notwithstanding, was to restore the "original understanding," that is, restore the interpretation that Article III's grants of federal court jurisdiction did not extend to suits against the States. That view finds present day expression.[8] It explains the decision in *Edelman* v. *Jordan,*[9] in which the Court held that a State could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the

[6] Id., 498. *See also Florida Dept. of State* v. *Treasure Salvors,* 458 U.S. 670 (1982).

[7] *Principality of Monaco* v. *Mississippi,* 292 U.S. 313, 322–323 (1934) (quoting *The Federalist*), No. 81.

[8] E.g., *Employees of the Dept of Public Health and Welfare* v. *Dept. of Public Health and Welfare,* 411 U.S. 279, 291–292 (1973) (Justice Marshall concurring); *Nevada* v. *Hall,* 440 U.S. 410, 420–421 (1979); *Patsy* v. *Florida Board of Regents,* 457 U.S. 496, 520 (1982) (Justice Powell dissenting).

[9] 415 U.S. 651 (1974).

trial court." [10] But that the bar is not wholly jurisdictional seems established as well.[11]

Moreover, if under Article III there is no jurisdiction of suits against States, the settled principle that States may consent to suit [12] becomes conceptually difficult, inasmuch as it is not possible to confer jurisdiction where it is lacking through the consent of the parties.[13] And there is jurisdiction under Article III of some suits against States, such as those brought by the United States or by other States.[14] And, furthermore, Congress is able in at least some instances to legislate away state immunity,[15] although it may not enlarge Article III jurisdiction.[16]

Another explanation of the Eleventh Amendment is that it is an exemplication of the doctrine of sovereign immunity which was clearly established at the time: a state was not subject to suit without its consent.[17] The Court in dealing with questions of governmental immunity from suit has traditionally treated interchangeably precedents dealing with state immunity and those dealing with federal governmental immunity.[18] Viewing the Amendment

[10] Id., 678. The Court relied on *Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the State's immunity. *Edelman* has been followed in *Sosna* v. *Iowa*, 419 U.S. 393, 396 n. 2 (1975); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion. *But see infra*, n. 11.

[11] *See Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 515–516 n. 19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question on the merits resolved. *See* id., 520 (Justice Powell dissenting).

[12] *Clark* v. *Barnard*, 108 U.S. 436 (1883).

[13] E.g., *People's Band* v. *Calhoun*, 102 U.S. 256, 260–261 (1880). *See* Justice Powell's explanation in *Patsy* v. *Florida Board of Regents*, 457, U.S. 496, 528 n. 13 (1982) (dissenting) (no jurisdiction under Article III of suits against *unconsenting* States).

[14] *See*, e.g., the Court's express rejection of the Eleventh Amendment defense in these cases. *United States* v. *Texas*, 143 U.S. 621 (1892); *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904).

[15] E.g., *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

[16] The principal citation is, of course, *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803).

[17] As Justice Holmes explained, the doctrine is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polybank*, 205 U.S. 349, 353 (1907). On the sovereign immunity of the United States, *see supra*, pp. 758–763. For the history and jurisprudence, see Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1 (1963).

[18] *See*, e.g., *United States* v. *Lee*, 106 U.S. 196, 210–214 (1882); *Belknap* v. *Schild*, 161 U.S. 10, 18 (1896); *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636, 642–643, 645 (1911).

and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver.[19] The limited effect of the doctrine in this context in federal court arises from the fact that traditional sovereign immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But the States upon entering the Union gave up to some undetermined and changing degree their sovereignty to the national government, a sovereign that does not have plenary power over them but which is more than their co-equal.[20]

Thus, outside the area of federal court jurisdiction, there is the case of *Nevada* v. *Hall*,[21] which perfectly illustrates the difficulty. The case arose when a California resident sued in a California court a Nevada state agency because one of its employees negligently injured him in an automobile accident in California. Recognizing that while during the framing of the Constitution the rule was that a State could not without its consent be sued in the courts of another sovereign, the Court could not discern any evidence in the federal constitutional structure, in the specific language, or in the intention of the Framers that would impose a general, federal constitutional constraint upon the action of a State in authorizing suit in its own courts against another State. The Court did imply that in some cases a "substantial threat to our constitutional system of cooperative federalism" might arise and occasion a different result, but this was not such a case.[22]

Within the area of federal court jurisdiction, the issue becomes the extent to which upon entering the Union the States gave up their immunity to suit in federal court. *Chisholm* held, and the Eleventh Amendment reversed the holding, that the States had given up their immunity to suit in diversity cases based on common law or state law causes of action; *Hans* v. *Louisiana* and subsequent cases held that the Amendment in effect codified an understanding of broader immunity to suits based on federal causes of action.[23] Other cases have held that with respect to suits

[19] A sovereign may consent to suit. E.g., *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).

[20] Fletcher, *op. cit.*, p. 1427 n. 2.

[21] 440 U.S. 410 (1979).

[22] Id., 424 n. 24. The Court looked to the full faith and credit clause as a possible constitutional limitation. The dissent would have found implicit constitutional assurance of state immunity as an essential component of federalism. Id., 427 (Justice Blackmun), 432 (Justice Rehnquist).

[23] On the present Court, apparently only Justice Brennan believes that the Eleventh Amendment is the sole constitutional expression of sovereign immunity

by the United States or by other States the States did give up their immunity and that subjection to suit continues.[24] These understandings continue and the major question unresolved is the extent to which Congress under its granted powers may remove state immunity to suit in federal court.[25]

Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the power of the Federal Government.[1] In this respect, the federal courts may not act without congressional guidance in subjecting States to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially-created doctrines requiring it to be explicit when it legislates against state immunity.[2]

**Suits Against States**

Aside from suits against States by the United States and by other States, there are permissible suits by individuals against States under federal constitutional and statutory grounds and indeed upon grounds expressly covered by the Eleventh Amendment in somewhat fewer circumstances.

***Consent to Suit and Waiver.***—The immunity of a State from suit is a privilege which it may waive at its pleasure. It may do so by a law specifically consenting to suit in the federal courts.[3] But

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and that *Hans* recognized only a common law sovereign immunity, with the result that the States' general immunity was waived upon entry in the Union. *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964); *Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, 411 U.S. 279, 298 (1973) (dissenting). Justice Marshall, id., 291–292, and Justice Powell, *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 520 (1982) (dissenting), disagree and view the immunity as across the board, as do apparently most of the other Justices. *See* the plurality opinion and the dissent in *Florida Dept. of State* v. *Treasure Salvors*, 458 U.S. 670 (1982).

[24] E.g., *United States* v. *Texas*, 143 U.S. 621 (1892); *South Dakota* v. *North Carolina*, 192 U.S. 286 (1904).

[25] *Infra*, pp. 1438–1440.

[1] E.g., *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979).

[2] *See Hutto* v. *Finney*, 437 U.S. 678 (1978), in which the various opinions differ among themselves on the degree of explicitness required. *See also Quern* v. *Jordan*, 440 U.S. 332, 343–345 (1979). The parallelism of congressional power to regulate and to legislate away immunity is not exact. Thus, in *Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, 411 U.S. 279 (1973), the Court strictly construed congressional provision of suits as not reaching States, while in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), it had sustained the constitutionality of the substantive law, a position it reversed in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), in holding the statute unconstitutional.

[3] *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906).

the conclusion that there has been consent or a waiver is not lightly to be inferred and the Court will strictly construe statutes alleged to consent to suit. Thus, a State may waive its immunity in its own courts without consenting to suit in federal court,[4] and a general authorization "to sue and be sued" is ordinarily insufficient to constitute consent.[5] While the Court in a few cases has found a waiver by implication, the current vitality of these cases is questionable. Thus, in *Parden* v. *Terminal Ry.*,[6] the Court ruled that employees of a state-owned railroad could sue the State for damages under the Federal Employers' Liability Act. One of the two primary grounds for finding lack of immunity was that by taking control of a railroad which was subject to the FELA, that had been enacted some 20 years previously, the State had effectively accepted the imposition of the Act and consented to suit.[7] Distinguishing *Parden* as involving a proprietary activity, the Court subsequently refused to find any implied consent to suit by States participating in federal spending programs; participation was insufficient, and only when waiver has been "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," will it be found.[8]

Similarly, the State may waive its immunity by initiating or participating in litigation. In *Clark* v. *Bernard*,[9] the State had filed

[4] *Smith* v. *Reeves*, 178 U.S. 436 (1900); *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 172 (1909); *Graves* v. *Texas Co.*, 298 U.S. 393, 403-404 (1936); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944).

[5] *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47, 54 (1944); *Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459 (1945); *Kennecott Copper Corp.* v. *State Tax Comm.*, 327 U.S. 573 (1947); *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959); *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U.S. 147 (1981). *Compare Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 519 n.* (1982) (Justice White concurring), with id., 522 and n. 5 (Justice Powell dissenting).

[6] 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress' power to withdraw immunity. *See also Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959).

[7] *Edelman* v. *Jordan*, 415 U.S. 651, 671-672 (1974). For the same distinction in the Tenth Amendment context, *see National League of Cities* v. *Usery*, 426 U.S. 833, 854 n. 18 (1976).

[8] *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (quoting id., 673, *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)); *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U.S. 147 (1981). Of the four *Edelman* dissenters, Justices Marshall and Blackmun found waiver through knowing participation, id., 415 U.S., 688. In *Florida Dept.*, Justice Stevens noted he would have agreed with them had he been on the Court at the time but that he would now adhere to *Edelman*. Id., 450 U.S., 151.

[9] 108 U.S. 436 (1883).

a claim for disputed money deposited in a federal court, and the Court held that the State could not thereafter complain when the court awarded the money to another claimant. However, the Court is loath to find a waiver simply because of the decision of an official or an attorney representing the State, because of the question of the ability of the individual to act under state law to make a valid waiver, with the result that the State may at any point in litigation raise a claim of immunity.[10]

With respect to governmental entities that derive their authority from the State, but are not the State, the Court closely examines state law to determine what the nature of the entity is, whether it is an arm of the State or whether it is to be treated like a municipal corporation or other political subdivision.[11] An arm of the State has immunity. Municipal corporations, though they partake under state law of the State's immunity, do not have immunity in federal court and the States may not confer it.[12] Entities created through interstate compacts (subject to congressional approval) generally also are subject to suit.[13]

***Congressional Withdrawal of Immunity.***—The Constitution delegates to Congress power to legislate to affect the States in some permissible ways. At least in some instances when Congress does so, it may subject the States themselves to suit at the initiation of individuals to implement the legislation. The clearest example arises from the Reconstruction Amendments, which are direct restrictions upon state powers and which expressly provide for congressional implementing legislation.[14] Thus, "the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment." [15] Dwelling on the fact that the Four-

[10] *Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459, 466–467 (1945); *Edelman* v. *Jordan*, 415 U.S. 651, 677–678 (1974).

[11] *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 279–281 (1977); *Lake County Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 400–402 (1979).

[12] *Lincoln County* v. *Luning*, 133 U.S. 529 (1890); *Chicot County* v. *Sherwood*, 148 U.S. 529 (1893); *Workman* v. *City of New York*, 179 U.S. 552 (1900); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977). Notice that in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court extended the state immunity from regulation in that case to political subdivisions as well.

[13] *Lake County Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959).

[14] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Hutto* v. *Finney*, 437 U.S. 678 (1978); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

[15] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976).

teenth Amendment was ratified after the Eleventh became part of the Constitution, the Court implied that earlier grants of legislative power to Congress in the body of the Constitution might not contain a similar power to authorize suits against the States,[16] but the power thus established is substantial in itself and appears not to be closely tied to actual effectuation of Fourteenth and Fifteenth Amendment rights themselves, so long as Congress legislates pursuant to them.[17]

Nonetheless, the Court does insist, in ways yet to be fully elucidated, that Congress, when it exercises its power to subject States to suit, must be fairly clear with respect to its intent to impose liability; imposition will not be inferred unless that statutory language so requires or the legislative history is persuasive that Congress did so intend and understood the effects of its enactment.[18]

With respect to Congress' Article I powers, the Court has been ambivalent with respect to the authority to withdraw immunity from suit. In *Parden* v. *Terminal Ry.*,[19] as an alternative holding,

[16] Id., 456 (under Fourteenth Amendment, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts.") It is unclear whether "other contexts" refers to other exercises of congressional power or to suits in the absence of congressional authorization. But see id., 452-453 (implying the latter).

[17] In *Maher* v. *Gagne*, 448 U.S. 122 (1980), the Court found Congress could validly authorize imposition of attorneys' fees on the State following settlement of a suit based on both constitutional and statutory grounds, in which settlement had prevented determination that there had been a constitutional violation. *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory grounds as well as federal. Other cases in which attorneys' fees were awarded against States are *Hutto* v. *Finney*, 437 U.S. 678 (1978); *New York Gaslight Club* v. *Carey*, 447 U.S. 54 (1980).

[18] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 451-453 (1976); *Hutto* v. *Finney*, 437 U.S. 678, 693-698 (1978). In dissent, Justice Powell, joined by Chief Justice Burger, argued that only express statutory language was sufficient to withdraw state immunity. Id., 704. *See also* id., 717 (Justice Rehnquist dissenting). Because of its rule of clear statement, the Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include States within the term "person" for the purpose of subjecting them to suit. The question arose after *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), reinterpreted "person" to include municipal corporations. *Cf. Alabama* v. *Pugh*, 438 U.S. 781 (1978). The Court has reserved the question whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against States, *Milliken* v. *Bradley*, 433 U.S. 267, 290 n. 23 (1977), but the result in *Milliken*, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. But see *Mauclet* v. *Nyquist*, 406, F. Supp. 1233 (D.C.W.D.N.Y. 1976) (refusing money damages under the Fourteenth Amendment), app. *dismd. sub nom. Rabinovitch* v. *Nyquist*, 433 U.S. 901 (1977). The Court declined in *Ex parte Young*, 209 U.S. 123, 150 (1908), to view the Eleventh as modified by the Fourteenth.

[19] 377 U.S. 184 (1964).

the Court seemed plainly to state that Congress' power to regulate interstate commerce included power to subject States to suit under appropriate regulations. Subsequently, in another commerce clause case, the Court observed that Congress had the power to bring "the States to heel, in the sense of lifting their immunity from suit in a federal court," and that "when Congress does act, it may place new or even enormous fiscal burdens on the States;" nevertheless, it held that the congressional provision of suit was too ambiguous to constitute a sufficient withdrawal of immunity.[20] However, in *Edelman* v. *Jordan*,[21] the Court seemed to suggest that a two-part test had to be met before the States lost their immunity: "whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." *Edelman*, was, of course, a spending power case, and generally Congress there does not act coercively but imposes conditions upon state participation, on a voluntary basis, although the Court's "clear statement" rule has also been utilized in this context.[22] Resolution of the question of Congress' power, when plainly exercised, must thus await further litigation.

It should be noted that, should Congress be held to lack power to abrogate state immunity under its commerce and other Article I powers, it is not barred by the Eleventh Amendment, nor apparently by any other constitutional provision, from providing authority for suits in the courts of the States to implement federal statutory rights, thus doing away for those purposes with common law sovereign immunity of the States.[23]

[20] *Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, 411 U.S. 279, 283, 284, 285–286 (1973). Difficulty in this area arises from the fact that the Court frequently speaks in the same opinion in ways that imply both that immunity is absolute and that it may be set aside by Congress. *See*, e.g., id., 284 (under Eleventh Amendment "a federal court is not competent to render judgment against a nonconsenting State"), and 285 ("It is not easy to infer that Congress in legislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution").

[21] 415 U.S. 651, 672 (1974).

[22] Id., 673–677; *Florida Dept. of Health* v. *Florida Nursing Home Assn.*, 450 U.S. 147 (1981). *Cf. Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 24-25 (1981). Note that in P.L. 94-182, § 111, 89 Stat. 1054, Congress required States to consent to suit as part of their participation in the Medicaid program, but it promptly repealed the provision by P.L. 94-552, 90 Stat. 2540.

[23] The point was noted and reserved in *Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, 411 U.S. 279, 287 (1973), while Justice Marshall argued that this was plainly the case. Id., 298 (concurring). Suits under § 1983, for example, may be brought in state courts, *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), and state immunities are inapplicable. Id., 9 n. 7; *Maher* v. *Gagne*, 448 U.S. 122, 130 n. 12 (1980). Inasmuch as state courts are ordinarily obligated to en-

**Suits Against State Officials**

Mitigation of the wrongs possible when the State is immune from suit has been achieved under the doctrine that sovereign immunity, either of the States or of the Federal Government, does not ordinarily prevent a suit against an official to restrain him from commission of a wrong, even though the government is thereby restrained.[1] The doctrine is built upon a double fiction: that for purposes of the sovereign's immunity, a suit against the official is not a suit against the government, but for the purpose of finding state action to which to apply the Constitution, the official's conduct is that of the State.[2] The doctrine preceded but is most noteworthily associated with the decision in *Ex parte Young*,[3] a case truly deserving the overworked adjective, seminal.

*Young* arose when a state legislature passed a law reducing railroad rates and providing severe penalties for any railroad that failed to comply with the law. Plaintiff railroad stockholders brought an action to enjoin Young, the state attorney general, from enforcing the law, alleging that it was unconstitutional and that they would suffer irreparable harm if he were not prevented from acting. An injunction was granted forbidding Young from acting on the law, an injunction he violated by bringing an action in state court against noncomplying railroads, and for his action he was adjudged in contempt. If the Supreme Court had held that the injunction was not impermissible, because the suit was one against the State, there would have been no practicable way for the railroads to attack the statute without placing themselves in great danger. They could have disobeyed it and alleged its unconstitutionality in the enforcement proceedings, but if they were wrong about the statute's validity the penalties would have been devastating.[4] In the modern context, the effectuation of federal constitutional rights against state action often depends upon the imposition of affirmative obligations through injunctions and this relief would be impossible if such an injunction were in effect a suit against a State.

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force federal law, *cf. Testa* v. *Katt*, 330 U.S. 386 (1960), state courts are presumably required to hear § 1983 and other claims, but the Court has expressly reserved the issue. *Martinez* v. *California*, 444 U.S. 277, 283 n. 7 (1980).

[1] *See*, e.g., *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682 (1949), where the majority and dissenting opinions utilize both federal and Eleventh Amendment cases in a suit against a federal official. *See also Tindal* v. *Wesley*, 167 U.S. 204, 213 (1897), applying the federal rule of *United States* v. *Lee*, 106 U.S. 196 (1882), to the States.

[2] C. Wright, *The Law of Federal Courts* (Minneapolis: 4th ed. 1983), § 48.

[3] 209 U.S. 123 (1908).

[4] In fact, the statute was eventually held to be constitutional. *Minnesota Rate Cases* (*Simpson* v. *Shepard*), 230 U.S. 352 (1913).

In deciding *Young*, the Court was confronted with inconsistent lines of cases, including numerous precedents for permitting suits against state officers. Chief Justice Marshall had begun the process in *Osborn* by holding that suit was barred only when the State was formally named a partner,[5] although he was presently required to modify that decision and preclude suit when it was brought against an official, the governor of a State, when he was sued in his official capacity.[6] Relying on *Osborn* and treating *Madrazo* narrowly, the Court, seeming to treat the barrier to suit as common-law sovereign immunity, held in a series of cases that an official of a State could be sued to prevent him from executing a state law in conflict with the Constitution or a law of the United States, and the fact that the officer may be acting on behalf of the State or in response to a statutory obligation of the State does not make the suit one against the State.[7] Shortly, however, the Court began developing a more expansive concept of the Eleventh Amendment and sovereign immunity, beginning with the first case in which the sovereign immunity of the United States was claimed and rejected [8] and the *Hans* v. *Louisiana* decision reading broadly the effect of the adoption of the Eleventh Amendment.[9]

The two leading cases, as were many cases of this period, were suits attempting to prevent Southern States from defaulting on bonds.[10] In *Louisiana* v. *Jumel*,[11] a citizen of the State sought to compel the state treasurer to apply a sinking fund that had been created under the earlier constitution for the payment of the bonds to that payment after a subsequent constitution had abolished this provision for retiring the bonds. The proceeding was held to be a

[5] *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824).

[6] *Governor of Georgia* v. *Madrazo*, 1 Pet. (26 U.S.) 110 (1828).

[7] *Davis* v. *Gray*, 16 Wall. (83 U.S.) 203 (1872); *Board of Liquidation* v. *McComb*, 92 U.S. 531 (1875); *Allen* v. *Baltimore & Ohio R.R.*, 114 U.S. 311 (1885); *Rolston* v. *Missouri Fund Comrs.*, 120 U.S. 390 (1887); *Pennoyer* v. *McConnaughy*, 140 U.S. 1 (1891); *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362 (1893); *Smyth* v. *Ames*, 169 U.S. 466 (1898); *Scranton* v. *Wheeler*, 179 U.S. 141 (1900).

[8] *United States* v. *Lee*, 106 U.S. 196 (1882). *See supra, pp.* 760–763. The Court sustained the suit against the federal officers by only a 5-to-4 vote, the dissent presenting the arguments that were soon to inform Eleventh Amendment cases.

[9] 134 U.S. 1 (1890).

[10] See Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," 83 Colum. L. Rev. 1889, 1968–2003 (1983); Orth, "The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power," 1983 U. Ill. L. Rev. 423.

[11] 107 U.S. 711 (1882).

suit against the State.[12] Then, In *re Ayers*[13] purported to supply a rationale for the cases permitting the issuance of mandamus or injuctive relief against state officers in a way that would have severely curtailed federal judicial power. Suit against a state officer was not barred when his action, aside from any official authority claimed as its justification, was a wrong simply as an individual act, such as a trespass, but if the act of the officer did not constitute an individual wrong and was something that only a State, through its officers, could do, the suit was in actuality a suit against the State and was barred.[14] That is, the unconstitutional nature of the state statute under which the officer acted stripped him of the State's shield against suit, but it did not itself constitute a private cause of action. For that, one must be able to point to an independent violation of a common law right.[15]

Although *Ayers* was in all relevant points on all fours with *Young*,[16] the Court held that the injunction had properly issued

[12] "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." Id., 721. *See also Christian* v. *Atlantic & N.C. Railroad*, 133 U.S. 233 (1890).

[13] 123 U.S. 443 (1887).

[14] Id., 500–501, 502.

[15] *Ayers* was a suit by plaintiffs seeking to enjoin state officials from bringing suit under an allegedly unconstitutional statute purporting to overturn a contract between the State and the bondholders to receive the bond coupons for tax payments. The Court asserted that the State's contracts impliedly contained the State's immunity from suit, so that express withdrawal of a supposed consent to be sued was not a violation of the contract; but, in any event, inasmuch as any violations of the assumed contract was an act of the State, to which the officials were not parties, their actions as individuals in bringing suit was not a breach of the contract. Id., 503, 505–506. The rationale had been asserted by a four-Justice concurrence in *Antoni* v. *Greenhow*, 107 U.S. 769, 783 (1882). *See also Cunningham* v. *Macon & Brunswick R.R.*, 109 U.S. 446 (1883); *Hagood* v. *Southern*, 117 U.S. 52 (188–6); *North Carolina* v. *Temple*, 134 U.S. 22 (1890); *In re Tyler*, 149 U.S. 164 (1893); *Baltzer* v *North Carolina*, 161 U.S. 240 (1896); *Fitts* v. *McGhee*, 172 U.S. 516 (1899); *Smith* v. *Reeves*, 178 U.S. 436 (1900).

[16] *Ayers* "would seem to be decisive of the *Young* litigation." C. Wright, *The Law of Federal Courts* (Minneapolis: 4th ed. 1983), § 48 at 288. The *Young* Court purported to distinguish and to preserve *Ayers* but on grounds that either were irrelevant to *Ayers* or that had been rejected in the earlier case. *Ex parte Young*, 209 U.S. 123, 151, 167 (1908). Similarly, in a later case, the Court continued to distinguish *Ayers* but on grounds that did not in fact distinguish it from the case before the Court, in which it permitted a suit against a state revenue commissioner to enjoin him from collecting allegedly unconstitutional taxes. *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952).

against the state attorney general, even though the State was in effect restrained as well. "The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official, in attempting by the use of the name of the state to enforce a legislative enactment which is void, because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." [17] Justice Harlan was the only dissenter, arguing that in law and fact that the suit was one only against the State and that the suit against the individual was a mere "fiction." [18]

The "fiction" remains a mainstay of our jurisprudence.[19] It accounts for a great deal of the litigation brought by individuals to challenge the carrying out of state policies by officers. Thus, suits against state officers alleging that they are acting pursuant to an unconstitutional statute are the standard device by which to test the validity of state legislation in federal courts prior to enforcement and thus interpretation in the state courts.[20] Similarly, suits

[17] *Ex parte Young*, 209 U.S. 123, 159–160 (1908). The opinion did not address the issue of how an officer "stripped of his official . . . character" could violate the Constitution, inasmuch as the Consitution restricts only "state action," but the double fiction has been expounded numerous times since. Thus, for example, it is well settled that an action unauthorized by state law is state action for purposes of the Fourteenth Amendment. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913). The contrary premise of *Barney* v. *City of New York*, 193 U.S. 430 (1904), though eviserated by *Home Tel. & Tel.* was not expressly disavowed until *United States* v. *Raines*, 362 U.S. 17, 25–26 (1960).

[18] *Ex parte Young*, 209 U.S. 123, 173–174 (1908).

[19] E.g., *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 n. 6 (1978) (rejecting request of state officials being sued to restrain enforcement of state statute as preempted by federal law that *Young* be overruled); *Florida Dept. of State* v. *Treasure Salvors*, 458 U.S. 670, 685 (1982).

[20] *See, e.g., Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Cavanaugh* v. *Looney*, 248 U.S. 453 (1919); *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497 (1925); *Mass. State Grange* v. *Benton*, 272 U.S. 525 (1926); *Hawks* v. *Hamill*, 288 U.S. 52 (1933); *see also Graham* v. *Richardson*, 403 U.S. 365 (1971) (enjoining state welfare officials from denying welfare benefits to otherwise qualified recipients because they were aliens); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (enjoining city welfare officials from following state procedures for termination of benefits); *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (imposing half the costs of mandated compensatory education programs upon State through order directed to governor and other officials). On injunctions against governors, *see Continental Baking Co.* v. *Woodring*, 286 U.S.

to restrain state officials from taking certain actions in contravention of federal statutes [21] or to compel the undertaking of affirmative obligations imposed by the Constitution or federal laws [22] are common. But, furthermore, suits prosecuted against state officers in federal courts upon grounds that they are acting in excess of their state statutory authority [23] or that they are not doing something required by state law [24] are not precluded by the Eleventh Amendment or its emanations of sovereign immunity, provided only that there are grounds to obtain federal jurisdiction.[25]

However, the Court adheres to the doctrine, first pronounced in *Madrazo*,[1] that some suits against officers are "really" against the State [2] and are barred by the State's immunity, such as when the suit involves state property or asks for relief which clearly call for the exercise of official authority, such as paying money out of the treasury to remedy past harms. For example, a suit to prevent tax officials from collecting death taxes arising from the competing claims of two States as being the last domicile of the decedent floundered upon the conclusion that there could be no credible

352 (1932); *Sterling* v. *Constantin*, 287 U.S. 378 (1932). Applicable to suits under this doctrine are principles of judicial restraint, constitutional, statutory, and prudential, discussed under Article III.

[21] E.g., *Edelman* v. *Jordan*, 415 U.S. 651, 664–668 (1974); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

[22] E.g., *Milliken* v. *Bradley*, 433 U.S. 267 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 664–668 (1974); *Quern* v. *Jordan*, 440 U.S. 332, 346–349 (1979).

[23] E.g., *Pennoyer* v. *McConnaughy*, 140 U.S. 1 (1891); *Scully* v. *Bird*, 209 U.S. 481 (1908); *Atchison, T. & S. F. Ry. Co.* v. *O'Connor*, 223 U.S. 280 (1912); *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499 (1977); *Louisville & Nashville R.R. Co.* v. *Greene*, 244 U.S. 522 (1917). Property held by state officials on behalf of the State under claimed state authority may be recovered in suits against the officials, although the court may not conclusively resolve the State's claims against it in such a suit. *South Carolina* v. *Wesley*, 155 U.S. 542 (1895); *Tindal* v. *Wesley*, 167 U.S. 204 (1897); *Hopkins* v. *Clemson College*, 221 U.S. 636 (1911); *see also Florida Dept. of State* v. *Treasure Salvors*, 458 U.S. 670 (1982), in which the eight Justices agreeing the Eleventh Amendment applied divided 4-to-4 with respect to the proper interpretation.

[24] E.g., *Rolston* v. *Missouri Fund Comrs.*, 120 U.S. 390 (1887); *Atchison, T. & S. F. Ry. Co.* v. *O'Connor*, 223 U.S. 280 (1912); *Johnson* v. *Lankford*, 245 U.S. 541, 545 (1918); *Lankford* v. *Platte Iron Works Co.*, 235 U.S. 461, 471 (1915); *Davis* v. *Wallace*, 257 U.S. 478, 482–485 (1922); *Glenn* v. *Field Packing Co.*, 290 U.S. 177, 178 (1933); *Lee* v. *Buckell*, 292 U.S. 415, 425 (1934).

[25] Typically, the plaintiff would be in federal court under diversity jurisdiction, *cf. Martin* v. *Lankford*, 245 U.S. 547, 551 (1918), perhaps under admiralty jurisdiction, *Florida Dept. of State* v. *Treasure Salvors*, 458 U.S. 670 (1982), or under federal question jurisdiction. In the last instance, federal courts are obligated first to consider whether the issues presented may be decided on state law grounds before reaching federal constitutional grounds, and thus relief may be afforded on state law grounds solely. *Cf. Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909); *Hagans* v. *Lavine*, 415 U.S. 528, 546–547 & n. 12 (1974).

[1] *Governor of Georgia* v. *Madrazo*, 1 Pet. (26 U.S.) 110 (1828).

[2] E.g., *Ford Motor Co.* v. *Department of the Treasury*, 323 U.S. 459, 464 (1945).

claim of violation of the Constitution or federal law and state law imposed the obligation upon the officials; it was "in reality" an action against the State.[3] With respect to suits against state officials to recover taxes, they have been made increasingly difficult to maintain. Although the Court long ago held that the sovereign immunity of the State prevented a suit to recover money in the general treasury,[4] it also held that a suit would lie against a revenue officer to recover tax moneys illegally collected and still in his possession.[5] Beginning, however, with *Great Northern Life Ins. Co.* v. *Read*,[6] the Court has held that this kind of suit cannot be maintained unless the State expressly consents to suits in the federal courts. In this case, the state statute provided for the payment of taxes under protest and for suits afterward against state tax collection officials for the recovery of taxes illegally collected, which revenues were required to be kept segregated.[7]

In *Edelman* v. *Jordan*,[8] the Court appeared to begin to lay down new restrictive interpretations of what the Eleventh Amendment proscribed. The Court announced that a suit "seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." [9] What the Court actually held, however, was that it was permissible for federal courts to require state officials to comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, but that they were not permitted to hear claims seeking or issue orders directing payment of funds found to be wrongfully withheld.[10] Conceding that some of the characteris-

[3] *Worcester County Co.* v. *Riley*, 302 U.S. 292 (1937); *see also Old Colony Trust Co.* v. *Seattle*, 271 U.S. 426 (1926). *Worcester County* remains viable. *Cory* v. *White*, 457 U.S. 85 (1982). The actions were under the Federal Interpleader Act, 49 Stat. 1096 (1936), 28 U.S.C. § 1335, under which other actions against officials have been allowed. E.g., *Treines* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939 (joinder of state court judge and receiver in interpleader proceeding in which State had no interest and neither judge nor receiver was enjoined by final decree). *See also Missouri* v. *Fiske*, 290 U.S. 18 (1933).

[4] *Smith* v. *Reeves*, 178 U.S. 436 (1900).

[5] *Atchison, T. & S. F. Ky. Co.* v. *O'Connor*, 223 U.S. 280 (1912).

[6] 322 U.S. 47 (1944).

[7] *See also Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945); *Kennecott Copper Corp.* v. *Tax Comm.*, 327 U.S. 573 (1946). States may confine to their own courts suits to recover taxes. *Smith* v. *Reeves*, 178 U.S. 436 (1900); *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151 (1909); *Chandler* v. *Dix*, 194 U.S. 590 (1904).

[8] 415 U.S. 651 (1974).

[9] Id., 663.

[10] Id., 667-668.

tics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to the imposition of liabilities which must be paid from public funds in the treasury and which was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is "an ancillary effect" which "is a permissible and often an inevitable consequence" of *Ex parte Young*, whereas "payment of state funds . . . as a form of compensation" to those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State." [11]

That *Edelman* in many instances will be a formal restriction rather than an actual one is illustrated by *Milliken* v. *Bradley*,[12] in which state officers were ordered to spend money from the state treasury in order to finance remedial educational programs to counteract the effects of past school segregation; the decree, the Court said, "fits squarely within the prospective-compliance exception reaffirmed by *Edelman*." [13] Although the payments were a result of past wrongs, of past constitutional violations, the Court did not view them as "compensation," inasmuch as they were not to be paid to victims of past discrimination but rather used to better conditions either for them or their successors.[14]

Thus, as with the cases dealing with suits facially against the States themselves, the Court's recent greater attention to state immunity in the context of suits against state officials has resulted in a mixed picture, of some new restrictions, of the lessening of others. But a number of Justices has resorted to the Eleventh Amendment increasingly, as one means of reducing federal-state judicial conflict.[15] One may, therefore, expect this to be a continuingly contentious area.

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[11] Id., 668. *See also Quern* v. *Jordan*, 440 U.S. 332 (1979) (reaffirming *Edelman*, but holding that state officials could be ordered to notify members of the class that had been denied retroactive relief in that case that they might seek back benefits by invoking state administrative procedures; the order did not direct the payment but left it to state discretion to award retroactive relief).

[12] 433 U.S. 267 (1977).

[13] Id., 289.

[14] Id., 290 n. 22. *See also Hutto* v. *Finney*, 437 U.S. 678, 690–691 (1978) (affirming order to pay attorney's fees out of state treasury as an "ancillary" order because of bad faith of State).

[15] *See*, e.g., *Florida Dept. of State* v. *Treasure Salvors*, 458 U.S. 670, 702 (1982) (dissenting opinion); *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 520 (1982) (dissenting opinion). *And see Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, 411 U.S. 279 (1973).

***Tort Actions Against State Officials.***—In *Tindal* v. *Wesley*,[16] the Court adopted the rule of *United States* v. *Lee*,[17] a tort suit against federal officials, to permit a tort action against state officials to recover real property held by them and claimed by the State and to obtain damages for the period of withholding. The immunity of a State from suit has long been held not to extend to actions against state officials for damages arising out of willful and negligent disregard of state laws.[18] The reach of the rule is evident in *Scheuer* v. *Rhodes*,[19] in which the Court held that plaintiffs were not barred by the Eleventh Amendment or other immunity doctrines from suing the governor and other officials of a State alleging that they deprived plaintiffs of federal rights under color of state law and seeking damages, when it was clear that plaintiffs were seeking to impose individual and personal liability on the officials. There was no "executive immunity" from suit, the Court held; rather, the immunity of state officials is qualified and varies according to the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.[20]

[16] 167 U.S. 204 (1897).

[17] 106 U.S. 196 (1897).

[18] *Johnson* v. *Lankford*, 245 U.S. 541 (1918); *Martin* v. *Lankford*, 245 U.S. 547 (1918).

[19] 416 U.S. 233 (1974).

[20] These suits, like suits against local officials and municipal corporations, are typically brought pursuant to 42 U.S.C. § 1983 and typically involve all the decisions respecting liability and immunities thereunder. On the scope of immunity of federal officials, *see supra*, *pp.* 760–763.

## TWELFTH AMENDMENT

### ELECTION OF PRESIDENT

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the

Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## ELECTION OF PRESIDENT

This Amendment,[1] which supersedes clause 3 of § 1 of Article II, was adopted so as to make impossible the situation occurring after the election of 1800 in which Jefferson and Burr received tie votes in the electoral college, thus throwing the selection of a President into the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice-President.[2] The difference between the procedure which it defines and that which was laid down originally is in the provision it makes for a separate designation by the electors of their choices for President and Vice-President, respectively. As a consequence of the disputed election of 1870, Congress has enacted a statute providing that if the vote of a State is not certified by the governor under seal, it shall not be counted unless both Houses of Congress concur.[3]

[1] A number of provisions of the Amendment have been superseded by the Twentieth Amendment.

[2] Cunningham, "Election of 1800," in 1 A. Schlesinger (ed.), *History of American Presidential Elections* (New York: 1971), 101.

[3] 3 U.S.C. § 15.

# THIRTEENTH AMENDMENT

## SLAVERY AND INVOLUNTARY SERVITUDE

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## SLAVERY AND INVOLUNTARY SERVITUDE

### THIRTEENTH AMENDMENT

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

### ABOLITION OF SLAVERY

**Origin and Purpose**

In 1863, President Lincoln issued an Emancipation Proclamation [1] declaring, based on his war powers, that within named States and parts of States in rebellion against the United States "all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; . . . ." The Proclamation did not allude to slaves held in the loyalist States and with regard to the States in rebellion there was not only doubt with regard to the President's power to issue his order at all but a general conviction that its effect would not last beyond the restoration of the seceded States to the Union.[2] Because the power of Congress was similarly deemed not to run to legislative extirpation of the "peculiar institution" [3] a constitutional amendment was then sought and after first failing to muster a two-thirds vote in the House of Representatives was forwarded to the States on February 1, 1865, and ratified by the following December 18.[4]

[1] 12 Stat. 1267.

[2] The legal issues were surveyed in Welling, "The Emancipation Proclamation," 130 No. Amer. Rev. 163 (1880). *See* J. Randall, *Constitutional Problems Under Lincoln* (Urbana: rev. ed. 1951), 371–404.

[3] K. Stampp, *The Peculiar Institution: Slavery in the Ante Bellum South* (New York: 1956).

[4] The congressional debate on adoption of the Amendment is conveniently collected in 1 B. Schwartz, *Statutory History of the United States—Civil Rights* (New York: 1970), 25–96.

In selecting the text of the Amendment, Congress "reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory, and gave them unrestricted application within the United States." [5] By its adoption, Congress intended, said Senator Trumbull, one of its sponsors, to "take this question [of emancipation] entirely away from the politics of the country. We relieve Congress of sectional strifes . . ." [6] An early Supreme Court decision, rejecting a contention that the Amendment reached servitudes on property as it did on persons, observed in dicta that the "word servitude is of larger meaning than slavery, . . . and the obvious purpose was to forbid all shades and conditions of African slavery." But while the Court was initially in doubt whether persons other than Negroes could share in the protection afforded by the Amendment, it did continue to say that although "[N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void." [7]

"This Amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom." [8] These words of the Court in 1883 have generally been noncontroversial and have evoked little disagreement in the intervening years. The "force and effect" of the Amendment itself has been invoked only a few times by the Court to strike down state legislation which it considered to have reintroduced servitude of persons [9] and it has not used § 1 of the Amendment against private parties.[10] A major

[5] *Bailey* v. *Alabama*, 219 U.S. 219, 240 (1911). During the debate, Senator Howard noted that the language was "the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals. . . ." *Cong. Globe*, 38th Congress, 1st sess., 1489 (1864).

[6] Id., 1313-1314.

[7] *Slaughter House Cases*, 16 Wall. (83 U.S.) 36, 69, 71-72 (1873). This general applicability was again stated in *Hodges* v. *United States*, 203 U.S. 1, 16-17 (1906), and confirmed by the result of the peonage cases. *Infra*. p. 1457.

[8] *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

[9] *Infra*, p. 1457.

[10] In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), the Court left open the question whether the Amendment itself unaided by legislation would reach the "badges and incidents" of slavery not directly associated with involuntary servitude, and it continued to reserve the question in *City of Memphis* v. *Greene*, 451 U.S. 100, 125-126 (1981). *See Plessy* v. *Ferguson*, 163 U.S. 537, 552 (1896) (Justice Harlan dissenting). The Court drew back from the possibility in *Palmer* v. *Thompson*, 403 U.S. 217, 226-227 (1971).

change, however, has been recently wrought with regard to the scope of congressional power under § 2 to enforce § 1 of the Amendment.

Certain early cases suggested broad congressional powers [11] but the *Civil Rights Cases* [12] of 1883 began a process, culminating in *Hodges* v. *United States*, [13] which substantially curtailed these powers. In the former decision, the Court held unconstitutional an 1875 law [14] guaranteeing equality of access to public accommodations. Referring to the Thirteenth Amendment, the Court conceded that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Appropriate legislation under the Amendment, the Court continued, could go beyond nullifying state laws establishing or upholding slavery, because the Amendment "has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States" and thus Congress was empowered "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." [15] But these badges and incidents as perceived by the Court were those which Congress had in its 1866 legislation [16] sought "to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." [17] But the Court could not see that the refusal to any person of an accommodation at an inn or a place of public amusement, without any sanction or support from any state law, could inflict upon such person any

[11] *United States* v. *Rhodes*, 27, F. Cas. 785 (No. 16,151) (C.C. Ky. 1866) (Justice Swayne on circuit); *United States* v. *Cruikshank*, 25 F. Cas. 707 (No. 14,897) (C.C. La. 1874) (Justice Bradley on circuit), *aff'd on other grounds*, 92, U.S. 542 (1876); *United States* v. *Harris*, 106 U.S. 629,640 (1883); *Blyew* v. *United States*, 80 U.S. 581, 601 (1871) (dissenting opinion, majority not addressing the issue).

[12] 109 U.S. 3 (1883).

[13] 203 U.S. 1 (1906). *See also Plessy* v. *Ferguson*, 163 U.S. 537, 542–543 (1896); *Corrigan* v. *Buckley*, 271 U.S. 323, 331 (1926); *Hurd* v. *Hodge*, 334 U.S. 24, 31 (1948).

[14] 18 Stat. 335.

[15] *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

[16] 14 Stat. 39 (1886), now 42 U.S.C. §§ 1981–1982.

[17] *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

manner of servitude or form of slavery, as those terms were commonly understood. "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make. . . ." [18]

Then in *Hodges,* v. *United States,*[19] the Court set aside the convictions of three men for conspiring to drive several Negroes from their employment in a lumber mill. The Thirteenth Amendment operated to abolish, and to authorize Congress to legislate to enforce abolition of, conditions of enforced compulsory service of one to another and no attempt to analogize a private impairment of freedom to a disability of slavery would suffice to give the Federal Government jurisdiction over what was constitutionally a matter of state remedial law.

The latter case was overruled by the Court in a far-reaching decision in which it concluded that the 1866 congressional enactment,[20] far from simply conveying on all persons the *capacity* to buy and sell property, also prohibited private denials of the right through refusals to deal[21] and that this statute was fully supportible by the Thirteenth Amendment. "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. . . . Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

". . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment

[18] Id., 24.

[19] 203 U.S. 1 (1906), overruled by *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441 n. 78 (1968).

[20] 14 Stat. 39 (1866). The portion at issue is now 42 U.S.C. § 1982.

[21] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 420–437 (1968). Justices Harlan and White dissented from the Court's interpretation of the statute. Id., 449. Chief Justice Burger joined their dissent in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 241 (1969). The 1968 Civil Rights Act forbidding discrimination in housing on the basis of race was enacted a brief time before the Court's decision. 82 Stat. 81, 42 U.S.C. § 3601 *et seq.*

made a promise the Nation cannot keep."[22] The Amendment, then, could provide the constitutional support for the various congressional enactments against private racial discrimination which Congress had previously based on the commerce clause[23] and because the 1866 Act contains none of the limitations written into the modern laws it has a vastly extensive application.[24] Whether the Court will yet carry its interpretation of the statute to the fullest extent possible is, of course, not now knowable.

**Peonage**

Notwithstanding its early acknowledgement in the *Slaughter-House Cases* that peonage was comprehended within the slavery and involuntary servitude proscribed by the Thirteenth Amendment,[1] the Court has had frequent occasion to determine whether state legislation or the conduct of individuals has contributed to re-establishment of that prohibited status. Defined as a condition of enforced servitude by which the servitor is compelled to labor in liquidation of some debt or obligation, either real or pretended, against his will, peonage was found to have been unconstitutionally sanctioned by an Alabama statute, directed at defaulting share-croppers, which imposed a criminal liability and subjected to imprisonment farm workers or tenants who abandoned their employ-

[22] *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 440–443 (1968). *See also City of Memphis* v. *Greene*, 451 U.S. 100, 124–126 (1981).

[23] E.g., federal prohibition of racial discrimination in public accommodations, found lacking in constitutional basis under the Thirteenth and Fourteeth Amendments in the *Civil Rights Cases*, 109 U.S. 3 (1883), was upheld as an exercise of the commerce power in *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1965), and *Katzenbach* v. *McClung*, 379 U.S. 294 (1965).

[24] The 1968 statute on housing and the 1866 act are compared in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413–417 (1968). The expansiveness of the 1866 statute and of congressional power is shown by *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1069) (share in neighborhood recreational club which ordinarily went with the lease or ownership of house in area protected by the 1866 law); *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (guarantee that all persons shall have right to make and enforce contracts as is enjoyed by white persons protects the right of black children to gain admission to private, commercially operated, nonsectarian schools); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459–460 (1975) (statute affords a federal remedy against discrimination in private employment on the basis of race); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285–296 (1976) (statute protects against racial discrimination in private employment against whites as well as nonwhites). *See also Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973). The Court has also concluded that pursuant to its Thirteenth Amendment powers Congress could provide remedial legislation for Negroes deprived of their rights because of their race in *Griffin* v. *Breckenridge*, 403 U.S. 88, 104–105 (1971). Conceivably, the reach of the 1866 law could extend into all areas into which Congress has so far legislated and into other areas as well, justifying legislative or judicial enforcement of the Amendment itself in such areas as school segregation.

[1] 16 Wall. (83 U.S.) 36 (1873).

ment, breached their contracts, and exercised their legal right to enter into employment of a similar nature with another person. The clear purpose of such a statute was declared to be the coercion of payment, by means of criminal proceedings, of a purely civil liability arising from breach of contract.[2] Several years later, in *Bailey* v. *Alabama*,[3] the Court voided another Alabama statue which made the refusal without just cause to perform the labor called for in a written contract of employment, or to refund the money or pay for the property advanced thereunder, *prima facie* evidence of an intent to defraud and punishable as a criminal offense, and which was enforced subject to a local rule of evidence which prevented the accused, for the purpose of rebutting the statutory presumption, from testifying as to his "uncommunicated motives, purpose, or intention." Inasmuch as a State "may not compel one man to labor for another in payment of a debt by punishing him as a criminal if he does not perform the service or pay the debt," the Court refused to permit it "to accomplish the same result [indirectly] by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction." [4]

In 1914, in *United States* v. *Reynolds*,[5] a third Alabama enactment was condemned as conducive to peonage through the permission it accorded to persons, fined upon conviction for a misdemeanor, to confess judgment with a surety in the amount of the fine and costs, and then to agree with said surety, in consideration of the latter's payment of the confessed judgment, to reimburse him by working for him upon terms approved by the court, which, the Court pointed out, might prove more onerous than if the convict had been sentenced to imprisonment at hard labor in the first place. Fulfillment of such a contract with the surety was viewed as being virtually coerced by the constant fear it induced of rearrest, a new prosecution, and a new fine for breach of contract, which new penalty the convicted person might undertake to liquidate in a similar manner attended by similar consequences. More recently, *Bailey* v. *Alabama* has been followed in *Taylor* v. *Georgia* [6] and

[2] *Peonage Cases*, 123 F. 671 (D.C.M.D. Ala. 1903).

[3] 219 U.S. 219 (1911). Justice Holmes, who was joined by Justice Lurton, dissented on the ground that a State was not forbidden by this Amendment from punishing a breach of contract as a crime. "Compulsory work for no private master in a jail is not peonage." Id., 247.

[4] Id., 244.

[5] 235 U.S. 133 (1914).

[6] 315 U.S. 25 (1942).

*Pollock* v. *Williams*,[7] in which statutes of Georgia and Florida, not materially different from that voided in the *Bailey* case, were found to be unconstitutional. Although the Georgia statute prohibited the defendant from testifying under oath, it did not prevent him from entering an unsworn denial both of the contract and of the receipt of any cash advancement thereunder, a factor which, the Court emphasized, was no more controlling than the customary rule of evidence in the *Bailey* case. In the Florida case, notwithstanding the fact that the defendant pleaded guilty and accordingly obviated the necessity of applying the *prima facie* presumption provision, the Court reached an identical result, chiefly on the ground that the presumption provision, despite its nonapplication, "had a coercive effect in producing the plea of guilty."

Pursuant to its § 2 enforcement powers, Congress enacted a statute by which it abolished peonage and prohibited anyone from holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage.[8]

**Situations in Which the Amendment Is Inapplicable**

In a wide range of situations the Thirteenth Amendment has been unsuccessfully pressed into service. Thus, under a rubric of "services which have from time immemorial been treated as exceptional," the Court held that contracts of seamen, involving to a certain extent the surrender of personal liberty, may be enforced without regard to the Amendment.[1] Similarly, enforcement of those duties which individuals owe the government, such as service in the military and on juries, are not covered.[2] A state law requiring every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation was sustained.[3] Another state law making it a misdemeanor for a lessor, or his agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary to the proper and customary use of the building was held not to

[7] 322 U.S. 4 (1944). Justice Reed, with Chief Justice Stone concurring, contended in a dissenting opinion that a State is not prohibited by the Thirteenth Amendment from "punishing the fraudulent procurement of an advance in wages." Id., 27.

[8] 14 Stat. 546, now in 42 U.S.C. § 1994 and 18 U.S.C. § 1581. Upheld in *Clyatt* v. *United States*, 197 U.S. 207 (1905); and *see United States* v. *Gaskin*, 320 U.S. 527 (1944). *See also* 18 U.S.C. § 1584, which is a merger of 3 Stat. 452 (1818), and 18 Stat. 251 (1874), dealing with involuntary servitude. *Cf. United States* v. *Shackney*, 333 F. 2d 475, 481–483 (C.A. 2, 1964).

[1] *Robertson* v. *Baldwin*, 165 U.S. 275, 282 (1897).

[2] *Butler* v. *Perry*, 240 U.S. 328 (1916).

[3] *Arver* v. *United States*, 245 U.S. 366, 390 (1918).

create an involuntary servitude.[4] A federal statute making it unlawful to coerce, compel, or constrain a communications licensee to employ persons in excess of the number of the employees needed to conduct his business was held not to implicate the Amendment.[5]

[4] *Marcus Brown Co.* v. *Feldman*, 265 U.S. 170, 199 (1921).

[5] *United States* v. *Petrillo*, 332 U.S. 1, 12–13 (1947). Injunctions and cease and desist orders in labor disputes requiring return to work do not violate the Amendment. *UAW* v. *WERB*, 336 U.S. 245 (1949).

# FOURTEENTH AMENDMENT

## RIGHTS GUARANTEED
## PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS AND EQUAL PROTECTION

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## RIGHTS GUARANTEED

## PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS AND EQUAL PROTECTION

### FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### CITIZENS OF THE UNITED STATES

In the *Dred Scott Case*,[1] Chief Justice Taney for the Court ruled that United States citizenship was enjoyed by two classes of individuals: (1) white persons born in the United States as descendents of "persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and [who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein. The States were competent, he continued, to confer state citizenship upon anyone in their midst, but they could not make the recipient of such status a citizen of the United States. The Negro, according to the Chief Justice, was ineligible to attain United States citizenship, either from a State or by virtue of birth in the United States, even as a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution.[2] Congress, first in § 1 of the Civil Rights

[1] *Scott* v. *Sandford*, 19 How. (60 U.S.) 393, 404-406, 417-418, 419-420 (1857).

[2] The controversy, political as well as constitutional, which this case stirred and still stirs, is exemplified and analyzed in the material collected in S. Kutler, *The Dred Scott Decision: Law or Politics?* (Boston: 1967).



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Act of 1866 [3] and then in the first sentence of § 1 of the Fourteenth Amendment,[4] set aside the *Dred Scott* holding in a sentence "declaratory of existing rights, and affirmative of existing law . . ." [5]

While clearly establishing a national rule on national citizenship and settling a controversy of long-standing with regard to the derivation of national citizenship, the Fourteenth Amendment did not obliterate the distinction between national and state citizenship but rather preserved it.[6] The Court has accorded the first sentence of § 1 a construction in accordance with the congressional intentions, holding that a child born in the United States of Chinese parents who were ineligible themselves to be naturalized is a citizen of the United States nevertheless and entitled to all the rights and privileges of citizenship.[7] Congress' intent in including the qualifying phrase "and subject to the jurisdiction thereof," was apparently to exclude from the reach of the language children born of diplomatic representatives of a foreign state and children born of alien enemies in hostile occupation, both recognized exceptions to the common-law rule of acquired citizenship by birth,[8] as well as children of members of Indian tribes subject to tribal laws.[9] The lower courts have generally held that the citizenship of the parents determines the citizenship of children born on vessels in United States territorial waters or on the high seas.[10]

In *Afroyim* v. *Rusk*,[11] a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew

[3] "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; . . . ." 14 Stat. 27.

[4] The proposed amendment as it passed the House contained no such provision and it was decided in the Senate to include language like that finally adopted. *Cong. Globe*, 39th Cong., 1st sess. (1866), 2560, 2768-2769, 2869. The sponsor of the language said: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." Id., 2890. The legislative history is discussed at some length in *Afroyim* v. *Rusk*, 387 U.S. 253, 282-286 (1967) (Justice Harlan dissenting).

[5] *United States* v. *Wong Kim Ark*, 169 U.S. 649, 688 (1898).

[6] *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 74 (1873).

[7] *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898).

[8] Id., 682.

[9] Id., 680-682; *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884).

[10] *United States* v. *Gordon*, 25 Fed. Cas. 1364 (No. 15,231) (C.C.S.D.N.Y. 1861); *In re Look Tin Sing*, 21 F. 905 (C.C.Cal., 1884); *Lam Mow* v. *Nagle*, 24 F.2d 316 (C.A. 9, 1928).

[11] 387 U.S. 253 (1967). Though the Court upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in *Mackenzie* v. *Hare*, 239 U.S. 299 (1915), the subject first received extended judicial treatment in *Perez* v. *Brownell*, 356 U.S. 44 (1958), in which by a five-to-four decision the Court upheld a statute denaturalizing a native-born citizen for having voted in a

from the Government of the United States the power to expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit. It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted." [12] In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of § 1 and that Congress could therefore impose a reasonable and nonarbitrary condition subsequent upon their continued retention of United States citizenship.[13] Between these two decisions there is a tension which should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.[14]

foreign election. For the Court, Justice Frankfurter reasoned that Congress' power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. Three of the dissenters denied that Congress had any power to denaturalize. *See supra, pp.* 302–306. In the years before *Afroyim*, a series of decisions had curbed congressional power.

[12] *Afroyim* v. *Rusk*, 387 U.S. 253, 262–263 (1967). Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court's reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter's previous reasoning in *Perez*. Id., 268.

[13] *Rogers* v. *Bellei*, 401 U.S. 815 (1971). This, too, was a five-to-four decision, Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.

[14] *Insurance Co.* v. *New Orleans*, 13 Fed. Cas. 67 (C.C.D.La., 1870). Not being citizens of the United States, corporations accordingly have been declared unable "to claim the protection of that clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State." *Orient Ins. Co.* v. *Daggs*, 172 U.S. 557, 561 (1869). This conclusion was in harmony with the earlier holding in *Paul* v. *Virginia*, 8 Wall. (75 U.S.) 168 (1869), to the effect that corporations were not within the scope of the privilege and immunities clause of state citizenship set out in Article IV, § 2. *See also Selover, Bates & Co.* v. *Walsh*, 226 U.S. 112, 126 (1912); *Berea College* v. *Ken-*

## PRIVILEGES AND IMMUNITIES

Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a "practical nullity" by a single decision of the Supreme Court issued within five years after its ratification. In the *Slaughter-House Cases,*[1] a bare majority of the Court frustrated the aims of the most aggressive sponsors of this clause, to whom was attributed an intention to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" with a view to enabling business to develop unimpeded by state interference. This expansive alteration of the federal system was to have been achieved by converting the rights of the citizens of each State as of the date of the adoption of the Fourteenth Amendment into privileges and immunities of United States citizenship and thereafter perpetuating this newly defined *status quo* through judicial condemnation of any state law challenged as "abridging" any one of the latter privileges. To have fostered such intentions, the Court declared, would have been "to transfer the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and to "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; . . . . We are convinced that no such results were intended by the Congress . . ., nor by the legislatures . . . which ratified" this amendment, and that the sole "pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Conformably to these conclusions, the Court advised the New Orleans butchers that the Louisiana statute, conferring on a single corporation a monopoly of the business of slaughtering cattle, abrogated no rights possessed by them as United States citizens and that insofar as that law interfered with their claimed privilege of pursuing the lawful calling of butchering animals, the privilege

*tucky*, 211 U.S. 45 (1908); *Liberty Warehouse Co.* v. *Tobacco Growers*, 276 U.S. 71, 89 (1928); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936).

[1] 16 Wall. (83 U.S.) 36, 71, 77-79 (1873).

thus terminated was merely one of "those which belonged to the citizens of the States as such, and" that these had been "left to the state governments for security and protection" and had not been by this clause "placed under the special care of the Federal Government." The only privileges which the latter clause expressly protected against state encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws;"—privileges, indeed, which had been available to the United States citizens even prior to the adoption of the Fourteenth Amendment, and inasmuch as under the principle of federal supremacy no State ever was competent to interfere with their enjoyment, the privileges and immunities clause of the Fourteenth Amendment was thereby reduced to a superfluous reiteration of a prohibition already operative against the States.[2]

Although the Court has expressed a reluctance to attempt a definitive enumeration of those privileges and immunities of United States citizens which are protected against state encroachment, it nevertheless felt obliged in the *Slaughter-House Cases* [3] "to suggest some which owe their existence to the Federal Government, its National character, its Constitution, or its laws." Among those which it then identified were the right of access to the seat of Government and to the seaports, subtreasuries, land officers, and courts of justice in the several States, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly and privilege of *habeas corpus*, the right to use the navigable waters of the United States, and rights secured by treaty. In *Twining* v. *New Jersey*,[4] the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from State to State,[5] the right to petition Congress for a re-

[2] Id., 78–79.

[3] Id., 79.

[4] 211 U.S. 78, 97 (1908).

[5] Citing *Crandall* v. *Nevada*, 65 Wall. (73 U.S.) 35 (1868). It was observed in *United States* v. *Wheeler*, 254 U.S. 281, 299 (1920), that the statute at issue in *Crandall* was actually held to burden directly the performance by the United States of its governmental functions. *Cf. Passenger Cases*, 7 How. (48 U.S.) 282, 491–492 (1849) (Chief Justice Taney dissenting). Four concurring Justices in *Edwards* v. *California*, 314 U.S. 160, 177, 181 (1941), would have grounded a right of interstate travel on the privileges and immunities clause. Presently, the Court declines to ascribe a source but is content to assert the right to be protected. *United States* v. *Guest*, 383 U.S. 745, 758 (1966); *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631 (1969). Three Justices ascribed the source to this clause in *Oregon* v. *Mitchell*, 400 U.S. 112, 285–287 (1970) (Justices Stewart and Blackmun and Chief Justice Burger, concurring in part and dissenting in part).

dress of grievances,[6] the right to vote for national officers,[7] the right to enter public lands,[8] the right to be protected against violence while in the lawful custody of a United States marshal,[9] and the right to inform the United States authorities of violation of its laws.[10] Earlier, in a decision not mentioned in *Twining*, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to excise." [11]

In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint which it imposes upon state action. *Colgate* v. *Harvey*,[12] which was overruled five years later,[13] represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the privileges and immunities clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." Here, the Court declared that the right of a citizen resident in one State to contract in another, to transact any lawful business, or to make a loan of money, in any State other than that in which the citizen resides was a privilege of national citizenship which was abridged by a state income tax law excluding from taxable income interest received on money loaned within the State. In *Hague* v. *CIO*,[14] two and perhaps three justices thought that freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen, and in *Edwards* v. *California* [15] four Justices were prepared to rely on the clause.[16] In *Oyama* v. *California*,[17] in a single

[6] Citing *United States* v. *Cruikshank*, 92 U.S. 542 (1876).

[7] Citing *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Wiley* v. *Sinkler*, 179 U.S. 58 (1900). Note Justice Douglas' reliance on this clause in *Oregon* v. *Mitchell*, 400 U.S. 112, 149 (1970) (concurring in part and dissenting in part).

[8] Citing *United States* v. *Waddell*, 112 U.S. 76 (1884).

[9] Citing *Logan* v. *United States*, 144 U.S. 263 (1892).

[10] Citing *In re Quarles and Butler*, 158 U.S. 532 (1895).

[11] *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891).

[12] 296 U.S. 404 (1935).

[13] *Madden* v. *Kentucky*, 309 U.S. 83, 93 (1940).

[14] 307 U.S. 496, 510–518 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. Id., 532). Justices Stone and Reed preferred to base the decision on the due process clause. Id., 518.

[15] 314 U.S. 160, 177–183 (1941).

[16] *See also Oregon* v. *Mitchell*, 400 U.S. 112, 149 (1970) (Justice Douglas); id., 285–287 (Justices Stewart and Blackmun and Chief Justice Burger).

[17] 332 U.S. 633, 640 (1948).

sentence the Court agreed with the contention of a native-born youth that a state Alien Land Law, applied to work a forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible to citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against state abridgment, although a federal statute, enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed.[18]

In other respects, however, claims based on this clause have been rejected.[19]

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[18] Civil Rights Act of 1866, 14 Stat. 27, as amended, now 42 U.S.C. § 1982.

[19] E.g., *Holden* v. *Hardy*, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); *Williams* v. *Fears*, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the State); *Wilmington Mining Co.* v. *Fulton*, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); *Heim* v. *McCall*, 239 U.S. 175 (1915); *Crane* v. *New York*, 239 U.S. 195 (1915) (statute restricting employment under public works of the State to citizens of the United States, with a preference to citizens of the State); *Missouri Pacific Ry. Co.* v. *Castle*, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); *West. Un. Tel. Co.* v. *Milling Co.*, 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); *Bradwell* v. *Illinois*, 16 Wall. (83 U.S.) 130, 139 (1873); *In re Lockwood*, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); *Kirtland* v. *Hotchkiss*, 100 U.S. 491, 499 (1879) (law taxing in the hands of a resident citizen a debt owing from a resident of another State and secured by mortgage of land in the debtor's State); *Bartemeyer* v. *Iowa*, 18 Wall. (85 U.S.) 129 (1874); *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Crowley* v. *Christensen*, 137 U.S. 86, 91 (1890); *Giozza* v. *Tiernan*, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); *In re Kemmler*, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); *Minor* v. *Happersett*, 21 Wall. (88 U.S.) 162 (1875) (statute regulating the franchise to male citizens); *Pope* v. *Williams*, 193 U.S. 621 (1904) (statute requiring persons coming into a State to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters); *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); *Walker* v. *Sauvinet*, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); *Presser* v. *Illinois*, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the Governor); *Maxwell* v. *Dow*, 176 U.S. 581, 596, 597–598 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association (other than benevolent orders, and the like) with knowledge that the association has failed to file its constitution and membership lists); *Palko* v. *Connecticut*, 302 U.S. 319 (1937) (statute allowing a State to appeal in criminal cases for errors of law and to retry the accused); *Breedlove* v. *Suttles*, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); *Madden* v.

## DUE PROCESS OF LAW

### The Development of Substantive Due Process

Although many years after ratification the Court ventured the not very informative observation that the Fourteenth Amendment "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment," [1] and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth," [2] the significance of the due process clause as a restraint on state action appears to have been grossly underestimated by litigants no less than by the Court in the years immediately following its adoption. From the outset of our constitutional history due process of law as it occurs in the Fifth Amendment had been recognized as a restraint upon government, but, with one conspicuous exception,[3] only in the narrower sense that a legislature must provide "due process for the enforcement of law"; it was in accordance with this limited appraisal of the clause that the Court disposed of early cases arising thereunder.

Thus, in the *Slaughter-House Cases*,[4] in which the clause was invoked by a group of butchers challenging on several grounds the validity of a Lousiana statute which conferred upon one corporation the exclusive privilege of butchering cattle in New Orleans, the Court declared that the prohibition against a deprivation of property "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitution of

*Kentucky*, 309 U.S. 83, 92–93 (1940), overruling *Colgate* v. *Harvey*, 296 U.S. 404, 430 (1935) (statute whereby deposits in banks outside the State are taxed at 50¢ per $100); *Snowden* v. *Hughes*, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); *MacDougall* v. *Green*, 335 U.S. 281 (1948) (the Illinois Election Code which required that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 to the 102 counties in the State, notwithstanding that 52% of the voters reside in only one country and 87% in the 49 most populous counties); *New York* v. *O'Neill*, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a State in criminal proceedings); *James* v. *Valtierra*, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).

[1] *Hibben* v. *Smith*, 191 U.S. 310, 325 (1903).

[2] *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 410 (1905). *See also French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901).

[3] *Scott* v. *Sandford*, 19 How. (60 U.S.) 393, 450 (1857), is the exception.

[4] 16 Wall. (83 U.S.) 36, 80–81 (1873).

nearly all the States, as a restraint upon the power of the States. . . . We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." Four years later, in *Munn* v. *Illinois*,[5] the Court again refused to interpret the due process clause as invalidating state legislation regulating the rates charged for the transportation and warehousing of grain. Overruling contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring to the public an interest in a private enterprise, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Deploring such attempts, nullified consistently in the preceding cases, to convert the due process clause into a substantive restraint on the powers of the States, Justice Miller in *Davidson* v. *New Orleans*,[6] obliquely counseled against a departure from the conventional application of the clause, albeit he acknowledged the difficulty of arriving at a precise, all inclusive, definition thereof. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Four-

[5] 94 U.S. 113, 134 (1877).
[6] 96 U.S. 97, 103–104 (1878).

teenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental of law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom . . . in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, . . . ."

In thus persisting in its refusal to review, on other than procedural grounds, the constitutionality of state action, the Court was rejecting additional business, but a bare half-dozen years later, in again reaching a result in harmony with past precedents, the Justices gave fair warning of the imminence of a modification of their views. After noting that the due process clause, by reason of its operation upon "all the powers of government, legislative as well as executive and judicial," could not be appraised solely in terms of the "sanction of settled usage," Justice Mathews, speaking for the Court in *Hurtado* v. *California,*[7] declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." Thus were

[7] 110 U.S. 516, 528, 532, 536 (1884).

the States put on notice that every species of state legislation, whether dealing with procedural or substantive rights, was subject to the scrutiny of the Court when the question of its essential justice is raised.

What induced the Court to dismiss its fears of upsetting the balance in the distribution of powers under the federal system and to enlarge its own supervisory powers over state legislation were the appeals more and more addressed to it for adequate protection of property rights against the remedial social legislation which the States were increasingly enacting in the wake of industrial expansion. At the same time the added emphasis on the due process clause which satisfaction of these requests entailed afforded the Court an opportunity to compensate for its earlier virtual nullification of the privileges and immunities clause of the Amendment. So far as such modification of its position needed to be justified in legal terms, theories concerning the relation of government to private rights were available to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. Preliminary, however, to this consummation the *Slaughter-House Cases* and *Munn* v. *Illinois* had to be overruled in part, at least, and the views of the dissenting Justices in those cases converted into majority doctrine.

About twenty years were required to complete this process, in the course of which the restricted view of the police power advanced by Justice Field in his dissent in *Munn* v. *Illinois*,[8] namely, that it is solely a power to prevent injury, was in effect ratified by the Court itself. This occurred in *Mugler* v. *Kansas*,[9] where the power was defined as embracing no more than the power to promote public health, morals, and safety. During the same interval, ideas embodying the social compact and natural rights, which had been espoused by Justice Bradley in his dissent in the *Slaughter-House Cases*,[10] had been transformed tentatively into constitutionally enforceable limitations upon government,[11] with the consequence that the States, in exercising their police power, could foster only those purposes of health, morals, and safety which the Court had enumerated and could employ only such means as would

[8] 94 U.S. 113, 141-148 (1877).

[9] 123 U.S. 623, 661 (1887).

[10] 16 Wall. (83 U.S.) 36, 113-114, 116, 122 (1873).

[11] *Loan Association* v. *Topeka*, 20 Wall. (87 U.S.) 655, 663 (1875). "There are . . . rights in every free government beyond the control of the State . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, . . ."

not unreasonably interfere with the fundamentally natural rights of liberty and property, which Justice Bradley had equated with freedom to pursue a lawful calling and to make contracts for that purpose.[12]

So having narrowed the scope of the state's police power in deference of the natural rights of liberty and property, the Court next proceeded to read into the latter currently accepted theories of *laissez faire* economics, reinforced by the doctrine of evolution as elaborated by Herbert Spencer, to the end that "liberty," in particular, became synonymous with governmental hands-off in the field of private economic relations. In *Budd* v. *New York*,[13] Justice Brewer in a *dictum* declared: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government." And to implement this point of view the Court next undertook to water down the accepted maxim that a state statute must be presumed to be valid until clearly shown to be otherwise.[14] The first step was taken with opposite intention. This occurred in *Munn* v. *Illinois*,[15] where the Court, in sustaining the legislation before it, declared: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed." Ten years later, in *Mugler* v. *Kansas*,[16] this procedure was improved upon, and a state-wide anti-liquor law was sustained on the basis of the proposition that deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them, that is to say, for the Court to review and appraise the consideration which had induced the legislature to enact the statute in

[12] "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; . . . This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law." *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 116, 122 (1873) (Justice Bradley dissenting).

[13] 143 U.S. 517, 551 (1892).

[14] *See Fletcher* v. *Peck*, 6 Cr. (10. U.S.) 87, 128 (1810).

[15] 94 U.S. 113, 123, 182 (1877).

[16] 123 U.S. 623 (1887).

the first place.[17] However, in *Powell* v. *Pennsylvania*,[18] decided the following year, the Court, confronted with a similar act involving olemargarine, concerning which it was unable to claim a like measure of common knowledge, fell back upon the doctrine of presumed validity, and declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law, . . ." sustained the measure.

In contrast to the presumed validity rule under which the Court ordinarily is not obliged to go beyond the record of evidence submitted by the litigants in determining the validity of a statute, the judicial notice principle, as developed in *Mugler* v. *Kansas*, carried the inference that unless the Court, independently of the record, is able to ascertain the existence of justifying facts accessible to it by the rules governing judicial notice, it will be obliged to invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter; namely, health, morals, or safety. For appraising state legislation affecting neither liberty nor property, the Court found the rule of presumed validity quite serviceable, but for invalidating legislation constituting governmental interference in the field of economic relations, and, more particularly, labor-management relations, the Court found the principle of judicial notice more advantageous. This advantage was enhanced by the disposition of the Court, in litigation embracing the latter type of legislation, to shift the burden of proof from the litigant charging unconstitutionality to the State seeking enforcement. To the latter was transferred the task of demonstrating that a statute interfering with the natural right of liberty or property was in fact "authorized" by the Constitution and not merely that the latter did not expressly prohibit enactment of the same.

That this approach to the constitutionality of state legislation, at least when legislation regulating economic matters is concerned, is no longer the one followed by the Court, has not in fact been the approach since *Nebbia* v. *New York*,[19] will become clear toward the conclusion of the materials which follow. Thus, in 1955, reversing a federal district court's judgment holding unconstitutional a state statutory scheme regulating the sale of eyeglasses to the advantage

[17] Id., 662. "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil."

[18] 127 U.S. 678, 685 (1888).

[19] 291 U.S. 502 (1934).

of ophthalmologists and optometrists in private professional practice and adversely to opticians and to those employed by or using space in business establishments, the Court observed that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn* v. *Illinois*, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls not to the courts.' " [20] Yet the Court went on to assess the reasons which might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that *some* regulation might be found unreasonable.[21] More recent decisions, however, without considering at all the reasonableness of the regulation questioned, have flatly pronounced the inapplicability of the due process clause in the case.[22]

***"Persons" Defined.***—Notwithstanding the historical controversy that has been waged concerning whether the framers of the Fourteenth Amendment intended the word "person" to mean only natural persons, or whether the word was substituted for the word, "citizen," with a view to protecting corporations from oppressive state legislation,[23] the Supreme Court, as early as the *Granger Cases*,[24] decided in 1877, upheld on the merits various state laws

[20] *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955).

[21] Id., 487, 491.

[22] The Court has pronounced a strict "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress." That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 83–84 (1978); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14–20 (1976); *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 106–108 (1978); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124–125 (1978); *Brotherhood of Locomotive Firemen and Engineers* v. *Chicago, R.I. & P. R. Co.*, 393 U.S. 129, 143 (1968); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, 733 (1963).

[23] *See* Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L. J. 371 (1938).

[24] *Munn* v. *Illinois*, 94 U.S. 113 (1877). In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law." *Sinking Fund Cases*, 99 U.S. 700, 718–719 (1879).

without raising any question as to the status of railway corporation plaintiffs to advance due process contentions. There is no doubt that a corporation may not be deprived of its property without due process of law,[25] and although prior decisions have held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural, not artificial, persons,[1] nevertheless a newspaper corporation was sustained, in 1936, in its objection that a state law deprived it of liberty of press.[2] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship.[3]

Ordinarily, the mere interest of an official as such, in contrast to an actual injury sustained by a natural or artificial person through invasion of personal or property rights, has not been deemed adequate to enable him to invoke the protection of the Fourteenth Amendment against state action.[4] Similarly, municipal corporations are viewed as having no standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the State.[5] However, state officers are acknowledged to have an interest, despite their not having sustained any "private damage," in resisting an "endeavor to prevent the enforcement of laws in relation to which they have official duties," and, accordingly, may apply to federal courts for the "review of decisions of state

[25] *Smyth* v. *Ames*, 169 U.S. 466, 522, 526 (1898); *Kentucky Co.* v. *Paramount Exch.*, 262 U.S. 544, 550 (1923); *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928).

[1] *Northwestern Life Ins. Co.* v. *Riggs*, 203 U.S. 243, 255 (1906); *Western Turf Association* v. *Greenberg*, 204 U.S. 359, 363 (1907); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). Earlier, in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 362 (1904), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation . . . is not endowed with the inalienable rights of a natural person."

[2] *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936). In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. *See* id., 778 n. 14 (reserving question). *But see* id., 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).

[3] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Terrace* v. *Thompson*, 263 U.S. 197, 216 (1923). *See Hellenic Lines* v. *Rhodetis*, 398 U.S. 306, 309 (1970).

[4] *Pennie* v. *Reis*, 132 U.S. 464 (1889); *Taylor and Marshall* v. *Beckham (No. 1)*, 178 U.S. 548 (1900); *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405, 410 (1900); *Straus* v. *Foxworth*, 231 U.S. 162 (1913); *Columbus & Greenv. Ry.* v. *Miller*, 283 U.S. 96 (1931).

[5] *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394 (1919); *Trenton* v. *New Jersey*, 262 U.S. 182 (1923); *Williams* v. *Mayor*, 289 U.S. 36 (1933). *But see Madison School Dist.* v. *WERC*, 429 U.S. 167, 175 n. 7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against State).

courts declaring state statutes which [they] seek to enforce to be repugnant to the" Fourteenth Amendment.[6]

***Police Power Defined and Limited.***—The police power of a State today embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public safety, health, and morals, and is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the state.[7]

Because the police power of State is the least limitable of the exercises of government, such limitations as are applicable thereto are not readily definable. Being neither susceptible of circumstantial precision, nor discoverable by any formula, these limitations can be determined only through appropriate regard to the subject matter of the exercise of that power.[8] "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise."[9] Insofar

[6] *Coleman* v. *Miller*, 307 U.S. 433, 441, 442, 443, 445 (1939); *Boynton* v. *Hutchinson Gas Co.*, 291 U.S. 656 (1934); *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177 (1938).

The converse is not true, however, and the interest of a state official in vindicating the Constitution gives him no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. *Smith* v. *Indiana*, 191 U.S. 138 (1903); *Braxton County Court* v. *West Virginia*, 208 U.S. 192 (1908); *Marshall* v. *Dye*, 231 U.S. 250 (1913); *Stewart* v. *Kansas City*, 239 U.S. 14 (1915). *See also Coleman* v. *Miller*, 307 U.S. 433, 437–446 (1939).

[7] *California Reduction Co.* v. *Sanitary Works*, 199 U.S. 306, 318 (1905); *Chicago B. & Q. Railway* v. *Drainage Comrs.*, 200 U.S. 561, 592 (1906); *Bacon* v. *Walker*, 204 U.S. 311 (1907); *Eubank* v. *Richmond*, 226 U.S. 137 (1912); *Schmidinger* v. *Chicago*, 226 U.S. 578 (1913); *Sligh* v. *Kirkwood*, 237 U.S. 52, 58–59 (1915); *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405 (1935). *See also Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city). *And see City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976).

[8] *Hudson Water Co.* v. *McCarter*, 209 U.S. 349 (1908); *Eubank* v. *Richmond*, 226 U.S. 137, 142 (1912); *Erie R.R. Co.* v. *Williams*, 233 U.S. 685, 699 (1914); *Sligh* v. *Kirkwood*, 237 U.S. 52, 58–59 (1915); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Panhandle Eastern Pipeline Co.* v. *Highway Comm.*, 294 U.S. 613,622 (1935).

[9] *Atlantic Coast Line* v. *Goldsboro*, 232 U.S. 548, 558 (1914).

as the police power is utilized by a State, the means employed to effect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, public safety, or public morals, or some other phase of the general welfare.[10]

The general rule is that if a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid.[11] Yet where mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose seems to be a private use.[12] On the other hand, mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power."[13] Moreover, it is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking without due process of law.[14] Similarly, initial compliance with a regulation which is valid when adopted occasions no forfeiture of the right to protest when that regulation subsequently loses its validity by becoming confiscatory in its operation.[15]

***"Liberty".***—The "liberty" guaranteed by the due process clause has been variously defined by the Court, as will be seen hereinafter. In general, in the early years, it meant almost exclusively "liberty of contract," but almost simultaneously with the demise of this concept came a general broadening of the word to include a broad compass of political and social rights and privileges of ever-lengthening itemization.[16]

[10] *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 111–112 (1928); *Treigle* v. *Acme Homestead Assn.*, 297 U.S. 189, 197 (1936).

[11] *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); *Welch* v. *Swasey*, 214 U.S. 91, 107 (1909). *See also Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978); *Agins* v. *City of Tiburon*, 477 U.S. 255 (1980). *See supra, pp.* 1320–1328.

[12] *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911).

[13] *Erie R.R. Co.* v. *Williams*, 233 U.S. 685, 700 (1914).

[14] *New Orleans Public Service* v. *New Orleans*, 281 U.S. 682, 687 (1930).

[15] *Abie State Bank* v. *Bryan*, 282 U.S. 765, 776 (1931).

[16] *See* the tentative effort in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 102 and n. 23 (1976), apparently to expand upon the concept of "liberty" within the meaning of the Fifth Amendment's due process clause and necessarily therefore the Fourteenth's. *But see* also the substantial confinement of the concept in *Meachum* v. *Fano*, 427 U.S. 215 (1976); and *Montanye* v. *Haymes* 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the "entitlement" doctrine developed in property cases in which the interest is made to depend upon state recognition of the interest through positive law,-an approach contrary to previous due process-liberty analysis. *Compare Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972).

**Liberty of Contract**

***Regulatory Labor Laws Generally.***—Liberty of contract, a concept originally advanced by Justices Bradley and Field in the *Slaughter-House Cases*,[1] was elevated to the status of accepted doctrine in *Allgeyer* v. *Louisiana*.[2] Applied repeatedly in subsequent cases as a restraint on federal and state power, freedom of contract was also alluded to as a property right, as is evident in the language of the Court in *Coppage* v. *Kansas*.[3] "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

By a process of reasoning that was almost completely discarded during the Depression, the Court was nevertheless able, prior thereto, to sustain state ameliorative legislation by acknowledging that freedom of contract was "a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community. . . . In dealing with the relation of the employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[4] Through observance of such qualifying statement the Court was induced to uphold the following types of labor legislation.

Although occasionally acknowledging in abstract terms that freedom of contract is not absolute but is subject to restraint by the State in the exercise of its police powers, the Court, in conformity with the previously mentioned theories of economics and evolution,

[1] 16 Wall. (83 U.S.) 36 (1873).

[2] 165 U.S. 578, 589 (1897). "The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

[3] 236 U.S. 1, 14 (1915).

[4] *Chicago, B. & Q. R.R. Co.* v. *McGuire*, 219 U.S. 549, 567, 570 (1911); *Wolff Packing Co.* v. *Industrial Court*, 262 U.S. 522, 534 (1923).

was in fact committed to the principle that freedom of contract is the general rule and that legislative authority to abridge it could be justified only by exceptional circumstances. To maintain such abridgments at a minimum, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of *Holden* v. *Hardy* [5] and *Lochner* v. *New York*,[6] decisions which bear the same relation to each other as *Powell* v. *Pennsylvania* [7] and *Mugler* v. *Kansas*.[8]

In *Holden* v. *Hardy*,[9] the Court, in reliance upon the principle of presumed validity, allowed the burden of proof to remain with those attacking the validity of a statute and upheld a Utah act limiting the period of labor in mines to eight hours per day. Taking cognizance of the fact that labor below the surface of the earth was attended by risk to person and the health and for these reasons had long been the subject of state intervention, the Court registered its willingness to sustain a limitation on freedom of contract which a state legislature had adjudged "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."

Seven years later, however, a radically altered Court was predisposed in favor of the doctrine of judicial notice, through application of which it arrived at the conclusion, in *Lochner* v. *New York*,[10] that a law restricting employment in bakeries to ten hours per day and 60 hours per week was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract with respect to their means of livelihood. Denying that in so holding the Court was in effect substituting its own judgment for that of the legislature, Justice Peckham, nevertheless, maintained that whether the act within the police power of the State was a "question that must be answered by the Court," and then, in disregard of the accumulated medical evidence proffered in support of the act, uttered the following observation. "In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . It might be safely affirmed that almost all occupations more

[5] 169 U.S. 366 (1898).
[6] 198 U.S. 45 (1905).
[7] 127 U.S. 678 (1888).
[8] 123 U.S. 623 (1887).
[9] 169 U.S. 366, 398 (1898).
[10] 198 U.S. 45, 58–59 (1905).

or less affect the health. . . . But are we all, on that account, at the mercy of the legislative majorities?"

Of two dissenting opinions filed in the case, one, prepared by Justice Harlan, stressed the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages; he concluded that the very existence of such evidence left the reasonableness of the measure under review open to discussion and that the latter fact of itself put the statute within legislative discretion. "The responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [T]he public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." [11]

The second dissenting opinion written by Justice Holmes has received the greater measure of attention, however, for the views expressed therein were a forecast of the line of reasoning to be followed by the Court some decades later. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our

[11] Id., 71, 74, quoting *Atkin* v. *Kansas*, 191 U.S. 207, 223 (1903).

finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution. . . . I think that the word liberty, in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." [12]

In part, Justice Holmes' criticism of his colleagues was unfair, for his "rational and fair man" could not function in a vacuum, and, in appraising the constitutionality of state legislation, could no more avoid being guided by his preferences or "economic predilections" than were the Justices constituting the majority. Insofar as he was resigned to accept the broader conception of due process of law in preference to the historical concept thereof as pertaining to the enforcement rather than the making of law and did not affirmatively advocate a return to the maxim that the possibility of abuse is no argument against possession of a power, Justice Holmes, whether consciously or not, was thus prepared to observe, along with his opponents in the majority, the very practices which were deemed to have rendered inevitable the assumption by the Court of a "perpetual censorship" over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the espousal of the conflicting doctrines of judicial notice by the former and of presumed validity by the latter.

Although the Holmes dissent bore fruit in time in the form of the *Bunting* v. *Oregon* [13] and *Muller* v. *Oregon* [14] decisions modifying the *Lochner* case, the doctrinal approach employed in the earlier of these by Justice Brewer continued to prevail until the Depression in the 1930's. In view of the shift in the burden of proof which application of the principle of judicial notice entailed, counsel defending the constitutionality of social legislation developed the practice of submitting voluminous factual briefs replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours of work,[15] it generally intimated that the facts thus

[12] *Lochner* v. *New York*, 198 U.S. 45, 75–76 (1905).
[13] 243 U.S. 426 (1917).
[14] 208 U.S. 412 (1908).
[15] Ibid.

submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof, but whenever it chose to invalidate comparable legislation, such as enactments establishing minimum wage for women and children,[16] it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safety, and condemned the former as an arbitrary interference with freedom of contract.

During the great Depression, however, the *laissez faire* tenet of self-help was supplanted by the belief that it is peculiarly the duty of government to help those who are unable to help themselves; to sustain remedial legislation enacted in conformity with the latter philosophy, the Court had to revise extensively its previously formulated concepts of "liberty" under the due process clause. Not only did the Court take judicial notice of the demands for relief arising from the Depression when it overturned prior holdings and sustained minimum wage legislation,[17] but in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court virtually had to exclude from consideration the employer's contention that such legislation interfered with his liberty of contract in contravention of the due process clause and to exalt as a fundamental right the correlative liberty of employees, which right the state legislatures were declared to be competent to protect against interference from private sources.

To enable these legislatures to balance the equities, that is, to achieve equality in bargaining power between employer and employees, the Court thus sanctioned a diminution of liberty in the sense of the employer's freedom of contract and a corresponding increase in the measure of liberty enjoyable by the workers. To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of other individuals no less than by the arbitrary action of public officials, the Court in effect transformed the due process clause into a source of encouragement to state legislatures to intervene affirmatively by way of mitigating the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint

[16] *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Stettler* v. *O'Hara*, 243 U.S. 629 (1917); *Morehead* v. *New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

[17] *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). Thus the National Labor Relations Act was declared not to "interfere with the normal exercise of the right of the employer to select its employees or to discharge them." However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44, 45–46 (1937).

upon government, was replaced by the civil liberty which an individual enjoys by virtue of the restraints which government, in his behalf, imposes upon his neighbors.

***Laws Regulating Hours of Labor.***—The due process clause has been construed as permitting enactment by the States of laws: (1) limiting the hours of labor in mines and smelters to eight hours per day,[18] (2) prescribing eight hours a day or a maximum of 48 hours per week as a limitation of the hours at which women may labor,[19] and (3) providing that no person shall work in any mill, or other workplace, more than ten hours per day (with exceptions) but permitting overtime, not to exceed three hours a day, on condition that it is paid at the rate of one and one-half times the regular wage.[20] Because of the almost plenary powers of the State and its municipal subdivisions to determine the conditions under which work shall go forward on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date.[21]

***Laws Regulating Labor in Mines.***—The regulation of mines being patently within the police power, States have been upheld in the enactment of laws providing for appointment of mining inspectors and requiring payment of their fees by mine owners,[22] compelling employment of only licensed mine managers and mine examiners, and imposing upon mine owners liability for the willful failure of their manager and examiner to furnish a reasonably safe place for workmen.[23] Other similar regulations which have been sustained have included laws requiring that entries be of a specified width,[24] that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment,[25] and that washhouses be provided for employees.[1]

***Law Prohibiting Employment of Children in Hazardous Occupations.***—To make effective its prohibition against the employment of persons under 16 years of age in dangerous occupations, a State has been held to be competent to require employers at their peril to ascertain whether their employees are in fact below that age.[2]

[18] *Holden* v. *Hardy*, 169 U.S. 366 (1898).
[19] *Miller* v. *Wilson*, 236 U.S. 373 (1915); *Bosley* v. *McLaughlin*, 236 U.S. 385 (1915). *See also Muller* v. *Oregon*, 208 U.S. 412 (1908); *Riley* v. *Massachusetts*, 232 U.S. 671 (1914); *Hawley* v. *Walker*, 232 U.S. 718 (1914).
[20] *Bunting* v. *Oregon*, 243 U.S. 426 (1917).
[21] *Atkin* v. *Kansas*, 191 U.S. 207 (1903).
[22] *St. Louis Cons. Coal Co.* v. *Illinois*, 185 U.S. 203 (1902).
[23] *Wilmington Mining Co.* v. *Fulton*, 205 U.S. 60 (1907).
[24] *Barrett* v. *Indiana*, 229 U.S. 26 (1913).
[25] *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531 (1914).
[1] *Booth* v. *Indiana*, 237 U.S. 391 (1915).
[2] *Sturges & Burn* v. *Beauchamp*, 231 U.S. 320 (1913).

***Laws Regulating Payment of Wages.***—No unconstitutional deprivation of liberty of contract was deemed to have been occasioned by a statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages.[3] Nor was any constitutional defect discernible in laws requiring railroads to pay their employees semimonthly[4] and to pay them on the day of discharge, without abatement or reduction, any funds due them.[5] Similarly, freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission.[6]

***Minimum Wage Laws.***—The theory that a law prescribing minimum wages for women and children violates due process by impairing freedom of contract was finally discarded in 1937.[7] The current theory of the Court, particularly when labor is the beneficiary of legislation, was stated by Justice Douglas for a majority of the Court, in the following terms: "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits. . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."[8] Proceeding from this basis the Court sustained a Missouri statute giving employees the right to absent themselves four hours on election day, between the opening and closing of the polls, without deduction of wages for their absence.

[3] *Knoxville Iron Co.* v. *Harbison*, 183 U.S. 13 (1901); *Dayton Coal and Iron Co.* v. *Barton*, 183 U.S. 23 (1901); *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224 (1914).

[4] *Erie R.R. Co.* v. *Williams*, 233 U.S. 685 (1914).

[5] *St. Louis, I. Mo. & S.P. Ry. Co.* v. *Paul*, 173 U.S. 404 (1899).

[6] *Rail Coal Co.* v. *Ohio Industrial Comm.*, 236 U.S. 338 (1915). *See also McLean* v. *Arkansas*, 211 U.S. 539 (1909).

[7] *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), overruling *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923) (a Fifth Amendment case); *Morehead* v. *New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

[8] *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952).

It was admitted that this was a minimum wage law, but, said Justice Douglas, "the protection of the right of suffrage under our scheme of things is basic and fundamental," and hence within the police power. "Of course," the Justice added, "many forms of regulation reduce the net return of the enterprise. . . . Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one aprt of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases." [9]

***Workmen's Compensation Laws.***—"This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules effecting the employer's liability for personal injuries to the employee." [10] "These decisions have established the propositions that the ruies of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change." [11]

[9] Id., 424–425. *See also Dean* v. *Gadsden Times Pub. Co.*, 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

[10] *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 200 (1917).

[11] *Arizona Employers' Liability Cases*, 250 U.S. 400, 419–420 (1919).

Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers and the rights of employees and their dependents, in respect of compensation for disabling injuries and death caused by accident in certain hazardous occupations,[12] was held not to work a deprivation of property without due process of law in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, nor in depriving the employee, or his dependents, of the higher damages which, in some cases, might be rendered under these doctrines.[13] Likewise, an act which allowed an injured employee an election of remedies permitting restricted recovery under a compensation law although guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act did not deprive an employer of his property without due process of law.[14]

The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating *former* employees who terminated work in the industry before passage of the law for black lung disabilities contracted in the course of their work was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.[15] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, i.e., that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

Contracts limiting liability for injuries, consummated in advance of the injury received, may be prohibited by the legislature, which may further stipulate that subsequent acceptance of benefits under such contracts shall not constitute satisfaction of a claim for injuries thereafter sustained.[16] Also, as applied to a nonresident

[12] In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." *Ward & Gow* v. *Krinsky*, 259 U.S. 503, 520 (1922).

[13] *New York Central R.R.* v. *White*, 243 U.S. 188 (1917); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917).

[14] *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919).

[15] *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S., 14–20 (1976). *But see* id., 38 (Justice Powell concurring).

[16] *Chicago, B. & Q. R.R. Co.* v. *McGuire*, 219 U.S. 549 (1911).

alien employee hired within the State but injured outside, an act forbidding any contracts exempting employers from liability for injuries outside the State has been construed as not denying due process to the employer.[17] The fact that a State, after having allowed employers to cover their liability with a private insurer, subsequently withdrew that privilege and required them to contribute to a state insurance fund was held to effect no unconstitutional deprivation as applied to an employer who had obtained protection from an insurance company before this change went into effect.[18] As long as the right to come under a workmen's compensation statute is optional with an employer, the latter, having chosen to accept benefits thereof, is estopped from attempting to escape its burdens by challenging the constitutionality of a provision thereof which makes the finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance.[19]

When, by the terms of a workmen's compensation statute, the wrongdoer, in case of wrongful death, is obliged to indemnify the employer or the insurance carrier of the employer of the decedent, in the amount which the latter were required under the act to contribute into special compensation funds, no unconstitutional deprivation of the wrongdoer's property was discernible.[20] By the same course of reasoning neither the employer nor the carrier was held to have been denied due process by another provision in an act requiring payments by them, in case an injured employee dies without dependents, into special funds to be used for vocational rehabilitation or disability compensation of injured workers of other establishments.[21] Compensation also need not be based exclusively on loss of earning power, and an award authorized by statute for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work, has been conceded to be neither an arbitrary nor oppressive exercise of the police power.[22]

***Collective Bargaining.***—During the 1930s, liberty, in the sense of freedom of contract, judicially translated into what one Justice has labeled the *Allgeyer-Lochner-Adair-Coppage* doctrine,[23] lost its

[17] *Alaska Packers Assn.* v. *Comm.*, 294 U.S. 532 (1935).

[18] *Thornton* v. *Duffy*, 254 U.S. 361 (1920).

[19] *Booth Fisheries* v. *Industrial Comm.*, 271 U.S. 208 (1926).

[20] *Staten Island Ry.* v. *Phoenix Co.*, 281 U.S. 98 (1930).

[21] *Sheehan Co.* v. *Shuler*, 265 U.S. 371 (1924); *New York State Rys.* v. *Shuler*, 265 U.S. 379 (1924).

[22] *New York Cent. R.R. Co.* v. *Bianc*, 250 U.S. 596 (1919). Attorneys are not deprived of property or their liberty of contract by restriction imposed by the State on the fees which they may charge in cases arising under the workmen's compensation law. *Yeiser* v. *Dysart*, 267 U.S. 540 (1925).

[23] Justice Black in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949). In his concurring opinion, contained in the companion

potency as an obstacle to the enforcement of legislation calculated to enhance the bargaining capacity of workers as against that already possessed by their employers. Prior to the manifestation, in *Senn* v. *Tile Layers Union*,[24] of a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments, the Court had, on occasion, sustained measures such as one requiring every corporation to furnish, upon request, to any employee, when discharged or leaving its service, a letter, signed by the superintendent or manager, setting forth the nature and duration of his service to the corporation and stating truly the cause of his leaving.[25] Added provisions that such letters should be on plain

case of *AFL* v. *American Sash & Door Co.*, 335 U.S. 538, 543–544 (1949), Justice Frankfurter summarized the now obsolete doctrines employed by the Court to strike down state laws fostering unionization. "[U]nionization encountered the shibboleths of a premachine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of 'liberty' were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. . . . The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earners' bargaining power. With that attitude as a premise, *Adair* v. *United States*, 208 U.S. 161 (1908), and *Coppage* v. *Kansas*, 236 U.S. 1 (1915), followed logically enough, not even *Truax* v. *Corrigan*, 257 U.S. 312 (1921), could be considered unexpected."

On grounds of unconstitutional impairment of freedom of contract, or more particularly, of the unrestricted right of the employer to hire and fire, a federal and a state statute attempting to outlaw "yellow dog" contracts whereby, as a condition of obtaining employment, a worker had to agree not to join or to remain a member of a union, were voided in *Adair* v. *United States*, 208 U.S. 161 (1908) and *Coppage* v. *Kansas*, 236 U.S. 1 (1915), respectively. In *Truax* v. *Corrigan*, 257 U.S. 312 (1921), a majority of the Court held that an Arizona statute which operated, in effect, to make remediless (by forbidding the use of injunction) injury to an employer's business by striking employees and others, through concerted action in picketing, displaying banners advertising the strike, denouncing the employer as unfair to union labor, appealing to customers to withdraw their patronage, and circulating handbills containing abusive and libelous charges against employers, employees, and patrons, and intimidations of an injury to future patrons, deprived the owner of the business and the premises of his property without due process of law.

In *Wolff Co.* v. *Industrial Court*, 262 U.S. 522 (1923), 267 U.S. 552 (1925) and in *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), the Court had also ruled that a statute compelling employers and employees to submit their controversies over wages and hours of labor to state arbitration was unconstitutional as part of a system compelling employers and employees to continue in business on terms not of their own making.

[24] 301 U.S. 486 (1937).

[25] *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement by a state court of a local rule of policy which rendered illegal an agreement of several insurance companies having a monopoly of a line of business in a city that none would

paper selected by the employee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property.[1] On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute by the terms of which an officer of a labor union was punished for having ordered a strike for the purpose of enforcing a payment to a former employee of a state claim for wages.[2]

The significance of the case of *Senn* v. *Tile Layers Union*[3] an indicator of the range of the alteration of the Court's views concerning the constitutionality of state labor legislation, derives in part from the fact that the statute upheld therein was not appreciably different from that voided in *Truax* v. *Corrigan*.[4] Both statutes were alike in that they withheld the remedy of injunction, but because the invalidated act did not contain the more liberal and also more precise definition of a labor dispute set forth in the later enactment and, above all, did not affirmatively purport to sanction peaceful picketing only, the Court was enabled to maintain that *Truax* v. *Corrigan*, insofar as "the statute there in question was . . . applied to legalize conduct which was not simply peaceful picketing," was distinguishable. Specifically, the Court in the *Senn* case gave its approval to the application of a Wisconsin statute which authorized the giving of publicity to labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct to a controversy in which the matter at issue was the refusal of a tiling contractor employing nonunion workmen to sign a closed shop agreement unless a provision requiring him to abstain from working in his business as a tile layer or helper should be eliminated. Inasmuch as the enhancement of job opportunities for members of the union was a legitimate objective, the State was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.[5]

employ within two years any man who had been discharged from, or left, the service of any of the others.

[1] *Chicago, R.I. & P. Ry. Co.* v. *Perry*, 259 U.S. 548 (1922).

[2] *Dorchy* v. *Kansas*, 272 U.S. 306 (1926).

[3] 301 U.S. 468 (1937).

[4] 257 U.S. 312 (1921).

[5] Cases disposing of the contention that restraints on picketing amount to a denial of freedom of speech and constitute therefore a deprivation of liberty without due process of law have been set forth under the First Amendment.

The policy of many state legislatures in recent years, however, has been to adopt legislation designed to control the abuse of the enormous economic power which previously enacted protective measures enabled labor unions to amass, and it is the constitutionality of such restrictive measures that has lately concerned the Court. Thus in *Railway Mail Assn.* v. *Corsi*,[6] § 43 of New York's Civil Rights Law which forbade a labor organization to deny any person membership by reason of race, color, or creed, or to deny any member, on similar grounds, equal treatment in designation for employment, promotion, or dismissal by an employer was sustained when applied to an organization of railway mail clerks, as not interfering unlawfully with the latter's right to choose its members nor abridging its property rights, or liberty of contract. Inasmuch as it held "itself out to represent the general business needs of employees" and functioned "under the protection of the State," the union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.[7]

Similarly approved as constitutional in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*[8] and *AFL* v. *American Sash & Door Co.*[9] were state laws outlawing the closed shop, and when labor unions invoked in their own defense the freedom of contract doctrine that hitherto had been employed to nullify legislation intended for their protection, the Court, speaking through Justice Black announced its refusal "to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause," it maintained, does not "forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers." [10] Also in harmony with the

[6] 326 U.S. 88 (1945).

[7] Id., 94. Justice Frankfurter, concurring, declared that "the insistence by individuals of their private prejudices . . . in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." Id., 98.

[8] 335 U.S. 525 (1949).

[9] 335 U.S. 538 (1949).

[10] 335 U.S. 525, 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination "whether it is preferable in the public interest that trade unions should be subjected to state intervention or left to the free play of social forces, whether experience has disclosed 'union unfair labor practices,' and if so, whether legislative correction is more appropriate than self-discipline and pressure of public opinion. . . ." Id., 538, 549–550.

last mentioned pair of cases is *UAW* v. *WERB* [11] in which was upheld enforcement of the Wisconsin Employment Peace Act which proscribed as an unfair labor practice efforts of a union, after collective bargaining negotiations had become deadlocked, to coerce an employer through a "slow-down" in production achieved by the irregular, but frequent, calling of union meetings during working hours without advance notice to the employer or notice as to whether or when the employees would return, and without informing him of the specific terms sought by such tactics. "No one," declared the Court, can question "the State's power to police coercion by . . . methods" which involve "considerable injury to property and intimidation of other employees by threats." [12] Finally, in *Giboney* v. *Empire Storage Co.*,[13] the Court acknowledged that no violation of the Constitution results when a state law forbidding agreements in restraint of trade is construed by state courts as forbidding members of a union of ice peddlers from peacefully picketing a wholesale ice distributor's place of business for the sole purpose of inducing the latter not to sell to nonunion peddlers.

### Regulation of Business Enterprises: Rates, Charges, and Conditions of Service

***"Business Affected With a Public Interest".***—In endeavoring to measure the impact of the due process clause upon efforts by the States to control the charges exacted by various businesses for their services, the Supreme Court, almost from the inception of the Fourteenth Amendment, devoted itself to the examination of two questions: (1) whether that clause precluded that kind of regulation of certain types of business, and (2) the nature of the restraint, if any, which this clause imposed on state control of rates in the case of businesses as to which such control existed. For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court appears to have underestimated the significance of this clause as a substantive restraint on the power of States to fix rates chargeable by an industry deemed appropriately subject to such controls. Thus, in *Munn* v. *Illinois*,[1] the first of the *"Granger Cases,"* in which maximum charges established by a state legislature for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose, the Court, in an opinion

[11] 336 U.S. 245 (1949).
[12] Id., 253.
[13] 336 U.S. 490 (1949). Other recent cases regulating picketing are treated under the First Amendment.
[1] 94 U.S. 113 (1877).

that was largely an *obiter dictum*, declared that the due process clause did not operate as a safeguard against oppressive rates, that if regulation was permissible, the severity thereof was within legislative discretion and could be ameliorated only by resort to the polls. Not much time was permitted to elapse, however, before the Court effected a complete withdrawal from this position. By 1890 [2] it had fully converted the due process clause into a positive restriction which the judicial branch is duty bound to enforce whenever state agencies seek to impose rates which, in its estimation, are arbitrary or unreasonable.

In contrast to the speed with which the Court arrived at those above mentioned conclusions, more than fifty years were to elapse before it developed its currently applicable formula for determining the propriety of subjecting specific businesses to state regulation of their prices or charges. Prior to 1934, unless a business was "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, this standard, "business affected with a public interest," never acquired any precise meaning; as a consequence lawyers were never able to identify all those qualities or attributes which invariably distinguished a business so affected from one not so affected. The best the Court ever offered by way of enlightenment was the following classification of businesses subject to regulation, prepared by Chief Justice Taft.[3] "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . . (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest

[2] *Chicago, M. & S.P. Railway Co. v. Minnesota*, 134 U.S. 418 (1890).
[3] *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522, 535–536 (1923).

although the property continues to belong to its private owner and to be entitled to protection accordingly."

Through application of this now outmoded formula the Court found it possible to sustain state laws regulating charges made by grain elevators,[4] stockyards,[5] and tobacco warehouses,[6] and fire insurance rates[7] and commissions paid to fire insurance agents.[8] Voided, because the businesses sought to be controlled were deemed to be not so affected, were state statutes fixing the price at which gasoline may be sold,[9] or at which ticket brokers may resell tickets purchased from theatres,[10] and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage therein.[11]

***Nebbia v. New York.***—In upholding, by a vote of five-to-four, a depression induced New York statute fixing prices at which fluid milk might be sold, the Court, in 1934, finally shelved the concept of "a business affected with a public interest."[12] Older decisions, insofar as they negatived a power to control prices in businesses found not "to be clothed with a public use" were now viewed as resting, "finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. Price control, like any other form of regulation, is [now] unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to

[4] *Munn* v. *Illinois*, 94 U.S. 113 (1877); *Budd* v. *New York*, 143 U.S. 517, 546 (1892); *Brass* v. *North Dakota ex rel. Stoesser*, 153 U.S. 391 (1894).

[5] *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79 (1901).

[6] *Townsend* v. *Yeomans*, 301 U.S. 441 (1937).

[7] *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389 (1914); *Aetna Insurance Co.* v. *Hyde*, 275 U.S. 440 (1928).

[8] *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U.S. 251 (1931).

[9] *Williams* v. *Standard Oil Co.*, 278 U.S. 235 (1929).

[10] *Tyson & Bro.* v. *Banton*, 273 U.S. 418 (1927).

[11] *New State Ice Co.* v. *Liebmann*, 285 U.S. 262 (1932). *See also Adams* v. *Tanner*, 244 U.S. 590 (1917); *Weaver* v. *Palmer Bro.*, 270 U.S. 402 (1926).

[12] *Nebbia* v. *New York*, 291 U.S. 502, 531–532, 535–537, 539 (1934). In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in *Ribnik* v. *McBride*, 277 U.S. 350, 359–360 (1928), had declared: "Price regulation is within the State's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." In his dissenting opinion in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 302–303 (1932), Justice Brandeis had also observed: "The notion of a distinct category of business 'affected with a public interest' employing property 'devoted to a public use' rests upon historical error. In my opinion the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."

adopt, and hence an unnecessary and unwarranted interference with individual liberty." Conceding that "the dairy industry is not, in the accepted sense of the phrase, a public utility," that is, a "business affected with a public interest," the Court in effect declared that price control henceforth is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions which due process of law imposes on arbitrary interference with liberty and property. Nor was the Court disturbed by the fact that a "scientific validity" had been claimed for the theories of Adam Smith relating to the "price that will clear the market." However much the minority might stress the unreasonableness of any artificial state regulation interfering with the determination of prices by "natural forces," [13] the majority was content to note that the "due process clause makes no mention of prices" and that "the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or the practicability of the law enacted to forward it."

Having thus concluded that it is no longer the nature of the business which determines the validity of a regulation of its rates or charges but solely the reasonableness of the regulation, the Court had little difficulty in upholding, in *Olsen* v. *Nebraska*, [14] a state law prescribing the maximum commission which private employment agencies may charge. Rejecting the contentions of the employment agencies that the need for such protective legislation had not been shown, the Court held that differences of opinion as to the wisdom, need, or appropriateness of the legislation "suggest a choice which should be left to the States;" and that there was "no necessity for the State to demonstrate before us that evils persist despite the competition" between public, charitable, and private employment agencies. The older case of *Ribnik* v. *McBride*, [15]

[13] Justice McReynolds, speaking for the dissenting Justices, labelled the controls imposed by the challenged statute as a "fanciful scheme to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold." Intimating that the New York statute was as efficacious as a safety regulation which required "householders to pour oil on their roofs as a means of curbing the spread of a neighborhood fire," Justice McReynolds insisted that "this Court must have regard to the wisdom of the enactment," and must determine "whether the means proposed have reasonable relation to something within legislative power." 291 U.S., 556, 558 (1934).

[14] 313 U.S. 236, 246 (1941).

[15] 277 U.S. 350 (1928). *Adams* v. *Tanner*, 244 U.S. 590 (1917), was disapproved in *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), and *Tyson & Bro.* v. *Banton*, 273 U.S. 418 (1927), was effectively overruled in *Gold* v. *DiCarlo*, 380 U.S. 520 (1965), without the Court hearing argument on it.

which founded the invalidation of similar legislation upon the now obsolete concept of a "business affected with a public interest" was expressly overruled.

**Judicial Review of Publicly Determined Rates and Charges**

***Development.***—In *Munn* v. *Illinois,*[1] its initial holding concerning the applicability of the Fourteenth Amendment to governmental price fixing,[2] the Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the States' police power but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision. Expanding the range of permissible governmental fixing of prices, the Court, in the *Nebbia* case,[3] more recently declared that prices established for business in general would invite judicial condemnation only if "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." The latter standard of judicial appraisal, as will be subsequently noted, represents less of a departure from the principle enunciated in the *Munn* case than that which the Court evolved, in the years following 1877, to measure the validity of state imposed public utility rates, and this difference in the judicial treatment of prices and rates accordingly warrants an explanation at the outset. Unlike operators of public utilities who, in return for the grant of certain exclusive, virtually monopolistic privileges by the governmental unit enfranchising them, must assume an obligation to provide continuous service, proprietors of other businesses are in receipt of no similar special advantages and accordingly are unrestricted in the exercise of their right to liquidate and close their establishments. At liberty, therefore, as public utilities invariably are not, to escape, by dissolution, the consequences of publicly imposed charges deemed to be oppressive, owners of ordinary business, presumably for that reason, have thus far been unable to convince the courts that they too, no less than public utilities, are in need of that protection which judicial review affords.

Consistently with its initial pronouncement in the *Munn* case, that reasonableness of compensation allowed under permissible rate regulation presented a legislative rather than a judicial question, the Court, in *Davidson* v. *New Orleans,*[4] also rejected the con-

[1] 94 U.S. 113 (1877). *See also Peik* v. *Chicago & Nw. Railway Co.*, 94 U.S. 164 (1877).

[2] Rate-making is deemed to be one species of price fixing. *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 603 (1942).

[3] *Nebbia* v. *New York*, 291 U.S. 502 (1934).

[4] 96 U.S. 97 (1878). *See also Chicago, B. & Q.R. Co.* v. *Chicago*, 166 U.S. 226 (1897).

tention that, by virtue of the due process clause, businesses, even though subject to control of their prices or charges, were nevertheless entitled to "just compensation." Less than a decade was to elapse, however, before the Court, appalled perhaps by prospective consequences of leaving business "at the mercy of the majority of the legislature," began to reverse itself. Thus, in 1886, Chief Justice Waite, in the *Railroad Commission Case*,[5] warned that "this power to regulate is not a power to destroy; [and] the State cannot do that in law which amounts to a taking of property for public use without just compensation or without due process of law;" in other words, a confiscatory rate could not be imposed. By treating "'due process of law" and "just compensation" as equivalents, the Court, contrary to its earlier holding in *Davidson* v. *New Orleans*, was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be an exercise of a State's police power and became one of eminent domain. Nevertheless, even the added measure of protection afforded by the doctrine of the *Railroad Commission Cases* proved inadequate to satisfy public utilities; through application of the latter the courts were competent to intervene only to prevent legislative imposition of a confiscatory rate, a rate so low as to be productive of a loss and to amount to taking of property without just compensation. Nothing less than a judicial acknowledgment that when the "reasonableness" of legislative rates is questioned, the courts should finally dispose of the contention was deemed sufficient by such businesses to afford the relief desired, and although as late as 1888[6] the Court doubted that it possessed the requisite power, it finally acceded to the wishes of the utilities in 1890, and, in *Chicago, M. & S.P. Railway Co.* v. *Minnesota*[7] ruled as follows: "The question of the reasonableness of rates . . ., involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

Despite a last hour attempt, in *Budd* v. *New York*,[8] to reconcile *Munn* v. *Illinois* with *Chicago, M. & S.P. Railroad Co.* v. *Min-*

[5] 116 U.S. 307 (1886).
[6] *Dow* v. *Beidelman*, 125 U.S. 680 (1888).
[7] 134 U.S. 418, 458 (1890).
[8] 143 U.S. 517 (1892).

*nesota* by confining application of the latter decision to cases wherein rates had been fixed by a commission and denying its pertinence to rates directly imposed by a legislature, the Court, in *Reagan* v. *Farmer's Loan and Trust Co.*,[9] set at rest all lingering doubts with regard to the scope of judicial intervention by declaring that, "if a carrier," in the absence of a legislative rate, "attempted to charge a shipper an unreasonable sum," the Court, in accordance with common law principles, will pass on the reasonableness of its rates and has "jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonableness rate; . . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of a carrier prescribes the rates." [10] Reiterating virtually the same principle in *Smyth* v. *Ames*,[11] the Court not only obliterated the distinction between confiscatory and unreasonable rates but contributed the additional observation that the requirements of due process are not met unless a court reviews not merely the reasonableness of a rate but also determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

***Limitations on Judicial Review.***—With regard to what courts will not do, when reviewing rate orders of a state commission, the following negative statements of the Supreme Court appear to have enduring value. As early as 1894, the Court asserted: "The courts

[9] 154 U.S. 362, 397 (1894).

[10] Insofar as judicial intervention resulting in the invalidation of legislatively imposed rates has involved carriers, it should be noted that the successful complainant invariably has been the carrier, not the shipper.

[11] 169 U.S. 466 (1898). Of course the validity of rates prescribed by a State for services wholly within its limits, must be determined wholly without reference to the interstate business done by a public utility. Domestic business should not be made to bear the losses on interstate business and *vice versa*. Thus a State has no power to require the hauling of logs at a loss or at rates that are unreasonable, even if a railroad receives adequate revenues from the intrastate long haul and the interstate lumber haul taken together. On the other hand, in determining whether intrastate passenger railway rates are confiscatory, all parts of the system within the State (including sleeping, parlor, and dining cars) should be embraced in the computation, and the unremunerative parts should not be excluded because built primarily for interstate traffic or not required to supply local transportation needs. *See Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U.S. 352, 434–435 (1913); *Chicago, M. & S.P. Railway Co.* v. *Pub. Util. Comm.*, 274 U.S. 344 (1927); *Groesbeck* v. *Duluth, S.S. & A. Ry. Co.*, 250 U.S. 607 (1919). The maxim that a legislature cannot delegate legislative power is qualified to permit creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. To prevent the conferring upon an administrative agency of authority to fix rates for public service from being a mere delegation to legislative power, and therefore void, the legislature must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions, with which the agency must substantially comply to validate its action. *Wichita R.R.* v. *Public Util. Comm.*, 260 U.S. 48 (1922).

are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; . . . [however, there can be no doubt] of their power and duty to inquire whether a body of rates . . . is unjust and unreasonable . . . and if found so to be, to restrain its operation." [12] And later, in 1910, although it was examining the order of a federal rate-making agency, the Court made a similar observation which appears to be equally applicable to the judicial review of regulations of state agencies. The courts cannot, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside" an order of the commission within the scope of the power delegated to such commission, upon the ground that such power was unwisely or expediently exercised.[13]

Also inferable from these early holdings, and effective to restrict the bounds of judical investigation, is the notion that a distinction can be made between factual questions which give rise only to controversies as to the wisdom or expediency of an order issued by a commission and determinations of fact which bear on a commission's power to act, namely, those questions which are inseparable from the constitutional issue of confiscation, and that judicial review does not extend to the former. This distinction is accorded adequate emphasis by the Court in *Louisville & Nash. R.R. Co.* v. *Garrett*,[14] in which it declared that "the appropriate question for the courts" is simply whether a "commission," in establishing a rate, "acted within the scope of its power" and did not violate "constitutional rights . . . by imposing confiscatory requirements" and that a carrier, contesting the rate thus established, accordingly was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate charged by it prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding whereby the commission determined that the existing rate was excessive, but not the expediency or wisdom of the commission's having superseded that rate with a rate regulation of its own.

Likewise, with a view to diminishing the number of opportunities which courts may enjoy for invalidating rate regulations of state commissions, the Court has placed various obstacles in the

[12] *Reagan* v. *Farmers' Loan & Trust Co.*, 154, U.S. 362, 397 (1894).
[13] *ICC* v. *Illinois Cent. R.R.*, 215 U.S. 452, 470 (1910).
[14] 231 U.S. 298, 310–313 (1913).

path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,[15] but he must present a case of "manifest constitutional invalidity;"[16] if, notwithstanding his effort, the question of confiscation remains in doubt, no relief will be granted.[17] Moreover, even though a public utility, which has petitioned a commission for relief from allegedly confiscatory rates, need not await indefinitely a decision by the latter before applying to a court for equitable relief,[18] the court ought not to interfere in advance of any experience of the practical result of such rates.[19]

In the course of time, however, a distinction emerged between ordinary factual determinations by state commissions and factual determinations which were found to be inseparable from the legal and constitutional issue of confiscation. In two older cases arising from proceedings begun in lower federal courts to enjoin rates, the Court initially adopted the position that it would not disturb such findings of fact insofar as these were supported by substantial evidence. Thus, in *San Diego Land Company* v. *National City*,[20] the Court declared that after a legislative body had fairly and fully investigated and acted, by fixing what it believes to be reasonable rates, the courts cannot step in and say its action shall be set aside because the courts, upon similar investigation, have come to a different conclusion about the reasonableness of the rates fixed. "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And in a similar later case[21] the Court expressed even more clearly its reluctance to reexamine factual determinations of the kind just described. It is not bound "to reexamine and weigh all the evidence . . . or to proceed according to . . . [its] independent opinion as to what are proper rates. It is enough if . . . [the Court] cannot say that it was impossible for a fair-minded board to come to the result which was reached."

[15] *Des Moines Gas Co.* v. *Des Moines*, 238 U.S. 153 (1915).
[16] *Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U.S. 352, 452 (1913).
[17] *Knoxville* v. *Water Co.*, 212 U.S. 1 (1909).
[18] *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587 (1926).
[19] *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19 (1909).
[20] 174 U.S. 739, 750, 754 (1899). *See also Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U.S. 352, 433 (1913).
[21] *San Diego Land & Town Co.* v. *Jasper*, 189 U.S. 439, 441, 442 (1903). *See also Van Dyke* v. *Geary*, 244 U.S. 39 (1917); *Georgia Ry.* v. *R.R. Comm.*, 262 U.S. 625, 633 (1923).

Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years,[22] chose to be guided by approximately the same standards of appraisal as it had originally formulated for examining regulations of state commissions, and so far as the following excerpt from its holding in *ICC* v. *Union Pacific R.R.*[23] represents an adequate summation of the law as it stood prior to 1920, it is set forth below: "[Q]uestions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory . . .; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling . . . [The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision . . . can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

***The Ben Avon Case.***—These standards of review were abruptly rejected by the Court in *Ohio Valley Co.* v. *Ben Avon Borough*,[24] as being no longer sufficient to satisfy the requirements of due process. Unlike previous litigation involving allegedly confiscatory rate orders of state commissions, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal;[25] although the latter did in fact review the evidence and ascertained that the state commission's findings of fact were supported by substantial evidence, it also construed the statute providing for review as denying to state courts "the power to pass upon the weight of such evidence." Largely on the strength of this interpre-

[22] For its current position, *see Crowell* v. *Benson*, 285 U.S. 22 (1932).

[23] 222 U.S. 541, 547-548 (1912). *See also ICC* v. *Illinois Cent. R.R.*, 215 U.S. 452, 470 (1910).

[24] 253 U.S. 287, 293-294 (1920).

[25] Id., 289. In injunctive proceedings, evidence is freshly introduced whereas in the cases received on appeal from state courts, the evidence is found within the record.

tation of the applicable state statute, the Court held that when the order of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

Without departing from the ruling, previously enunciated in *Louisville & Nashville R.R. Co.* v. *Garrett*,[1] that the failure of a State to grant a statutory right of judicial appeal from a commission's regulation is not violative of due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing judicially a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that "where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review." [2]

***History of the Valuation Question.***—For almost fifty years the Court was to wander through a maze of conflicting formulas for valuing public service corporation property only to emerge therefrom in 1944 at a point not very far removed from *Munn* v. *Illinois*.[3] By holding in *FPC* v. *Natural Gas Pipeline Co.*,[4] that the "Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and in *FPC* v. *Hope Natural Gas Co.*,[5] that "it is the result reached not the method employed which is controlling, . . . [that] it is not the theory but the impact of the rate order which counts, [and that] if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end," the Court, in effect, abdicated from the position assumed in the *Ben Avon* case.[6] Without surrendering the judicial power to declare

[1] 231 U.S. 298 (1913).

[2] 253 U.S. 287, 291, 295 (1920).

[3] 94 U.S. 113 (1877).

[4] 315 U.S. 575, 586 (1942).

[5] 320 U.S. 591, 602 (1944). Although this and the previously cited decision arose out of controversies involving the National Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.

[6] *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920).

rates unconstitutional on ground of a substantive [7] deprivation of due process, the Court announced that it would not overturn a result deemed by it to be just simply because "the method employed [by a commission] to reach that result may contain infirmities. . . . [A] Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." [8]

In dispensing with the necessity of observing any of the formulas for rate computation which previously had currency, the Court did not undertake to devise by way of substitution any discernible guide to aid it in ascertaining whether a so-called end result is unreasonable. It did intimate that rate-making "involves a balancing of the investor and consumer interests," which does not, however, "'insure that the business shall produce net revenues,' . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract

[7] In *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 599 (1942), Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to *Munn* v. *Illinois*, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, in *Driscoll* v. *Edison Co.*, 307 U.S. 104, 122 (1939), Justice Frankfurter termporarily adopted a similar position; he declared that "the only relevant function of law . . . [in rate controversies] is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process." However, in his dissent in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 625 (1944), he disassociated himself from this proposal, and asserted that "it was decided [more than fifty years ago] that the final say under the Constitution lies with the judiciary."

[8] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). *See also Wisconsin* v. *FPC*, 373 U.S. 294, 299, 317, 326 (1963), wherein the Court tentatively approved an "area rate approach," that is "the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country," and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labelled area pricing a "wild goose chase," and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

capital." [9] Nevertheless, in light of the Court's concentration on the reasonableness of the final result rather than on the correctness of the methods employed to reach that result, it is conceivable that methods or formulas, now discredited in whole or in part, might continue to be observed by state commissions in drafting rate orders that will prove to be justiciably sustainable.[10]

[9] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), *citing Chicago G.T. Ry. Co.* v. *Wellman*, 143 U.S. 339, 345–346 (1892); *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Pub. Serv. Comm.*, 262 U.S. 276, 291 (1923).

[10] For this reason there is presented below a survey of the formulas, utilization of which was hitherto deemed essential if due process requirements were to be satisfied.

(1) FAIR VALUE.—On the premise that a utility is entitled to demand a rate schedule that will yield a "fair return upon the value" of the property which it employs for public convenience, the Court in *Smyth* v. *Ames*, 169 U.S. 466, 546–547 (1898), held that determination of such value necessitated consideration of at least such factors as "the original cost of construction, the amount expended in permanent improvements, the amount and market value of . . . [the utility's] bonds and stock, the present as compared with the original cost of construction, [replacement cost], the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses.

(2) REPRODUCTION COST.—Prior to the demise in 1944 of the *Smyth* v. *Ames* fair value formula, two of the components thereof were accorded special emphasis with the second quickly surpassing the first in terms of the measure of importance attributed to it. These were: (1) the actual cost of the property ("the original cost of construction together with the amount expended in permanent improvements") and (2) reproduction costs ("the present as compared with the original cost of construction"). If prices did not fluctuate through the years, the controversy which arose over the application of reproduction cost in preference to original cost would have been reduced to a war of words; for results obtained by reliance upon either would have been identical. The instability in the price structure, however, presented the courts with a delimma. If rate making is attempted at a time of declining prices, valuation on the basis of present reproduction cost will advantage the consumer or users, and disadvantage the utility. On the other hand, if the original cost of construction is employed, the benefits are redistributed, with the consumer becoming the loser. Similarly, when rates are fixed at a time of rising prices, reliance upon reproduction cost to the exclusion of original cost will produce results satisfactory to the utility and undesirable to the public and vice versa.

Notwithstanding the admonition of *Smyth* v. *Ames* that original cost, no less than reproduction cost, was to be considered in determining value, the Court, in the years which intervened between 1898 and 1944, wavered only slightly in its preference for the reproduction cost formula, and moderated its application thereof only in part whenever periods of rising or sustained high prices appeared to require such deviation in behalf of consumer interests. As examples of the varied application by the Court of reproduction cost formula, the following cases are significant: *San Diego Land Co.* v. *National City*, 174 U.S. 739, 757 (1899); *San Diego Land & Town Co.* v. *Jasper*, 189 U.S. 439, 443 (1903); *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 52 (1909); *Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U.S. 352 (1913); *Galveston Elec. Co.* v. *Galveston*, 258 U.S. 388, 392 (1922); *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Pub. Serv. Comm.*, 262 U.S. 276 (1923); *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U.S. 679 (1923); *Georgia Ry.* v. *R.R. Comm.*, 262 U.S. 625, 630 (1923); *McCardle* v. *Indianapolis Co.*, 272 U.S. 400 (1926); *St Louis & O'Fallon R. Co.* v. *United States*, 279 U.S. 461 (1929).

(3) PRUDENT INVESTMENT (VERSUS REPRODUCTION COST).—This method of valuation, championed by Justice Brandeis in a separate opinion in *Missouri ex rel.*

*Southwestern Bell Tel. Co.* v. *Pub. Serv. Comm.*, 262 U.S. 276, 291-292, 302, 306-307 (1923), was defined as follows: "The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of capital. . . . the allowance for the risk incurred; and enough more to attract capital. . . . Where the financing has been proper, the cost to the utility of the capital, required to construct, equip and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn." Advantages to be derived from "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return" would, according to Justice Brandeis, be nothing less than the attainment of a "basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion. It would not fluctuate with the market price of labor, or materials, or money.

As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930's. The sharp decline in prices which occurred during this period doubtless contributed to the loss of affection for reproduction costs. In *Los Angeles Gas Co.* v. *R.R. Comm.*, 289 U.S. 287 (1933) and *R.R. Comm.* v. *Pacific Gas Co.*, 302 U.S. 388, 399, 405 (1938) the Court upheld respectively a valuation from which reproduction costs had been excluded and another in which historical cost served as the rate base. Later, in 1942, when in *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, the Court further emphasized its abandonment of the reproduction cost factor, there developed momentarily the prospect that prudent investment might be substituted. This possibility was quickly negatived, however, *by the Hope Gas* case, 320 U.S. 591 (1944), which dispensed with the necessity of relying upon any formula for the purpose of fixing valid rates.

(4) Depreciation.—No less indispensable to the determination of the fair value mentioned in *Smyth* v. *Ames* was the amount of depreciation to be allowd as a deduction from the measure of cost employed, whether the latter be actual cost, reproduction cost, or any other form of cost determination. Although not mentioned in *Smyth* v. *Ames*, the Court gave this item consideration in *Knoxville* v. *Water Co.*, 212 U.S. 1, 9-10 (1909); but notwithstanding its early rcognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy has been the disagreement as to whether annual allowances granted shall be in such amount as will permit the replacement of equipment at current costs, i.e., present value, or at original cost. In the *Hope Gas* case, *supra*, 606 (1944), the Court reversed *United Railways* v. *West*, 280 U.S. 234, 253-254 (1930), insofar as the latter holding rejected original cost as the basis of annual depreciation allowances.

(5) Going Concern Value and Good Will.—Whether or not intangibles were to be included in valuation was not passed upon in *Smyth* v. *Ames*, but shortly thereafter, in *Des Moines Gas Co.* v. *Des Moines*, 238 U.S. 153, 165 (1915), the Court declared it to be self-evident "that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, . . . [and that] this element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return. . . ." Generally described as going concern value, this element has never been precisely defined by the Court, and the latter has accordingly been plagued by the difficulty of determining its worth. In its latest pronouncement on the subject, uttered in *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 589 (1942), the Court denied that there is any "constitutional requirement that going concern value, even when it is an appropriate element to be included in a rate base, must be separately stated and appraised as such . . . [have often been] sustained without separate appraisal of the going concern element. . . When that has been done, the burden rests on the regulated company to show that this item has neither been adequately covered in the rate base nor recouped from prior earnings of the business." Franchise value and good will, on the other hand, have been consistently excluded

**Regulation of Public Utilities (Other Than Rates)**

***In General.***—By virtue of the nature of the business they carry on and the public's interest in it, public utilities are subject, as to their local business, to state regulation exerted either directly by the legislature or by duly authorized administrative bodies.[1] But inasmuch as their property remains under the full protection of the Constitution, it follows that whenever this power of regulation is exerted in what the Court considers to be an "arbitrary" or "unreasonable" way and to be in effect an infringement upon the right of ownership, such exertion of power is void as repugnant to the due process clause.[2] Thus, a city cannot take possession of the equipment of a street railway company, the franchise of which has expired,[3] although it may subject the company to the alternative of

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from valuation; the latter presumably beause a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: *Wilcox* v. *Consolidated Gas Co.*, 212 U.S. 19 (1909); *Des Moines Gas Co.* v. *Des Moines*, 238 U.S. 153, 163–164 (1915); *Galveston Elec. Co.* v. *Galveston*, 258 U.S. 388 (1922); *Los Angeles Gas Co.* v. *R.R. Commission*, 289 U.S. 287, 313 (1933).

(6) SALVAGE VALUE.—It is not a constitutional error to disregard theoretical reproduction cost for a plant which "'no responsible person would think of reproducing.'' Accordingly, where, due to adverse conditions, a street-surface railroad has lost all value except for scrap or salvage, it was permissible for a commission, as the Court held in *Market Street R. Co.* v. *Comm.*, 324 U.S. 548, 562, 564 (1945), to use as a rate the price at which the utility offered to sell its property to a citizen. Moreover, the Commission's order was not invalid even through under the prescribed rate the utility would operate at a loss; for the due process clause cannot be invoked to protect a public utility against business hazards, such as the loss of, or failure to obtain patronage. On the other hand, in the case of a water company whose franchise has expired. *Denver* v. *Denver Union Water Co.*, 246 U.S. 178 (1918), but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant.

(7) PAST LOSSES AND GAINS.—"The Constitution [does not] require that the losses of . . . [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory, *Galveston Elec. Co.* v. *Galveston*, 258 U.S. 388 (1922), any more than profits of the past can be used to sustain confiscatory rates for the future *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 175 (1922); *Board of Comrs.* v. *N.Y. Tel. Co.*, 271 U.S. 23, 31–32 (1926).

[1] *Atlantic Coast Line* v. *Corporation Comm.*, 206 U.S. 1, 19 (1907), citing *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U.S. 155 (1877). *See also Prentis* v. *Atlantic Coast Line*, 211 U.S. 210 (1908); *Denver & R.G. R.R. Co.* v. *Denver*, 250 U.S. 241 (1919).

[2] *Chicago & G.T. Ry. Co.* v. *Wellman*, 143 U.S. 339, 344 (1892); *Mississippi R. Comm.* v. *Mobile & Ohio R.R. Co.*, 244 U.S. 388, 391 (1917). *See also Missouri Pacific Ry.* v. *Nebraska*, 217 U.S. 196 (1910); *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 415 (1935).

[3] *Cleveland Electric Ry. Co.* v. *Cleveland*, 204 U.S. 116 (1907).

accepting an inadequate price for its property or of ceasing operations and removing its property from the streets.[4] Likewise, a city, which is desirous of establishing a lighting system of its own, may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise,[5] but in erecting its own waterworks in competition with that of a company which has no exclusive charter, a municipality inflicts no unconstitutional deprivation.[6] Nor is the property of a telegraph company illegally taken by a municipal ordinance which demands, as a condition of the establishment of poles and conduits in the city streets, that positions be reserved for the city's wires, which shall be carried free of charge, and which provides for the moving of the conduits, when necessary, at company expense.[7]

And, the fact that a State, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation which has elected to enter a State, the constitution and laws of which require that it operate its local private pipe line as a common carrier. Such foreign corporation is viewed as having waived its constitutional right to be secure against imposition of conditions which amount to a taking of property without due process of law.[8]

***Compulsory Expenditures: Grade Crossings, and the Like.***—The enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property without due process of law.[9] Thus, where the applicable rule so required at the time of the granting of its charter, a water company may be compelled to furnish connections at its own expense to one residing on an ungraded street in which it voluntarily laid its lines.[10] However, if pipe and telephone lines are located on a right of way owned by a pipeline company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense,[11] but if its pipes are laid under city streets, a

[4] *Detroit United Railway* v. *Detroit*, 255 U.S. 171 (1921). *See also Denver* v. *New York Trust Co.*, 229 U.S. 123 (1913).

[5] *Los Angeles* v. *Los Angeles Gas Corp.*, 251 U.S. 32 (1919).

[6] *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561 (1904). *See also Skaneateles Water Co.* v. *Skaneateles*, 184 U.S. 354 (1902); *Helena Water Works Co.* v. *Helena*, 195 U.S. 383 (1904); *Madera Water Works* v. *Madera*, 228 U.S. 454 (1913).

[7] *Western Union Tel. Co.* v. *Richmond*, 224 U.S. 160 (1912).

[8] *Pierce Oil Corp.* v. *Phoenix Refg. Co.*, 259 U.S. 125 (1922).

[9] *Atlantic Coast Line* v. *Goldsboro*, 232 U.S. 548, 558 (1914). *See also Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 255 (1897); *Chicago, B. & Q. Ry.* v. *Drainage Comrs.*, 200 U.S. 561, 591–592 (1906); *New Orleans Public Service* v. *New Orleans*, 281 U.S. 682 (1930).

[10] *Consumers' Co.* v. *Hatch*, 224 U.S. 148 (1912).

[11] *Panhandle Co.* v. *Highway Comm.*, 294 U.S. 613 (1935).

gas company validly may be obligated to assume the cost of moving them to accommodate a municipal drainage system.[12]

To require a turnpike company, as a condition of its taking tolls, to keep its road in repair and to suspend collection thereof, conformably to a state statute, until the road is put in good order, does not take property without due process of law, notwithstanding the fact that present patronage does not yield revenue sufficient to maintain the road in proper condition.[13] Nor is a railroad bridge company unconstitutionally deprived of its property when, in the absence of proof that the addition will not yield a reasonable return, it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles.[14]

When railroads are required to repair a viaduct under which they operate,[15] or to reconstruct a bridge or provide means for passing water for drainage through their embankment,[16] or to sprinkle that part of the street occupied by them,[17] their property is not taken without due process of law. But if an underground cattle-pass is to be constructed, not as a safety measure but as a means of sparing the farmer the inconvenience attendant upon the use of an existing and adequate grade crossing, collection of any part of the cost thereof from a railroad is a prohibited taking for private use.[18] As to grade crossing elimination, the rule is well established that the state may exact from railroads the whole, or such part, of the cost thereof as it deems appropriate, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

But, the power of the State in this respect is not unlimited. If its imposition is "arbitrary" and "unreasonable" it may be set aside, but to reach that conclusion, it may become necessary to consider certain relevant facts; e.g., whether a new highway on which an underpass is to be constructed is essential to the transportation needs of a community already well served by a crossing equipped with devices which are adequate for safety and convenience of local traffic; whether the underpass is prescribed as part of a national system of federal aid highways for the furtherance of motor vehicle

[12] *New Orleans Gas Co.* v. *Drainage Comm.*, 197 U.S. 453 (1905).
[13] *Norfolk Turnpike Co.* v. *Virginia*, 225 U.S. 264 (1912).
[14] *International Bridge Co.* v. *New York*, 254 U.S. 126 (1920).
[15] *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U.S. 57 (1898).
[16] *Chicago, B. & Q. Ry.* v. *Drainage Comm.*, 200 U.S. 561 (1906); *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67 (1915); *Lake Shore & Mich. So. Ry. Co.* v. *Clough*, 242 U.S. 375 (1917).
[17] *Pacific Gas Co.* v. *Police Court*, 251 U.S. 22 (1919).
[18] *Chicago, St. P., Mo. & O. Ry.* v. *Holmberg*, 282 U.S. 162 (1930).

traffic, much of which is in direct competition with the railroad; whether the increase in such traffic will greatly decrease rail traffic and hence the revenue of the railroad; whether the amount of taxes paid by the railroads of the State, part of which is devoted to the upkeep of public highways used by motor carriers, is disproportionately higher than the amount paid by motor carriers.[19]

***Compellable Services.***—The primary duty of a public utility being to serve on reasonable terms all those who desire the service it renders, it follows that a company cannot pick and choose and elect to serve only those portions of its territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. Compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the State entails therefore no unconstitutional deprivation.[20] Likewise a railway may be compelled to continue the service of a branch or part of a line although the operation involves a loss.[21] But even though a utility, as a condition of enjoyment of powers and privileges granted by the State, is under a continuing obligation to provide reasonably adequate service, and even though that obligation cannot be avoided merely because performance occasions financial loss, yet if a company is at liberty to surrender its franchise and discontinue operations, it cannot be compelled to continue at a loss.[22]

Pursuant to the principle that a State may require railroads to provide adequate facilities suitable for the convenience of the communities served by them,[23] such carriers have been obligated to establish stations at proper places for the convenience of patrons,[24] to stop all their intrastate trains at county seats,[25] to run a regu-

[19] *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405 (1935). *See also Lehigh Valley R.R.* v. *Commissioners*, 278 U.S. 24 (1928); *Atchison R. Co.* v. *Pub. Util. Comm.*, 346 U.S. 346, 353-354 (1953).

[20] *United Gas Co.* v. *Railroad Comm.*, 278 U.S. 300, 308-309 (1929). *See also New York ex rel. Woodhaven Gas Light Co.* v. *Public Serv. Comm.*, 269 U.S. 244 (1925); *New York & Queens Gas Co.* v. *McCall*, 245 U.S. 345 (1917).

[21] *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U.S. 262 (1910); *Chesapeake & Ohio Ry.* v. *Pub. Service Comm.*, 242 U.S. 603 (1917); *Fort Smith Traction Co.* v. *Bourland*, 267 U.S. 330 (1925).

[22] *Chesapeake & Ohio Ry.* v. *Public Service Comm.*, 242 U.S. 603, 607 (1917); *Brooks-Scanlon Co.* v. *R.R. Comm.*, 251 U.S. 396 (1920); *Railroad Comm.* v. *Eastern Tex. R.R.*, 264 U.S. 79 (1924); *Broad River Co.* v. *South Carolina ex rel. Daniel*, 281 U.S. 537 (1930).

[23] *Atchison, T. & S.F. Ry.* v. *Railroad Comm.*, 283 U.S. 380, 394-395 (1931).

[24] *Minneapolis & St. Louis R.R. Co.* v. *Minnesota*, 193 U.S. 53 (1904).

[25] *Gladson* v. *Minnesota*, 166 U.S. 427 (1897).

lar passenger train instead of a mixed passenger and freight train,[1] to furnish passenger service on a branch line previously devoted exclusively to carrying freight,[2] to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, sidetrack [3] as well as the upkeep of a switchtrack leading from its main line to industrial plants.[4] However, a statute requiring a railroad without indemnification to install switches on the application of owners of grain elevators erected on its right of way was held void.[5] Whether a state order requiring transportation service is to be viewed as reasonable may necessitate consideration of such facts as the likelihood that pecuniary loss will result to the carrier, the nature, extent and productiveness of the carrier's intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.[6] If the service required has no substantial relation to transportation, it will be deemed arbitary and void, as in the case of an order requiring railroads to maintain cattle scales to facilitate trading in cattle,[7] and of a prohibition against letting down an unengaged upper berth while the lower berth was occupied.[8]

"Since the decision in *Wisconsin, M. & P.R. Co.* v. *Jacobson*, 179 U.S. 287 (1900), there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; or does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. . . . If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the

[1] *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U.S. 262 (1910).
[2] *Chesapeake & Ohio Ry.* v. *Public Serv. Comm.*, 242 U.S. 603 (1917).
[3] *Lake Erie & W.R.R. Co.* v. *Public Util. Comm.*, 249 U.S. 422 (1919); *Western & Atlantic* v. *Pub. Comm.*, 267 U.S. 493 (1925).
[4] *Alton R. Co.* v. *Illinois Comm.*, 305 U.S. 548 (1939).
[5] *Missouri Pacific Ry.* v. *Nebraska*, 217 U.S. 196 (1910).
[6] *Chesapeake & Ohio Ry.* v. *Public Serv. Comm.*, 242 U.S. 603, 607 (1917).
[7] *Great Northern Ry. Co.* v. *Minnesota*, 238 U.S. 340 (1915); *Great Northern Ry. Co.* v. *Cahill*, 253 U.S. 71 (1920).
[8] *Chicago, M. & St. P. R.R.* v. *Wisconsin*, 238 U.S. 491 (1915).

order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' . . . Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier." [9]

Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former's terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use.[10] But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms,[11] and to accept, for reshipment over its lines to points within the State, cars already loaded and in suitable condition.[12]

Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers.[13] Nor is it "unreasonable" or "arbitrary" to require a railroad to desist from demanding freight in advance on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment.[14]

***Safety Regulations Applicable to Railroads.***—The following regulations with reference to railroads have been upheld: a prohibition against operation on certain streets,[15] restrictions on speed,

[9] *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild*, 224 U.S. 510, 528–529 (1912). *See also Michigan Cent. R. Co.* v. *Mich. R.R. Comm.*, 236 U.S. 615 (1915); *Seaboard Air Line* v. *Georgia R.R. Comm.*, 240 U.S. 324, 327 (1916).

[10] *Louisville & Nashville R. Co.* v. *Stock Yards Co.*, 212 U.S. 132 (1909).

[11] *Michigan Cent. R.R.* v. *Michigan R.R. Comm.*, 236 U.S. 615 (1915).

[12] *Chicago, M. & St. P. Ry.* v. *Iowa*, 233 U.S. 334 (1914).

[13] *Chicago, M. & St. P. Ry.* v. *Minn. Civil Assn.*, 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. *Louisville and Nashville R. Co.* v. *Kentucky*, 183 U.S. 503, 512 (1902); *Missouri Pacific Ry. Co.* v. *McGrew Coal Co.*, 244 U.S. 191 (1917).

[14] *Wadley Southern Ry.* v. *Georgia*, 235 U.S. 651 (1915).

[15] *Richmond, F. & P. R. Co.* v. *Richmond*, 96 U.S. 521 (1978).

operations, and the like, in business sections,[16] requirement of construction of a sidewalk across a right of way,[17] or removal of a track crossing at a thoroughfare,[18] compelling the presence of a flagman at a crossing notwithstanding that automatic devices might be cheaper and better,[19] compulsory examination of employees for color blindness,[20] full crews on certain trains,[21] specification of a type of locomotive headlight,[22] safety appliance regulations,[23] and a prohibition on the heating of passenger cars from stoves or furnaces inside or suspended from the cars.[24]

***Statutory Liabilities and Penalties Applicable to Railroads.***—A statute making the initial carrier,[25] or the connecting or delivering carrier,[1] liable to the shipper for the nondelivery of goods is not unconstitutional; nor is a law which provides that a railroad shall be responsible in damages to the owner of property injured by fire communicated by its locomotive engines and which grants the railroad an insurable interest in such property along its route and authority to procure insurance against such liability.[2] Equally consistent with the requirements of due process are the following two enactments: the first, imposing on all common carriers a penalty for failure to settle within a reasonable specified period claims for freight lost or damaged in shipment and conditioning payment of that penalty upon recovery by the claimant in a subsequent suit of more than the amount tendered,[3] and the second, levying double damages and an attorney's fee upon a railroad for failure to pay within a reasonable time after demand the amount claimed by a owner for stock injured or killed. However, only in the event that the application of the latter statute is limited to cases where the plaintiff has not demanded more than he recovered in court will in its constitutionality be upheld;[4] but when the penalty allowed

[16] *Atlantic Coast Line* v. *Goldsboro*, 232 U.S. 548 (1914).
[17] *Great Northern Ry. Co.* v. *Minnesota ex rel. Clara City*, 246 U.S. 434 (1918).
[18] *Denver & R. G. R.R. Co.* v. *Denver*, 250 U.S. 241 (1919).
[19] *Nashville, C. & St. L. Ry.* v. *White*, 278 U.S. 456 (1929).
[20] *Nashville, C. & St. L. Ry.* v. *Alabama*, 128 U.S. 96 (1888).
[21] *Chicago, R.I. & Pac. Ry. Co.* v. *Arkansas*, 219 U.S. 453 (1911); *St. Louis I.M. & S. Ry. Co.* v. *Arkansas*, 240 U.S. 518 (1916); *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249 (1931); *Firemen* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968).
[22] *Atlantic Coast Line* v. *Georgia*, 234 U.S. 280 (1914).
[23] *Erie Railroad* v. *Solomon*, 237 U.S. 427 (1915).
[24] *New York, N.H. and H. Railroad* v. *New York*, 165 U.S. 628 (1897).
[25] *Chicago & N.W. Ry. Co.* v. *Nye, Schneider, Fowler Co.*, 260 U.S. 35 (1922). *See also Yazoo & Miss. R.R.* v. *Jackson Vinegar Co.*, U.S. 217 (1912); *cf. Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913).
[1] *Atlantic Coast Line* v. *Glenn*, 239 U.S. 388 (1915).
[2] *St. Louis & San Francisco Ry.* v. *Mathews*, 165 U.S. 1 (1897).
[3] *Chicago & N.W. Ry. Co.* v. *Nye Schneider, Fowler Co.*, 260 U.S. 35 (1922).
[4] *Kansas City Ry.* v. *Anderson*, 233 U.S. 325 (1914).

thereunder is exacted in a case in which the plaintiff demanded more than he sued for and recovered, a defendant railroad is arbitrarily deprived of its property without due process.[5] The requirements of fair play are similarly violated by a statute which, by imposing double liability for failure to pay the full amount of damages within 60 days after notice the claimant recovers less than the amount offered in settlement, in effect penalizes a carrier for guessing incorrectly what a jury would award.[6]

To penalize a carrier which has collected transportation charges in excess of established maximum rates by permitting a person wronged to sue for and collect as liquidated damages $500 plus a reasonable attorney's fee is to subject the carrier to a requirement so unreasonable as to be repugnant to the due process clause; such liability is not only disproportionate to actual damages but is being exacted under conditions which do not afford the carrier an adequate opportunity for safely testing the validity of the rates before any liability for the penalty attaches.[7] Where it appears, however, that the carrier had an opportunity to test the reasonableness of the rate, and that its deviation therefrom, by collection of an overcharge, did not proceed from any belief that the rate was invalid, the validity of the penalty imposed is not to be tested by comparison with the amount of the overcharge. Inasmuch as it is imposed as punishment for violation of a law, the legislature may adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." In accordance with the latter standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's fee is constitutional.[8]

For like reasons, a statute requiring railroads to erect and maintain fences and cattle guards, and making them liable in double the amount of damages for their failure to so maintain them is not unconstitutional.[9] Nor is a Nebraska law which estab-

[5] *St. Louis, I.M. & S. Ry. Co.* v. *Wynne*, 224 U.S. 354 (1912).
[6] *Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U.S. 165 (1914).
[7] *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U.S. 340 (1913).
[8] *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U.S. 63, 67 (1919).
[9] *Missouri Pacific Railway Co.* v. *Humes*, 115 U.S. 512 (1885); *Minneapolis Railway Co.* v. *Beckwith*, 129 U.S. 26 (1889).

lishes a minimum rate of speed for delivery of livestock and which requires every carrier violating the same to pay the owner of such livestock the sum of $10 per car per hour.[10] On the other hand, when a telephone company, in accordance with its established and uncontested regulations suspends the service of a patron in arrears, infliction upon it of penalties aggregating $3,600, levied pursuant to a statute imposing fines of $100 per day for alleged discrimination, is so plainly arbitrary and oppressive as to take property without due process.[11]

**Regulation of Corporations, Business, Professions, and Trades**

***Domestic Corporations.***—Although a corporation is the creation of a State which reserves the power to amend or repeal corporate charters, the retention of such power will not support the taking of the corporate property without due process of law. To terminate the life of a corporation by annulling its charter is not to confiscate its property but to turn it over to the stockholders after liquidation.[1] Conversely, unreasonable regulation, as by the imposition of confiscatory rates, although it ostensibly falls short of termination of the corporate existence, entails an invalid deprivation.[2]

***Foreign Corporations.***—Foreign corporations also enjoy the protection which the due process clause affords, but such protection does not entitle them to enter another State or, once having been permitted to enter, to continue to do business therein.[3] The power of a State to exclude or to expel a foreign corporation being almost plenary as long as interstate commerce is not directly affected, it follows that a State may subject such entry or continued operation to conditions. Thus, a state law which requires the filing of articles with a local official as a condition prerequisite to the validity of conveyances of local realty to such corporations is not violative of due process.[4] Neither are statutes which require a foreign insurance company, as part of the price of entry, to maintain reserves computed by a specific percentage of premiums, including membership fees, received in all States,[5] or to consent to direct actions filed against it by persons injured in the State by tort-feasors whom it insures.[6] Similarly a statute requiring corporations to dis-

[10] *Chicago, B. & Q.R.R. Co.* v. *Cram*, 228 U.S. 70 (1913).
[11] *Southwestern Tel. Co.* v. *Danaher*, 238 U.S. 482 (1915).
[1] *New Orleans Debenture Redemption Co.* v. *Louisiana*, 180 U.S. 320 (1901).
[2] *Lake Shore & M.S. Ry. Co.* v. *Smith*, 173 U.S. 684, 698 (1899).
[3] *National Council U.A.M.* v. *State Council*, 203 U.S. 151 (1906).
[4] *Munday* v. *Wisconsin Trust Co.*, 252 U.S. 499 (1920).
[5] *State Farm Ins. Co.* v. *Duel*, 324 U.S. 154 (1945).
[6] *Watson* v. *Employers Liability Corp.*, 348 U.S. 66 (1954).

pose of farm land not necessary to the conduct of their business is not invalid as applied to a foreign hospital corporation, even though the latter, because of changed economic conditions, is unable to recoup its original investment from the sale which it is thus compelled to make.[7]

***Business in General.***—"The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency."[8]

***Laws Prohibiting Trusts, Discrimination, Restraint of Trade.***—A state act prohibiting trusts and other restraints is not in conflict with the Fourteenth Amendment as to a person combining with others to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.[9] Nor does the Fourteenth Amendment preclude a State from adopting a policy against all combinations of competing corporations and enforcing it even against combinations which may have been induced by good intentions and from which benefit and no injury may have resulted.[10] Nor is freedom of contract unconstitutionally abridged by a statute which prohibits retail lumber dealers from uniting in an agreement not to purchase materials from wholesalers selling directly to consumers in the retailers' localities,[11] nor by a law punishing combinations for "maliciously" injuring a rival in his business profession or trade.[12]

Similarly, a prohibition of unfair discrimination by any one engaged in the manufacture or distribution of a commodity in general use for the purpose of intentionally destroying competition of any regular dealer in such commodity by making sales thereof at a lower rate in one section of the State than in another, after equalization for distance, effects no invalid deprivation of property or interference with freedom of contract.[13] Liberty of contract is in-

[7] *Asbury Hospital* v. *Cass County*, 326 U.S. 207 (1945).

[8] *Nebbia* v. *New York*, 291 U.S. 502, 527–528 (1934). *See also New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 106–108 (1978).

[9] *Smiley* v. *Kansas*, 196 U.S. 447 (1905). *See Waters Pierce Oil Co.* v. *Texas*, 212 U.S. 86 (1909); *National Cotton Oil Co.* v. *Texas*, 197 U.S. 115 (1905), also upholding antitrust laws.

[10] *International Harvester Co.* v. *Missouri*, 234 U.S. 199 (1914). *See also American Machine Co.* v. *Kentucky*, 236 U.S. 660 (1915).

[11] *Grenada Lumber Co.* v. *Mississippi*, 217 U.S. 433 (1910).

[12] *Aikens* v. *Wisconsin*, 195 U.S. 194 (1904).

[13] *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157 (1912).

fringed, however, by a law punishing dealers in cream who pay higher prices in one locality than in another. Although high bidding by strong buyers tends toward monopoly, the statute has no reasonable relation to such bidding but infringes private rights whose exercise is not shown to produce evil consequences.[14] A law sanctioning contracts requiring that commodities identified by trademark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor does not violate the due process clause.[15] The fact that when appellant was enjoined from selling below statutory cost in violation of a state unfair sales act, its competitors were selling at unlawful prices below cost, the state court not only refused to enjoin competitors from giving away trading stamps, worth 2½ percent of the price with goods sold at or near statutory cost, but also prevented appellant from reducing its prices to meet such competition, such decree did not deprive it of due process. There is no constitutional right to employ retaliation against action outlawed by a State, and appellant had available a remedy whereby it could enjoin illegal activity of its competitors.[16]

***Statutes Preventing Fraud in Sales of Goods.***—Laws and ordinances tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power.[17] Thus, a prohibition on the issuance by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where state weighers are stationed or to charge for such weighing is not unconstitutional.[18] Nor is a municipal ordinance requiring that commodities sold in load lots by weight be weighed by a public weighmaster within the city invalid as applied to one delivering coal from state-tested scales at a mine outside the city.[19] A statute requiring merchants to record sales in bulk not made in the regular course of business is also within the police power.[20]

Similarly, the power of a State to prescribe standard containers to protect buyers from deception as well as to facilitate trading and to preserve the condition of the merchandise is not open to

[14] *Fairmont Co.* v. *Minnesota*, 274 U.S. 1 (1927).

[15] *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183 (1936); *Pep Boys* v. *Pyroil*, 299 U.S. 198 (1936).

[16] *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334 (1959).

[17] *Schmidinger* v. *Chicago*, 226 U.S. 578, 588 (1913), citing *McLean* v. *Arkansas*, 211 U.S. 539, 550 (1909).

[18] *Merchants Exchange* v. *Missouri*, 248 U.S. 365 (1919).

[19] *Hauge* v. *City of Chicago*, 299 U.S. 387 (1937).

[20] *Lemieux* v. *Young*, 211 U.S. 489 (1909); *Kidd, Dater Co.* v. *Musselman Grocer Co.*, 217 U.S. 461 (1910).

question. Accordingly, an administrative order issued pursuant to an authorizing statute and prescribing the dimensions, form, and capacity of containers for strawberries and raspberries is not arbitrary inasmuch as the form and dimensions bore a reasonable relation to the protection of the buyers and the preservation in transit of the fruit.[21] Similarly, an ordinance fixing standard sizes is not unconstitutional.[22] However, by a case decided in 1924, a "tolerance" of only two ounces in excess of the minimum weight of a loaf of bread was unreasonable when it is impossible to manufacture good bread without frequently exceeding the prescribed tolerance and was consequently unconstitutional,[23] but by one decided ten years later, regulations issued in furtherance of a statutory authorization which imposed a rate of tolerance not to exceed three ounces to a pound of bread and requiring that the bread maintain the statutory minimum weight for not less than 12 hours after cooling were constitutional.[24] Likewise a law requiring that lard not sold in bulk should be put up in containers holding one, three, or five pounds weight, or some whole multiple of these numbers, does not deprive sellers of their property without due process of law.[25]

The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of the police power and in the promotion of fair dealing, to require that the nature of the product be fairly set forth.[1]

A statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and permitting recission of the contract if the machinery does not prove reasonably adequate, and further declaring any agreement contrary to its provisions to be against public policy and void, does not violate the due process clause.[2]

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[21] *Pacific States Co.* v. *White*, 296 U.S. 176 (1935).

[22] *Schmidinger* v. *City of Chicago*, 226 U.S. 578 (1913).

[23] *Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924).

[24] *Petersen Baking Co.* v. *Bryan*, 290 U.S. 570 (1934). For a modern case involving similar requirements, decided in the context of conflict between federal and state requirements, *see Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977) (state and federal requirements that packaged bacon and flour contain an accurate statement of the weight of the contents but differing with respect to reasonable variations).

[25] *Armor & Co.* v. *North Dakota*, 240 U.S. 510 (1916).

[1] *Heath & Milligan Co.* v. *Worst*, 207 U.S. 338 (1907); *Corn Products Refg. Co.* v. *Eddy*, 249 U.S. 427 (1919); *National Fertilizer Assn.* v. *Bradley*, 301 U.S. 178 (1937).

[2] *Advance-Rumely Co.* v. *Jackson*, 287 U.S. 283 (1932).

***Blue Sky Laws: Laws Regulating Boards of Trade.***—In the exercise of its power to prevent fraud and imposition, a State may regulate trading in securities within its borders, require a license of those engaging in such dealing, make issuance of a license dependent on a public officer's being satisfied of the good repute of the applicants, and permit him, subject to judicial review of his findings, to revoke the same.[3] A State may forbid the giving of options to sell or buy at a future time any grain or other commodity.[4] It may also forbid sales on margin for future delivery,[5] and may prohibit the keeping of places where stocks, grain, and the like, are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid.[6] Making criminal any deduction by the purchaser from the actual weight of grain, hay, seed, or coal under a claim of right by reason of any custom or rule of a board of trade is valid exercise of the police power and does not deprive the purchaser of his property without due process of law nor interfere with his liberty of contract.[7]

***Trading Stamps.***—A prohibitive license fee upon the use of trading stamps is not unconstitutional.[8]

***Banking.***—The Fourteenth Amendment does not deny to States the power to forbid a business simply because it was permitted at common law; therefore, where public interests so demand, a State may place the banking business under legislative control and prohibit it except under prescribed conditions. Accordingly, a statute subjecting state banks to assessments for a depositors' guaranty fund is within the police power of the States and does not deprive the banks of property without due process of law.[9] Also, a law requiring savings banks to turn over to the State deposits inactive for thirty years (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of the right, does not effect an invalid taking of the property of said banks; nor does a statute requiring banks to turn over to the pro-

[3] *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick* v. *Halsey & Co.*, 242 U.S. 568 (1917).

[4] *Booth* v. *Illinois*, 184 U.S. 425 (1902).

[5] *Otis* v. *Parket*, 187 U.S. 606 (1903).

[6] *Brodnax* v. *Missouri*, 219 U.S. 285 (1911).

[7] *House* v. *Mayes*, 219 U.S. 270 (1911).

[8] *Rast* v. *Van Deman & Lewis*, 240 U.S. 342 (1916); *Tanner* v. *Little*, 240 U.S. 369 (1916); *Pitney* v. *Washington*, 240 U.S. 387 (1916).

[9] *Noble State Bank* v. *Haskell*, 219 U.S. 104 (1911); *Shallenberger* v. *First State Bank*, 219 U.S. 114 (1911); *Assaria State Bank* v. *Dolley*, 219 U.S. 121 (1911); *Abie State Bank* v. *Bryan*, 282 U.S. 765 (1931).

tective custody of the State deposits that have been inactive ten or twenty-five years (depending on the nature of the deposit).[10]

The constitutional rights of creditors in an insolvent bank in the hands of liquidators are not violated by a later statute permitting re-opening under a reorganization plan approved by the court, the liquidating officer, and by three-fourths of the creditors.[11] Similarly, a Federal Reserve bank is not unlawfully deprived of business rights of liberty of contract by a law which allows state banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker.[12]

***Loans, Interest, Wage Assignments and Garnishment.***—In fixing maximum rates of interest on money loaned within its borders, a State is acting clearly within its police power; and the details are within legislative discretion if not unreasonably or arbitrarily exercised.[13] Equally valid as an exercise of a State's police power is a requirement that assignments of future wages as security for debts of less than $200, to be valid, must be accepted in writing by the employer, consented to by the assignors, and filed in a public office. Such a requirement deprives neither the borrower nor the lender of his property without due process of law.[14]

***Insurance.***—The relations generally of those engaged in the insurance business[15] as well as the business itself have been peculiarly subject to supervision and control.[16] Government may fix insurance rates and regulate the compensation of insurance agents.[17] It may impose a fine on "any person 'who shall act in any manner in the negotiation or transaction of unlawful insurance . . . with a foreign insurance company not admitted to do business [within said

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[10] *Provident Savings Institution* v. *Malone*, 221 U.S. 660 (1911); *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233 (1944).

When a bank conservator appointed pursuant to a new statute has all the functions of a receiver under the old law, one of which is the enforcement on behalf of depositors of stockholders' liability, which liability the conservator can enforce as cheaply as could a receiver appointed under the pre-existing statute, it cannot be said that the new statute, in suspending the right of depositor to have a receiver appointed, arbitrarily deprives a depositor of his remedy or destroys his property without the due process of law. The depositor has no property right in any particular form of remedy. *Gebbes* v. *Zimmerman*, 290 U.S. 326 (1933).

[11] *Doty* v. *Love*, 295 U.S. 64 (1935).

[12] *Farmers Bank* v. *Fed. Reserve Bank*, 262 U.S. 649 (1923).

[13] *Griffith* v. *Connecticut*, 218 U.S. 563 (1910).

[14] *Mutual Loan Co.* v. *Martell*, 222 U.S. 225 (1911).

[15] *La Tourette* v. *McMaster*, 248 U.S. 465 (1919); *Stipich* v. *Insurance Co.*, 277 U.S. 311, 320 (1928).

[16] *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389 (1914).

[17] *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U.S. 251 (1931).

State].'"[18] It may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents.[19] Nor does a Virginia law which forbids the making of contracts of casualty or surety insurance, by companies authorized to do business therein, except through registered agents, which requires that such contracts applicable to persons or property in the State be countersigned by a registered local agent, and which prohibits such agents from sharing more than 50% of a commission with a nonresident broker, deprive authorized foreign casualty and surety insurers of due process.[20] And just as all banks may be required to contribute to a depositors' guaranty fund, so may all automobile liability insurers be required to submit to the equitable apportionment among them of applicants who are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.[21]

However, a statute which prohibits the assured from contracting directly with a marine insurance company outside the State for coverage of property within the State is invalid as a deprivation of liberty without due process of law.[22] For the same reason, a State may not prevent a citizen from concluding with a foreign life insurance company at its home office a policy loan agreement whereby the policy on his life is pledged as collateral security for a cash loan to become due upon default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness. Authority to subject such an agreement to the conflicting provisions of domestic law is not deducible from the power of a State to license a foreign insurance company as a condition of its doing business therein.[23]

A stipulation that policies of hail insurance shall take effect and become binding twenty-four hours after the hour in which an application is taken and further requiring notice by telegram of rejection of an application is not invalid.[24] Nor is any arbitrary re-

[18] *Nutting* v. *Massachusetts*, 183 U.S. 553, 556 (1902), distinguishing *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897). *See also Hoper* v. *California*, 155 U.S. 648 (1895).

[19] *Daniel* v. *Family Ins. Co.*, 336 U.S. 220 (1949).

[20] *Osborn* v. *Ozlin*, 310 U.S. 53, 68–69 (1940). Dissenting from the conclusion, Justice Roberts declared that the plain effect of the Virginia law is to compel a nonresident to pay a Virginia resident for services which the latter does not in fact render.

[21] *California Auto. Assn.* v. *Maloney*, 341 U.S. 105 (1951).

[22] *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897).

[23] *New York Life Ins. Co.* v. *Dodge*, 246 U.S. 357 (1918).

[24] *National Ins. Co.* v. *Wanberg*, 260 U.S. 71 (1922).

straint upon their liberty of contract imposed upon surety companies by a statute providing that any bond executed after its enactment for the faithful performance of a building contract shall inure to the benefit of materialmen and laborers, notwithstanding any provision of the bond to the contrary.[25] Likewise constitutional is a law requiring that a policy, indemnifying a motor vehicle owner against liability to persons injured through negligent operation, shall provide that bankruptcy of the insured shall not release the insurer from liability to an injured person.[1]

If fire insurance companies, in case of total loss, are compelled to pay the amount for which the property was insured, less depreciation between the time of issuing the policy and the time of the loss, such insurers are not deprived of their property without due process of law.[2]

Moreover, even though it has its attorney-in-fact located in Illinois, signs all its contracts there, and forwards therefrom all checks in payment of losses, a reciprocal insurance association, if it covers real property located in New York, may be compelled to comply with New York regulations which require maintenance of an office in that State and the countersigning of policies by an agent resident therein.[3] Also, to discourage monopolies and to encourage competition in the matter of rates, a State constitutionally may impose on all fire insurance companies connected with a tariff association fixing rates a liability or penalty to be collected by the insured of 25% in excess of actual loss or damage, stipulations in the insurance contract to the contrary notwithstanding.[4]

A state statute by which a life insurance company, if it fails to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reasonable in amount, and for a reasonable attorney's fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds.[5] It is also proper by law to cut off a defense by a life insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured.[6] A provision that suicide, unless con-

[25] *Hartford Accident Co.* v. *Nelson Co.*, 291 U.S. 352 (1934).

[1] *Merchants Liability Co.* v. *Smart*, 267 U.S. 126 (1925).

[2] *Orient Insurance Company* v. *Daggs*, 172 U.S. 577 (1899).

[3] *Hooperston Co.* v. *Cullen*, 318 U.S. 313 (1943).

[4] *German Alliance Ins. Co.* v. *Hale*, 219 U.S. 307 (1911). *See also Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401 (1905).

[5] *Life & Casualty Co.* v. *McCray*, 291 U.S. 566 (1934).

[6] *Northwestern Life Ins. Co.* v. *Riggs*, 203 U.S. 243 (1906).

templated when the application for a policy was made, shall be no defense is equally valid.[7] When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived of their property without due process of law.[8] Similarly, when the method of liquidation provided by a plan of rehabilitation of a mutual life insurance company is as favorable to dissenting policyholders as would have been the sale of assets and *pro rata* distribution to all creditors, the dissenters are unable to show any taking without due process. Dissenters have no constitutional right to a particular form of remedy.[9]

***Employment Agencies.***—An act imposing license fees for operating such agencies and prohibiting them from sending applicants to an employer who has not applied for labor does not deny due process of law.[10]

***Debt Pooling Agencies.***—State law prohibiting operation of a "debt pooling" or a "debt adjustment" business except as an incident to legitimate practice of law is a valid exercise of legislative discretion.[11]

***Pharmacies, Opticians.***—The Court has sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who were actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.[12] A state law forbidding (1) solicitation of the sale of frames, mountings, or other optical appliances, (2) solicitation of the sale of eyeglasses, lenses, or prisms by use of advertising media, (3) retailers

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[7] *Whitfield* v. *Aetna Life Ins. Co.*, 205 U.S. 489 (1907).

[8] *Polk* v. *Mutual Reserve Fund*, 207 U.S. 310 (1907).

[9] *Neblett* v. *Carpenter*, 305 U.S. 297 (1938).

[10] *Brazee* v. *Michigan*, 241 U.S. 340 (1916). With four Justices dissenting, the Court, in *Adams* v. *Tanner*, 244 U.S. 590 (1917), struck down a state law absolutely prohibiting maintenance of private employment agencies. Commenting on the "constitutional philosophy" thereof in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949), Justice Black stated that *Olsen* v. *Nebraska*, 313 U.S. 236 (1941), "clearly undermined *Adams* v. *Tanner*."

[11] *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).

[12] *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973). In the course of the decision, the Court overruled *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928), in which it had voided a law forbidding a corporation to own any drug store, unless all its stockholders were licensed pharmacists, as applied to a foreign corporation, all of whose stockholders were not pharmacists, which sought to extend its business in the State by acquiring and operating therein two additional stores.

from leasing, or otherwise permitting anyone purporting to do eye examining or visual care to occupy space in a retail store, and (4) anyone, such as an optician, to fit lenses, or replace lenses or other optical appliances, except upon written prescription of an optometrist or opthalmologist licensed in the State is not invalid. A State may treat all who deal with the human eye as members of a profession who should refrain from merchandising methods to obtain customers, and should choose locations that reduce the temptations of commercialism and also may conclude that eye examinations are so critical that every change in frame and duplication of a lens should be accompanied by a prescription.[13]

***Miscellaneous Occupations.***—The practice of medicine, using this word in its most general sense, has long been the subject of regulation; [14] in pursuance of its power a State may exclude osteophatic physicians from hospitals maintained by it or its municipalities,[15] may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, and by prohibiting certain advertising regardless of its truthfulness.[16] But while statutes requiring pilots to be licensed [17] and railroad engineers to pass color blindness tests [18] have been sustained, an act making it a misdemeanor for a person to act as a railway passenger conductor without having had two years' experience as a freight conductor or brakeman is invalid.[19]

Legislation has been upheld which regulated or required licenses for admission to places of amusement,[20] grain elevators,[21]

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[13] *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

[14] *McNaughton* v. *Johnson*, 242 U.S. 344, 349 (1917). *See also Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Hawker* v. *New York*, 170 U.S. 189 (1898); *Reetz* v. *Michigan*, 188 U.S. 505 (1903); *Watson* v. *Maryland*, 218 U.S. 173 (1910); *Barsky* v. *Board of Regents*, 347 U.S. 442 (1954) sustaining a New York law authorizing suspension for six months of the license of a physician who had been convicted of crime in any jurisdiction, in this instance, contempt of Congress under 2 U.S.C. § 192. Three Justices, Black, Douglas, and Frankfurter, dissented.

[15] *Collins* v. *Texas*, 223 U.S. 288 (1912); *Hayman* v. *Galveston*, 273 U.S. 414 (1927).

[16] *Semler* v. *Dental Examiners*, 294 U.S. 608, 611 (1935). *See also Douglas* v. *Noble*, 261 U.S. 165 (1923); *Graves* v. *Minnesota*, 272 U.S. 425, 427 (1926).

[17] *Olsen* v. *Smith*, 195 U.S. 332 (1904).

[18] *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U.S. 96 (1888).

[19] *Smith* v. *Texas*, 233 U.S. 630 (1914). *See deVeau* v. *Braisted*, 363 U.S. 144, 157–160 (1960), sustaining New York law barring from office in longshoremen's union persons convicted of felony and not thereafter pardoned or granted a good conduct certificate from a parole board.

[20] *Western Turf Association* v. *Greenberg*, 204 U.S. 359 (1907).

[21] *W.W. Cargill Co.* v. *Minnesota*, 180 U.S. 452 (1901).

detective agencies,[22] sale of cigarettes,[23] or cosmetics,[24] and the resale of theatre tickets,[25] or which absolutely forbade the advertising of cigarettes,[26] or the use of a representation of the United States flag on an advertising mediums,[27] the solicitation by a layman of business of collecting and adjusting claims,[28] the keeping of private markets within six squares of a public market,[29] the keeping of billiard halls except in hotels,[30] or the purchase by junk dealers of wire, copper etc., without ascertaining the seller's right to sell.[31]

**Protection of Resources of the State**

***Oil and Gas.***—To prevent waste, production may be prorated; the prohibition of wasteful conduct, whether primarily in behalf of the owners of gas in a common reservoir or because of the public interests involved, is consistent with the Constitution.[1] Thus a statute which defines waste as including, in addition to its ordinary meaning, economic waste, surface waste, and waste incident to production in excess of transportation or marketing facilities or reasonable market demands and which provides that whenever full production from a common source of supply can be obtained only under conditions constituting waste, a producer may take only such proportion of all that may be produced from such common source without waste as the production of his wells bears to the total production of such common source, is not repugnant to the due process clause.[2] But whether a system of proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors is a question for administrative and not judicial judgment. In a domain of knowledge still shifting and growing, and in a field where judgment is necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it has been held to be presumptuous for courts, on the basis of conflicting expert testimony, to nullify an oil prora-

[22] *Lehon* v. *Atlanta*, 242 U.S. 53 (1916).
[23] *Gundling* v. *Chicago*, 177 U.S. 183, 185 (1900).
[24] *Bourjois, Inc.* v. *Chapman*, 301 U.S. 183 (1937).
[25] *Weller* v. *New York*, 268 U.S. 319 (1925).
[26] *Packer Corporation* v. *Utah*, 285 U.S. 105 (1932).
[27] *Halter* v. *Nebraska*, 205 U.S. 34 (1907).
[28] *McCloskey* v. *Tobin*, 252 U.S. 107 (1920).
[29] *Natal* v. *Louisiana*, 139 U.S. 621 (1891).
[30] *Murphy* v. *California*, 225 U.S. 623 (1912).
[31] *Rosenthal* v. *New York*, 226 U.S. 260 (1912).

[1] *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 76–77 (1937); citing *Ohio Oil Co.* v. *Indiana (No. 1)*, 177 U.S. 190 (1900); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Oklahoma* v. *Kansas Nat. Gas Co.*, 221 U.S. 229 (1911).

[2] *Champlin Rfg. Co.* v. *Comm.*, 286 U.S. 210 (1932).

tion order, promulgated by an administrative commission in execution of a regulatory scheme intended to conserve a State's oil resources, as violative of due process.[3] On the other hand, where the evidence showed that an order, purporting to limit daily total production of a gas field and to prorate the allowed production among several wells, had for its real purpose, not the prevention of waste nor the undue drainage from the reserves of other well owners, but rather the compelling of pipe line owners to furnish a market to those who had no pipe line connections, the order was held void as a taking of private property for private benefit.[4] As authorized by statute the Oklahoma Corporation Commission, finding that existing low field prices for gas were resulting in economic and physical waste, issued orders fixing a minimum price for natural gas and requiring the Cities Service Company to take gas ratably from another producer in the same field at the dictated price. The orders were sustained by the Court as conservation measures.[5]

Even though carbon black is more valuable than the gas from which it is extracted, and notwithstanding a resulting loss of investment in a plant for the manufacture of carbon black, a State, in the exercise of its police power, may forbid the use of natural gas for products, such as carbon black, in the production of which such gas is burned without fully utilizing for other manufacturing or domestic purposes the heat therein contained.[6] Likewise, for the purpose of regulating and adjusting coexisting rights of surface owners to underlying oil and gas, it is within the power of a State to prohibit the operators of wells from allowing natural gas, not conveniently necessary for other purposes, to come to the surface without the lifting power having been utilized to produce the greatest quality of oil in proportion.[7]

***Protection of Property Damaged by Mining or Drilling of Wells.***—An ordinance conditioning the right to drill for oil and gas within the city limits upon the filing of a bond in the sum of $200,000 for each well, to secure payment of damages from injuries to any persons or property resulting from the drilling operation, or maintenance of any well or structure appurtenant thereto, is con-

[3] *Railroad Comm.* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940). *See also Railroad Comm.* v. *Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941); *Railroad Comm.* v. *Humble Oil & Refining Co.*, 311 U.S. 578 (1941).

[4] *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, (1937).

[5] *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179 (1950); *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190 (1950).

[6] *Walls* v. *Midland Carbon Co.*, 254 U.S. 300 (1920). *See also Henderson Co.* v. *Thompson*, 300 U.S. 258 (1937).

[7] *Bandini Co.* v. *Superior Court*, 284 U.S. 8 (1931).

sistent with due process of law and is not rendered unreasonable by the requirement that the bond be executed, not by personal sureties, but by a bonding company authorized to do business in the State.[8] On the other hand, a Pennsylvania statute, which forbade the mining of coal under private dwellings or streets of cities by a grantor that had reserved the right to mine, was viewed as restricting the use of private property too much and hence as a "taking" without due process of law.[9] Distinguished from the latter in part by absence of proof of any resulting decline in property values, an ordinance prohibiting sand and gravel excavation below two feet above maximum ground water level and imposing a duty to refill any excavation presently below that level is, for want of evidence that it is unreasonable or that it would have only a minimal effect on safety by reason of the fact that a pond 25 feet deep already is located on appellant's property, a valid exercise of the police power and the fact that it will suspend a business conducted since 1927, does not give rise to confiscation without compensation; appellant remains undisturbed in his use of the land for other legitimate purposes.[10]

***Water.***—A statute making it unlawful for a riparian owner to divert water into another State does not deprive him of property without due process of law. "The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . What it has it may keep and give no one a reason for its will."[11]

***Apple and Citrus Fruit Industries.***—A statute requiring the destruction of cedar trees to avoid the infecting with cedar rust of apple orchards within the vicinity of two miles is not unreasonable, notwithstanding the absence of a provision for compensation for the trees thus removed or the decrease in the market value of realty caused by their destruction. Apple growing being one of the principal agricultural pursuits in Virginia and the value of cedar trees throughout that State being small as compared with that of apple orchards, the State was constitutionally competent to decide

[8] *Gant* v. *Oklahoma City*, 289 U.S. 98 (1933).

[9] *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). On the "taking" jurisprudence which has stemmed from this case, *see supra, pp.* 1320-1328.

[10] *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962).

[11] *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 356-357 (1908). This case has now been disapproved on the basis of a commerce clause rationale which had been rejected in the case itself. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). *See also City of Altus* v. *Carr*, 255 F. Supp. 828 (D.C.W.D. Tex.), *aff'd. per curiam*, 385 U.S. 35 (1966). *Supra, pp.* 272-273.

upon the destruction of one class of property in order to save another which, in the judgment of its legislature, is of greater value to the public.[12] With a similar object in view, to protect the reputation of one of its major industries, Florida was held to possess constitutional authority to penalize the delivery for shipment in interstate commerce of citrus fruits so immature as to be unfit for consumption.[13]

***Fish and Game.***—Over fish found within its waters, and over wild game, the State has supreme control.[14] It may regulate or prohibit fishing and hunting within its limits,[15] and for the effective enforcement of such restrictions, it may forbid the possession within its borders of special instruments of violations, such as nets, traps, and seines, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor.[16] To conserve for food fish found within its waters, a State constitutionally may provide that a reduction plant, processing fish for commercial purposes, may not accept more fish than can be used without deterioration, waste, or spoilage; as a shield against the covert depletion of its local supply, it may render such restriction applicable to fish brought into the State from the outside.[17] Likewise, it is within the power of a State to forbid the transportation outside the State of game killed therein,[18] and to make illegal possession during the closed season even of game imported from abroad.[19]

**Ownership of Real Property: Limitations, Rights**

***Zoning and Similar Actions.***—By virtue of their possession of the police power, States and their municipal subdivisions may declare that in particular circumstances and in particular localities specific businesses, which are not nuisances *per se*, are to be deemed nuisances in fact and in law.[1] Consequently when, by an

[12] *Miller* v. *Schoene*, 276 U.S. 272, 277, 279 (1928).
[13] *Sligh* v. *Kirkwood*, 237 U.S. 52 (1915).
[14] *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422, 426 (1936).
[15] *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891); *Geer* v. *Connecticut*, 161 U.S. 519 (1896).
[16] *Miller* v. *McLaughlin*, 281 U.S. 261, 264 (1930).
[17] *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936).
[18] *Geer* v. *Connecticut*, 161 U.S. 519 (1896). This case and its progeny have been disapproved on commerce clause and privileges and immunities grounds. *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371 (1978). *Supra*, pp. 272–273, 876–877.
[19] *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31 (1908).
[1] *Reinman* v. *Little Rock*, 237 U.S. 171 (1915).

ordinance enacted in good faith, a municipality prohibited brickmaking in a designated area, the land of a brickmaker in said area was not taken without due process of law, although such land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brickmaking than for any other purpose, had been acquired by him before it was annexed to the municipality, and had long been used as a brickyard.[2] On the same basis laws have been upheld which restricted the location of dairy or cow stables,[3] of livery stables,[4] of the grazing of sheep near habitations.[5] Also a State may declare the emission of dense smoke in cities of populous neighborhoods a nuisance and restrain it; regulations to that effect are not invalid even though they affect the use of property or subject the owner to the expense of complying with their terms.[6]

With increasing urbanization and consequent broadening of the philosophy of regulation of land use to protect not only health and safety but as well the amenities of modern living,[7] the Court has recognized the discretion of government, within the loose confines of the due process clause, to zone in many ways and for many purposes. Before holding unconstitutional an ordinance imposing a land-use plan the Court must determine that it is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, or general welfare.[8] The creation of a residential district in a village and the exclusion therefrom of apartment houses, retail stores, and billboards is a permissible exercise of municipal power,[9] as is an ordinance restricting housing in a community to one-family dwellings, in which any number of persons related by blood, adoption, or marriage could occupy a house but only two unrelated persons could do so, which was sustained as a valid exercise of the police power in the public interest, absent a showing that it was aimed at the deprivation of a "fundamental interest." [10] Such a fundamental interest was found impaired by a

[2] *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915).
[3] *Fischer* v. *St. Louis*, 194 U.S. 361 (1904).
[4] *Reinman* v. *Little Rock*, 237 US. 171 (1915).
[5] *Bacon* v. *Walker*, 204 U.S. 311 (1907).
[6] *Northwestern Laundry* v. *Des Moines*, 239 U.S. 486 (1916). For a case embracing a rather special set of facts, *see Dobbins*, v. *Los Angeles*, 195 U.S. 223 (1904).
[7] *Cf.* "Developments in the Law-Zoning," 91 Harv. L. Rev. 1427 (1978).
[8] *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Zahn* v. *Bd. of Public Works*, 274 U.S. 325 (1927); *Nectow* v. *Cambridge*, 277 U.S. 183 (1928); *Cusack Co.* v. *Chicago*, 242 U.S. 526 (1917); *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U.S. 269 (1919).
[9] *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).
[10] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

zoning ordinance in *Moore* v. *City of East Cleveland,*[11] which restricted housing occupancy to a single family but so defined "family" that a grandmother who had been living with her two grandsons of different children was in violation of the ordinance. Similarly, Negroes cannot be forbidden to occupy houses in blocks where the greater number of houses are occupied by white persons and vice versa. Such a prohibition, the practical effect of which is to prevent the sales of lots in such blocks to Negroes, violates the constitutional prohibitions against interference with property rights except by due process of law and cannot be sustained on the ground that it will promote public peace by preventing racial conflicts.[12] But a range of regulation is permissible, such as regulating the height of building [13] and requiring lot owners, when constructing new buildings to set them back a certain distance from the street lines.[14] The preservation of open spaces, through density controls and restrictions on the numbers of houses [15] and the preservation of historic structures [16] are permissible utilizations of the zoning power.

In one aspect of zoning, the degree to which such decisions may be committed to private persons, the Court has not attained consistency. Thus, it invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two thirds of the property abutting any street,[17] and, subsequently, it struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.[18] In a decision falling chronologically between these two, it sustained an ordinance which permitted property owners to waive a municipal restriction prohibiting the construction of billboards.[19] In its most recent decision,

[11] 431 U.S. 494 (1977). A plurality of the Court struck down the ordinance as a violation of substantive due process, an infringment of family living arrangements which are a protected liberty interest, id., 498–506, while Justice Stevens concurred on the ground that the ordinance was arbitrary and unreasonable. Id., 513. Four Justices dissented. Id., 521, 531, 541.

[12] *Buchanan* v. *Warley,* 245 U.S. 60 (1917).

[13] *Welch* v. *Swasey,* 214 U.S. 91 (1909).

[14] *Gorieb* v. *Fox,* 274 U.S. 603 (1927).

[15] *Agins* v. *City of Tiburon,* 447 U.S. 255 (1980).

[16] *Penn Central Transp. Co.* v. *City of New York,* 438 U.S. 104 (1978). On the "taking" jurisprudence arising in this context, *see supra, pp.* 1320–1328.

[17] *Eubank* v. *City of Richmond,* 226 U.S. 137 (1912).

[18] *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116 (1928).

[19] *Thomas Cusack Co.* v. *City of Chicago,* 242 U.S. 526 (1917). The Court thought the case different from *Eubank,* because in that case the ordinance established no rule but gave to decision of a narrow segment of the community the force of law, whereas in *Cusack* the ordinance barred the erection of any billboards but permitted the prohibition to be modified by the persons most affected. Id., 531.

upholding a city charter provision permitting the petitioning to citywide referendum of zoning changes and variances by the city planning commission and necessitating a 55% approval vote in the referendum to sustain the commission's decision, the Court distinguished between delegating to a small group of affected landowners such a decision relating to other people and the people's retention of the ultimate legislative power in themselves which for convenience they had delegated to a legislative body.[20]

***Safety Regulations.***—As a legitimate exercise of the police power calculated to promote public safety and diminish fire hazard, municipal ordinances have been sustained which prohibit the storage of gasoline within 300 feet of any dwelling,[21] or require that all tanks with a capacity of more than ten gallons, used for the storage of gasoline, be buried at least three feet under ground,[22] or which prohibit washing and ironing in public laundries and wash houses, within defined territorial limts from 10 p.m. to 6 a.m.[23] Equally sanctioned by the Fourteenth Amendment is the demolition and removal by cities of wooden buildings erected within defined fire limits contrary to regulations in force at the time.[24] Nor does construction of property in full compliance with existing laws confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodginghouses of non-fireproof construction erected prior to said enactment, does not, as applied to a lodginghouse constructed in 1940 in conformity with all laws then applicable, deprive the owner thereof of due process, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.[25]

***Succession to Property.***—When a New York Decedent Estate Law, effective after 1930, grants for the first time to a surviving spouse a right of election to take as in intestacy, and the husband, by executing in 1934 a codicil to his will drafted in 1929, made this provision operative, his widow, notwithstanding her waiver in 1922 of any right in her husband's estate, may avail herself of such right of election. The deceased husband's heirs cannot contend that the impairment of the widow's waiver by subsequent legislation de-

[20] *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668 (1976). Such referenda do, however, raise equal protection problems. *See infra*, *pp.* 1747-1748.

[21] *Pierce Oil Corp.* v. *Hope*, 248 U.S. 498 (1919).

[22] *Standard Oil Co.* v. *Marysville*, 279 U.S. 582 (1929).

[23] *Barbier* v. *Connolly*, 113 U.S. 27 (1885); *Soon Hing* v. *Crowley*, 113 U.S. 703 (1885).

[24] *Maguire* v. *Reardon*, 225 U.S. 271 (1921).

[25] *Queenside Hills Co.* v. *Saxl*, 328 U.S. 80 (1946).

prived his estate of property without due process of law. Rights of succession to property are of statutory creation. Accordingly, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to the surviving spouse regardless of any waiver however formally executed.[1]

***Administration of Estates.***—Even after the creation of testamentary trust, a State retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration, especially such as the Depression presented to trusts containing mortgages. Accordingly, no constitutional right is violated by the retroactive application to an estate on which administration had already begun of a statute which had the effect of taking away a remainderman's right to judicial examination of the trustee's computation of income. Judicial rules, promulgated prior to such statute and which were more favorable to the interests of remaindermen, can be relied upon by the latter only insofar as said rules were intended to operate retroactively; the decedent, in whose estate the remaindermen had an interest, died even before such court rules were established. If a property right in a particular rule of income allotment in salvage proceedings vested at all, it would seem to have done so at the death of the decedent or testator.[2]

***Abandoned Property.***—As applied to insurance policies on the lives of New York residents issued by foreign corporations for delivery in New York, where the insured persons continued to be residents and the beneficiaries were resident at the maturity date of the policies, a New York Abandoned Property Law requiring payment to the State of money owing by life insurers and remaining unclaimed for seven years does not deprive such foreign companies of property without due process. The relationship between New York and its residents, who abandon claims against foreign insurance companies and between New York and foreign insurance companies doing business therein is sufficiently close to give New York jurisdiction.[3] In *Standard Oil Co.* v. *New Jersey*,[4] a divided

[1] *Irving Trust Co.* v. *Day*, 314 U.S. 556, 564 (1942).

[2] *Demorest* v. *City Bank Co.*, 321 U.S. 36, 47–48 (1944).

[3] *Connecticut Ins. Co.* v. *Moore*, 333 U.S. 541 (1948). Justices Jackson and Douglas dissented on the ground that New York is attempting to escheat unclaimed funds not located either actually or constructively in New York and which are the property of beneficiaries who may never have been citizens or residents of New York.

[4] 341 U.S. 428 (1951).

Court held that due process is not violated by a statute escheating to the State shares of stock in a domestic corporation and unpaid dividends declared thereon, even though the last known owners were nonresidents and the stock was issued and the dividends were held in another State. The State's power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

The large discretion the States possess to legislatively provide for the circumstances under which property is to be determined to have been abandoned and to provide for its disposition is revealed in *Texaco* v. *Short*.[5] There, Indiana enacted a statute which terminated interests in coal, oil, gas, or other minerals which have not been used for twenty years and which provided for ownership of such interests to revert to the owner of the interest out of which the interests had been carved. With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office. The "use" of a mineral interest which could prevent its extinction included the actual or attempted extraction of minerals, the payment of rents or royalties, and any payment of taxes. Merely filing a claim with the local recorder would preserve the interest. The statute provided no notice, save for its own publication, to owners of interests nor did it require surface owners to notify owners of mineral interests that the interests were about to expire. By a narrow margin, the Court sustained the statute, holding that the State's interest in encouraging production, securing timely notices of property ownership, and settling property titles provided a basis for enactment and finding that due process did not require any actual notice to holders of unused mineral interests. Property owners are charged with maintaining knowledge of the legal conditions of property ownership. The act provided a grace period and specified several actions which were sufficient to avoid extinguishment. The State "may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of interests" and it may similarly "impose on him the lesser burden of keeping informed of the use or nonuse of his own property." [6]

[5] 454 U.S. 516 (1982).

[6] Id., 538. The four dissenters thought that as to persons holding before enactment some specific notice was required. Id., 540.

**The Police Power**

***Generally.***—According to settled principles, the police power of a State must be held to embrace the authority not only to enact directly quarantine [1] and health laws of every description but also to vest in municipal subdivisions a capacity to safeguard by appropriate means public health, safety, and morals. The manner in which this objective is to be accomplished is within the discretion of the State and its localities, subject only to the condition that no regulation adopted by either shall contravene the Constitution or infringe any right granted or secured by that instrument.[2]

***Protection of Water Supply.***—A State may require the removal of timber refuse from the vicinity of a watershed for a municipal water supply to prevent the spread of fire and consequent damage to such watershed.[3]

***Garbage.***—An ordinance for cremation of garbage and refuse at a designated place as a means for the protection of the public health is not taking of private property without just compensation even though such garbage and refuse may have some elements of value for certain purposes.[4]

***Sewers.***—Compelling property owners to connect with a publicly maintained system of sewers and enforcing that duty by criminal penalties does not violate the due process clause.[5]

***Food, Drugs, Milk.***—"The power of the State to . . . prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established." [6] Statutes forbidding or regulating the manufacture of oleomargarine have been upheld as a valid exercise of such power.[7] For the same reasons, statutes ordering the destruction of unsafe and unwholesome food,[8] prohibiting the sale and authorizing confiscation of impure milk [9] have been sustained, notwithstanding

[1] *Compagnie Francaise de Navigation a Vapeur* v. *Board of Health*, 186 U.S. 380 (1902).

[2] *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *New York ex rel. Lieberman* v. *Van De Carr*, 199 U.S. 552 (1905).

[3] *Perley* v. *North Carolina*, 249 U.S. 510 (1919).

[4] *California Reduction Co.* v. *Sanitary Works*, 199 U.S. 306 (1905).

[5] *Hutchinson* v. *Valdosa*, 277 U.S. 303 (1913).

[6] *Sligh* v. *Kirkwood*, 237 U.S. 52, 59-60 (1915).

[7] *Powell* v. *Pennsylvania*, 127 U.S. 678 (1888); *Magnano* v. *Hamilton*, 292 U.S. 40 (1934).

[8] *North American Storage Co.* v. *Chicago*, 211 U.S. 306 (1908).

[9] *Adams* v. *Milwaukee*, 228 U.S. 572 (1913).

that such articles had a value for purposes other than food. There also can be no question of the authority of the State, in the interest of public health and welfare, to forbid the sale of drugs by itinerant vendors [10] or the sale of spectacles by an establishment not in charge of a physician or optometrist.[11] Nor is it any longer possible to doubt the validity of state regulations pertaining to the administration, sale, prescription, and use of dangerous and habit-forming drugs.[12]

Equally valid as police power regulations are laws forbidding the sale of ice cream not containing a reasonable proportion of butter fat [13] or of condensed milk made from skimmed milk rather than whole milk [14] or of food preservatives containing boric acid.[15] Similarly, a statute which prohibits the sale of milk to which has been added any fat or oil other than a milk fat, and which has, as one of its purposes, the prevention of fraud and deception in the sale of milk products, does not, when applied to "filled milk" having the taste, consistency, and appearance of whole milk products, violate the due process clause. Filled milk is inferior to whole milk in its nutritional content and cannot be served to children as a substitute for whole milk without producing a dietary deficiency.[16] However, a statute forbidding the use of shoddy, even when sterilized, was held to be arbitrary and therefore invalid.[17]

***Gambling and Lotteries.***—Unless effecting a clear, unmistakable infringement of rights secured by fundamental law, legislation suppressing gambling will be upheld by the Court as concededly within the police power of a State.[18] Accordingly, a state statute may provide that, in the event a judgment is obtained against a party winning money, a lien may be had on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling.[19] For the same reason, lotteries, including those operated under a legislative grant, may be forbidden, irrespective of any particular equities.[20]

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[10] *Baccus* v. *Louisiana*, 232 U.S. 334 (1914).
[11] *Roschen* v. *Ward*, 279 U.S. 337 (1929).
[12] *Minnesota ex rel. Whipple* v. *Martinson*, 256 U.S. 41, 45 (1921).
[13] *Hutchinson Ice Cream Co.* v. *Iowa*, 242 U.S. 153 (1916).
[14] *Hebe Co.* v. *Shaw*, 248 U.S. 297 (1919).
[15] *Price* v. *Illinois*, 238 U.S. 446 (1915).
[16] *Sage Stores Co.* v. *Kansas*, 323 U.S. 32 (1944).
[17] *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402 (1926).
[18] *Ah Sin* v. *Wittman*, 198 U.S. 500 (1905).
[19] *Marvin* v. *Trout*, 199 U.S. 212 (1905).
[20] *Stone* v. *Mississippi*, 101 U.S. 814 (1880); *Douglas* v. *Kentucky*, 168 U.S. 488 (1897).

***Red Light Districts.***—An ordinance prescribing limits in a city outside of which no woman of lewd character shall dwell does not deprive persons owning or occupying property in or adjacent to said limits of any rights protected by the Constitution.[21]

***Sunday Blue Laws.***—The Supreme Court has uniformly recognized state laws relating to the observance of Sunday as representing a legitimate exercise of the police power. Thus, a law forbidding the keeping open of barber shops on Sunday is constitutional.[22]

***Intoxicating Liquor.***—"[O]n account of their well-known noxious qualities and the extraordinary evils shown by experience to be consequent upon their use, a State . . . [is competent] to prohibit [absolutely the] manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders. . . ." [23] And to implement such prohibition, a State has the power to declare that places where liquor is manufactured or kept shall be deemed common nuisances [24] and even to subject an innocent owner to the forfeiture of his property for the acts of a wrongdoer.[25]

***Regulation of Motor Vehicles and Carriers.***—The highways of a State are public property, the primary and preferred use of which is for private purposes; their uses for purposes of gain may generally be prohibited by the legislature or conditioned as it sees fit.[1] In limiting the use of its highways for intrastate transportation for hire, a State reasonably may provide that carriers who have furnished adequate, responsible, and continuous service over a given route from a specified data in the past shall be entitled to licenses as a matter of right but that the licensing of those whose service over the route began later than the date specified shall depend upon public convenience and necessity.[2] To require private contract carriers for hire to obtain a certificate of convenience and necessity, which is not granted if the service of common carriers is impaired thereby, and to fix minimum rates applicable thereto, which are not less than those prescribed for common carriers, is valid as a means of conserving highways,[3] but any attempt to con-

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[21] *L'Hote* v. *New Orleans*, 177 U.S. 587 (1900).

[22] *Petit* v. *Minnesota*, 177 U.S. 164 (1900).

[23] *Beer Co.* v. *Massachusetts*, 97 U.S. 25, 33 (1878); *Mugler* v. *Kansas*, 123 U.S. 623 (1887); *Kidd* v. *Pearson*, 128 U.S. 1 (1888); *Purity Extract Co.* v. *Lynch*, 226 U.S. 192 (1912); *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.S. 311 (1917); *Barbour* v. *Georgia*, 249 U.S. 454 (1919).

[24] *Mugler* v. *Kansas*, 123 U.S. 623, 671 (1887).

[25] *Hawes* v. *Georgia*, 258 U.S. 1 (1922); *Van Oster* v. *Kansas*, 272 U.S. 465 (1926).

[1] *Stephenson* v. *Binford*, 287 U.S. 251 (1932).

[2] *Stanley* v. *Public Utilities Comm.*, 295 U.S. 76 (1935).

[3] *Stephenson* v. *Binford*, 287 U.S. 251 (1932).

vert private carriers into common carriers,[4] or to subject them to the burdens and regulations of common carriers, without expressly declaring them to be common carriers, is violative of due process.[5] In the absence of legislation by Congress, a State may, in protection of the public safety, deny an interstate motor carrier the use of an already congested highway.[6]

In exercising its authority over its highways, on the other hand, a State is limited not merely to the raising of revenue for maintenance and reconstruction or to regulations as to the manner in which vehicles shall be operated but may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable.[7] No less constitutional is a municipal traffic regulation which forbids the operation in the streets of any advertising vehicle, excepting vehicles displaying business notices or advertisements of the products of the owner and not used mainly for advertising; and such regulation may be validly enforced to prevent an express company from selling advertising space on the outside of its trucks. Inasmuch as it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion.[8]

Any appropriate means adopted to insure compliance and care on the part of licensees and to protect other highway users being consonant with due process, a State may also provide that one, against whom a judgment is rendered for negligent operation and who fails to pay it within a designated time, shall have his license and registration suspended for three years, unless, in the meantime, the judgment is satisfied or discharged.[9] Compulsory automo-

[4] *Michigan Comm.* v. *Duke*, 266 U.S. 570 (1925).

[5] *Frost Trucking* v. *Railroad Comm.*, 271 U.S. 583 (1926); *Smith* v. *Cahoon*, 283 U.S. 553 (1931).

[6] *Bradley* v. *Pub. Util. Comm.*, 289 U.S. 92 (1933).

[7] *Sproles* v. *Binford*, 286 U.S. 374 (1932).

[8] *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949).

[9] *Reitz* v. *Mealey*, 314 U.S. 33 (1941); *Kesler* v. *Dept. of Public Safety*, 369 U.S. 153 (1962). *But see Perez* v. *Campbell*, 402 U.S. 637 (1971). Procedural due process must, of course be observed. *Bell* v. *Burson*, 402 U.S. 535 (1971). A nonresident owner who loans his automobile in another State, by the law of which he is immune from liability for the borrower's negligence and who was not in the State at the time of the accident, is not subjected to any unconstitutional deprivation by a law thereof, imposing liability on the owner for the negligence of one driving the car with the owner's permission. *Young* v. *Masci*, 289 U.S. 253 (1933).

bile insurance is so plainly valid as to present no federal constitutional question.[10]

***Man's Best Friend.***—A statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that in a civil action for killing a dog the owner cannot recover beyond the value fixed by himself in the last assessment preceding the killing is within the police power of the State.[11]

**Vested Rights, Remedial Rights, Political Candidacy**

Inasmuch as the right to become a candidate for state office is a privilege only of state citizenship, an unlawful denial of such right is not a denial of a right of "property."[1] However, an existing right of action to recover damages for an injury is property, which a legislature has no power to destroy.[2] Thus, the retroactive repeal of a provision which made directors liable for moneys embezzled by corporate officers, by preventing enforcement of a liability which already had arisen, deprived certain creditors of their property without due process of law.[3] But while a vested cause of action is property, a person has no property, in the constitutional sense, in any particular form of remedy and is guaranteed only the preservation of a substantial right to redress by any effective procedure.[4] Accordingly, a statute creating an additional remedy for enforcing stockholders' liability is not, as applied to stockholders then holding stock, violative of due process.[5] Nor is a law which lifts a statute of limitations and makes possible a suit, theretofore barred, for the value of certain securities. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could

[10] *Ex parte Poresky*, 290 U.S. 30 (1933). *See also Packard* v. *Banton*, 264 U.S. 140 (1924); *Sprout* v. *South Bend*, 277 U.S. 163 (1928); *Hodge Co.* v. *Cincinnati*, 284 U.S. 335 (1932); *Contingency Baking Co.* v. *Woodring*, 286 U.S. 352 (1932).

[11] *Sentell* v. *New Orleans & Carrollton R. Co.*, 166 U.S. 698 (1897).

[1] *Snowden* v. *Hughes*, 321 U.S. 1 (1944). This principle must now be considered severely limited and while the statement is literally true, cases under the equal protection clause now mandate a different result. *See Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978) (seeming to conflate due process and equal protection standards in political rights cases).

[2] *Angle* v. *Chicago, St. Paul, M. & D. Ry. Co.*, 151 U.S. 1 (1894).

[3] *Coombes* v. *Getz*, 285 U.S. 434, 442, 448 (1932).

[4] *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 (1933). *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978) (limitation of common-law liability of private industry nuclear accidents in order to encourage development of energy a rational action, especially when combined with congressional pledge to take necessary action in event of accident; whether limitation would have been of questionable validity in absence of pledge uncertain but unlikely).

[5] *Shriver* v. *Woodbine Bank*, 285 U.S. 467 (1932).

not be changed retroactively without hardship and oppression . . ., certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." [6]

**Control of Local Units of Government**

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed or popularly elected.[7] It power over the rights and property of cities held and used for governmental purposes was unaltered by the ratification thereof.[8] Thus, notwithstanding that it imposes liability irrespective of the power of a city to have prevented the violence, a statute requiring cities to indemnify owners of property damaged by mobs or during riots effects no unconstitutional deprivation of the property of such municipalities.[9] Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act which so limits the municipality's taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability no unconstitutional deprivation is experienced.[10]

Local units of government obliged to surrender property to other units newly created out of the territory of the former cannot successfully invoke the due process clause,[11] nor may taxpayers allege any unconstitutional deprivation as a result of changes in their tax burden attendant upon the consolidation of contiguous municipalities.[12] Nor is a statute requiring counties to reimburse cities of the first class but not other classes for rebates allowed for prompt payment of taxes in conflict with the due process clause.[13]

**Taxing Power**

***Generally.***—It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the States.[1] Rather, the purpose of the amendment was to

[6] *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315–316 (1945).

[7] *Soliah* v. *Heskin*, 222 U.S. 522 (1912). The equal protection clause has been employed, however, to limit a State's discretion with regard to certain matters. *Infra*, *pp.* 1778–1795.

[8] *Trenton* v. *New Jersey*, 262 U.S. 182 (1923).

[9] *Chicago* v. *Sturges*, 222 U.S. 313 (1911).

[10] *Louisiana ex rel. Folsom* v. *Mayor of New Orleans*, 109 U.S. 285, 289 (1883).

[11] *Michigan ex rel. Kies* v. *Lowrey*, 199 U.S. 233 (1905).

[12] *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1907).

[13] *Stewart* v. *Kansas City*, 239 U.S. 14 (1915).

[1] *Tonawanda* v. *Lyon*, 181 U.S. 389 (1901); *Cass Farm Co.* v. *Detroit*, 181 U.S. 396 (1901).

extend to the residents of the States the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment.[2]

***Public Purpose.***—Inasmuch as public moneys cannot be expended for other than public purposes, it follows that an exercise of the taxing power for merely private purposes is beyond the authority of government.[3] Whether a use is public or private, however, while it is ultimately a judicial question, "is a practical question addressed to the law-making department and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court."[4] Taxes levied for each of the following listed purposes have been held to be for a public use: city coal and fuel yard,[5] state bank, warehouse, elevator, flourmill system, and homebuilding projects,[6] society for preventing cruelty to animals (dog license tax),[7] railroad tunnel,[8] books for school children attending private as well as public schools,[9] and relief of unemployment.[10]

***Other Considerations Affecting Validity: Excessive Burden; Ratio of Amount of Benefit Received.***—When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers;[11] the Court will refrain from condemning a tax solely on the ground that it is excessive.[12] Nor can the constitutionality

[2] *Southwestern Oil Co.* v. *Texas*, 217 U.S. 114, 119 (1910).

[3] *Loan Association* v. *City of Topeka*, 20 Wall. (87 U.S.) 655 (1875) (voiding tax employed by city to make a substantial grant to a bridge manufacturing company to induce it to locate its factory in the city). *See also City of Parkersburg* v. *Brown*, 106 U.S. 487 (1882); *Jones* v. *City of Portland*, 245 U.S. 217 (1917); *Green* v. *Frazier*, 253 U.S. 233 (1920).

[4] *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 515 (1937). Discretion as to what is a public purpose "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937); *United States* v. *Butler*, 297 U.S. 1, 67 (1936). That payment may be made to private individuals is now irrelevant. *Carmichael, supra*, 518. *Cf. Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).

[5] *Jones* v. *Portland*, 245 U.S. 217 (1917).

[6] *Green* v. *Frazier*, 253 U.S. 233 (1920).

[7] *Nicchia* v. *New York*, 254 U.S. 228 (1920).

[8] *Milheim* v. *Moffat Tunnel Dist.*, 262 U.S. 710 (1923).

[9] *Cochran* v. *Board of Education*, 281 U.S. 370 (1930).

[10] *Carmichael* v. *Southern Coal & Coke Co.*, 300 U.S. 644 (1937).

[11] *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 99 (1935).

[12] *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935). *See also Kelly* v. *City of Pittsburgh*, 104 U.S. 78 (1881); *Chapman* v. *Zobelein*, 237 U.S. 135 (1915); *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U.S. 44 (1921); *Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934); *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

of the power to levy taxes be made to depend upon the taxpayer's enjoyment of any special benefits from use of the funds raised by taxation.[13] The test for determining whether a state tax on an interstate business violates the due process clause is "whether the state has given anything for which it can ask return." [14]

***Estate, Gift, and Inheritance Taxes.***—The power of testamentary disposition and the privilege of inheritance being legitimate subjects of taxation, a State may apply its inheritance tax to either the transmission, or the exercise of the legal power of transmission, of property by will or descent, or to the legal privilege of taking property by devise or descent.[15] Accordingly, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the State in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator's death.[16] Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed intended to take effect upon the death of the grantor.[17]

The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such a tax; for that reason a graduated tax on the transfer of contingent remainders, undiminished by the value of an intervening life estate but not payable until after the death of the life tenant, is valid.[18] Also, when a power of appoint-

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[13] *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937). A taxpayer therefore cannot contest the imposition of an income tax on the ground that, in operation, it returns to his town less income tax than he and its other inhabitants pay. *Dane* v. *Jackson*, 256 U.S. 589 (1921).

[14] *National Bellas Hess.* v. *Dept. of Revenue*, 386 U.S. 753, 756 (1967), holding tax on seven out-of-state mail order companies, using nothing more than the postal service, unconstitutional, quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940). *See also Amer. Oil Co.* v. *Neill*, 380 U.S. 451 (1965), state tax on out-of-State sale held unconstitutional. The requirement in terms of a benefit is minimal. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622-623 (1982), quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937). It is satisfied by a "minimal connection" between the interstate activities and the taxing State and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. *Mobil Oil Corp.* v. *Comr. of Taxes*, 445 U.S. 425, 436-437 (1980); *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 272-273 (1978). *See esp. Standard Pressed Steel Co.* v. *Dept. of Revenue*, 419 U.S. 560, 562 (1975); *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551 (1977).

[15] *Stebbins* v. *Riley*, 268 U.S. 137, 140, 141 (1925).

[16] *Cahen* v. *Brewster*, 203 U.S. 543 (1906).

[17] *Keeney* v. *New York*, 222 U.S. 525 (1912).

[18] *Salomon* v. *State Tax Comm.*, 278 U.S. 484 (1929).

ment has been granted by deed, a transfer tax upon the exercise of the power by will is not a taking of property without due process of law, even though the instrument creating the power was executed prior to enactment of the taxing statute.[19] Likewise when a transfer tax law did not become effective until after a deed creating certain remainders had been executed, but the state court applied the tax on the theory that the vesting actually occurred after the tax law became operative, no denial of due process resulted.[20]

On the other hand, when remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional.[21] But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid.[22] Another example of valid retroactive taxation is to be found in a New York statute amending a 1930 estate tax law.

The amendment required inclusion in the decedent's gross estate, for tax computation purposes, of property in respect of which the decedent exercised after 1930, by will, a nongeneral power of appointment created prior to that year. The amendment reached such transfers under powers of appointment as under the previous statute escaped taxation. In sustaining application of the amendment, the Court held that the inclusion in the gross estate of property never owned by the decedent, but appointed by her will under a limited power which could not be exercised in favor of the decedent, her creditors, or her estate, did not deny due process to those who inherited the decedent's property, even though, because tax rate was progressive, the net amount they inherited was less than it would have been if the appointed property had not been included in the gross estate.[23] In summation, the Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event . . . Taxation . . . of a gift which . . . [the donor] might well have refrained from making had he anticipated the tax . . . [is] thought to be so arbitrary . . . as to be a denial of due process." [24]

[19] *Orr* v. *Gilman*, 183 U.S. 278 (1902); *Chanler* v. *Kelsey*, 205 U.S. 466 (1907).
[20] *Nickel* v. *Cole*, 256 U.S. 222 (1921).
[21] *Coolidge* v. *Long*, 282 U.S. 582 (1931).
[22] *Binney* v. *Long*, 299 U.S. 280 (1936).
[23] *Whitney* v. *Tax Comm.*, 309 U.S. 530, 540 (1940).
[24] *Welch* v. *Henry*, 305 U.S. 134, 147 (1938).

***Income Taxes.***—Any attempt by a state to measure a tax on one person's income by reference to the income of another is contrary to due process as guaranteed by the Fourteenth Amendment. Thus a husband cannot be taxed on the combined total of his and his wife's incomes as shown by separate returns, where her income is her separate property and where, by reason of the tax being graduated, its amount exceeded the sum of the taxes which would have been due had their separate incomes been separately assessed.[25] Moreover, a tax on income, unlike a gift tax, is not necessarily unconstitutional, because retroactive. Taxpayers cannot complain of arbitrary action or assert surprise in the retroactive apportionment of tax burdens to income when that is done by the legislature of the first opportunity after knowledge of the nature and amount of the income is available.[1]

***Franchise Taxes.***—A city ordinance imposing annual license taxes on light and power companies is not violative of the due process clause merely because the city has entered the power business in competition with such companies.[2] Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.[3]

***Severance Taxes.***—A state excise on the production of oil which extends to the royalty interest of the lessor in the oil produced under an oil lease as well as to the interest of the lessee engaged in the active work of production, the tax being apportioned between these parties according to their respective interest in the common venture, is not arbitrary as regards the lessor but consistent with due process.[4]

***Real Property Taxes (Assessment).***—The maintenance of a high assessment in the face of declining value is merely another way of achieving an increase in the rate of property tax. Hence, an overassessment constitutes no deprivation of property without due process of law.[5] Likewise, land subject to mortgage may be taxed

[25] *Hoeper* v. *Tax Comm.*, 284 U.S. 206, 147 (1931).

[1] *Welch* v. *Henry*, 305 U.S. 134, 147-150 (1938). *See also United States* v. *Darusmont*, 449 U.S. 292 (1981).

[2] *Puget Sound Co.* v. *Seattle*, 291 U.S. 619 (1934).

[3] *New York Tel. Co.* v. *Dolan*, 265 U.S. 96 (1924).

[4] *Barwise* v. *Sheppard*, 299 U.S. 33 (1936).

[5] *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940).

for its full value without deduction of the mortgage debt from the valuation.[6]

***Real Property Taxes: Special Assessments.***—A State may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation or by apportioning the burden among the municipalities in which the improvements are made or by creating, or authorizing the creation of, tax districts to meet sanctioned outlays.[7] Where a state statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, after due hearing of the owners as required by the statute cannot, when not arbitrary or fradulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included.[8]

It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work.[9] Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefited by the completed drainage plans.[10] On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon such railroad is violative of due process,[11] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[12] Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[13] However, when a high and dry island was included

[6] *Paddell* v. *New York*, 211 U.S. 446 (1908).

[7] *Hagar* v. *Reclamation District*, 111 U.S. 701 (1884).

[8] *Butters* v. *Oakland*, 263 U.S. 162 (1923).

[9] *Missouri Pac. R.R.* v. *Road District*, 266 U.S. 187 (1924). *See also Roberts* v. *Irrigation Dist.*, 289 U.S. 71 (1933) in which it was also stated that an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received.

[10] *Houck* v. *Little River District*, 239 U.S. 254 (1915).

[11] *Road Dist.* v. *Missouri Pac. R.R. Co.*, 274 U.S. 188 (1927).

[12] *Kansas City Ry.* v. *Road District*, 266 U.S. 379 (1924).

[13] *Louisville & Nashville R. Co.* v. *Barber Asphalt Co.*, 197 U.S. 430 (1905).

within the boundaries of a drainage district from which it could not be benefited directly or indirectly, a tax on such island was held to be a deprivation of property without due process of law.[14] Finally, a State may levy an assessment for special benefits resulting from an improvement already made[15] and may validate an assessment previously held void for want of authority.[16]

**Jurisdiction to Tax**

***Land.***—Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a State could not tax land situated beyond its limits; subsequently elaborating upon that principle the Court has said that, ". . . we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by a court." [1] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

***Tangible Personalty.***—As long as tangible personal property has a situs within its borders, a State validly may tax the same, whether directly through an *ad valorem* tax or indirectly through death taxes, irrespective of the residence of the owner.[2] By the same token, if tangible personal property makes only occasional incursions into other States, its permanent situs remains in the State of origin, and, subject to certain exceptions, is taxable only by the latter.[3] The ancient maxim, *mobilia sequuntur personam*, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." In recent years, the tendency has been to treat tangible personal property as "having a situs of its own for the purpose of taxation, and correlatively to . . . exempt [it] at the domicile of its owner." [4] The benefit-protection theory of taxation, upon which the

[14] *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U.S. 478 (1916).
[15] *Wagner* v. *Baltimore*, 239 U.S. 207 (1915).
[16] *Charlotte Harbor Ry.* v. *Welles*, 260 U.S. 8 (1922).
[1] *Union Transit Co.* v. *Kentucky*, 199 U.S. 194, 204 (1905). *See also Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U.S. 385 (1903).
[2] *Carstairs* v. *Cochran*, 193 U.S. 10 (1904); *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 285 (1910); *Frick* v. *Pennsylvania*, 268 U.S. 473 (1925); *Blodgett* v. *Silberman*, 277 U.S. 1 (1928).
[3] *New York ex rel. New York Central Railroad* v. *Miller*, 202 U.S. 584 (1906). As to the competence of States to tax equipment of foreign carriers which enter their jurisdiction intermittently, *see supra*, pp. 229–230, 239–240.
[4] *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193, 209–210 (1936); *Union Transit Co.* v. *Kentucky*, 199 U.S. 194, 207 (1905); *Johnson Oil Co.* v. *Oklahoma*, 290 U.S. 158 (1933).

Court has in fact relied to sustain taxation exclusively by the situs State, logically would seem to permit taxation by the domiciliary State as well as by the nondomiciliary State in which the tangibles are situated especially when the former levies the tax on the owner in terms of the value of the tangibles. Thus far, however, the Court has taken the position that when the tangibles have a situs elsewhere the domiciliary State can neither control such property nor extend to it or its owner such measure of protection as would be adequate to meet the jurisdictional requirements of due process.

***Tangible Personal Property of Corporation.***—When rolling stock is permanently located and employed in the prosecution of a business outside the boundaries of a domiciliary State, the latter has no jurisdiction to tax it.[5] Vessels, however, inasmuch as they merely touch briefly at numerous ports, never acquire a taxable situs at any one of them, and are taxable by the domicile of their owners or not at all,[6] unless of course, the ships operate wholly on the waters within one State, in which event they are taxable there and not at the domicile of the owners.[7] Only recently airplanes have been treated in a similar manner for tax purposes. Noting that the entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary State, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary State to all the airplanes owned by the taxpayer. No other State was deemed able to accord the same protection and benefits as the taxing State in which the taxpayer had both its domicile and its business situs; the doctrines of *Union Transit Co.* v. *Kentucky*,[8] as to the taxability of permanently locat-

[5] *Union Transit Co.* v. *Kentucky*, 199 U.S. 194 (1905). Justice Black, in *Central R. Co.* v. *Pennsylvania*, 370 U.S. 607, 619-621 (1962), had his "doubts about the use of the Due Process Clause to . . . [invalidate State taxes]. The modern use of due process to invalidate State taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines . . . And in the first case [*Northern Central Ry. Co.* v. *Jackson*, 7 Wall. (74 U.S.) 262 (1869)] striking down a State tax for lack of judisdiction to tax after the passage of that Amendment, neither the Amendment nor its Due Process Clause . . . was ever mentioned." He also maintained that Justice Holmes shared this view in *Union Transit Co.* v. *Kentucky*, *supra*, 211.

[6] *Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63 (1911).

[7] *Old Dominion Steamship Co.* v. *Virginia*, 198 U.S. 299 (1905).

[8] 199 U.S. 194 (1905). *See also Central R. Co.* v. *Pennsylvania*, 370 U.S. 607, 611-617 (1962), *supra*, *p.* 229.

ed tangibles, and that of apportionment, for instrumentalities engaged in interstate commerce [9] were held to be inapplicable.[10]

Conversely, a nondomiciliary State, although it may not tax property belonging to a foreign corporation which has never come within its borders, may levy on movables which are regularly and habitually used and employed therein. Thus, while the fact that cars are loaded and reloaded at a refinery in a State outside the owner's domicile does not fix the situs of the entire fleet in that State, the latter may nevertheless tax the number of cars which on the average are found to be present within its borders.[11] Moreover, in assessing that part of a railroad within its limits, a State need not treat it as an independent line, disconnected from the part without, and place upon the property within the State only a value which could be given to it if operated separately from the balance of the road. The State may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several States.[12] But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.[13] Also, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is not unconstitutional in the absence of proof that it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or that it is relatively higher than taxes on other kinds of property.[14] The tax

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[9] *Pullman's Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891).

[10] *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 294–297, 307 (1944). The case was said to be governed by *New York ex rel. New York Central Railroad* v. *Miller*, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other States, the Court declared that the "taxability of any part of this fleet by any other State, than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right to tax as exclusively of any similar right elsewhere.

[11] *Johnson Oil Co.* v. *Oklahoma*, 290 U.S. 158 (1933).

[12] *Pittsburg C.C. & St. L. Ry. Co.* v. *Backus*, 154 U.S. 421 (1894).

[13] *Wallace* v. *Hines*, 253 U.S. 66 (1920). For example, the ratio of track mileage within the taxing State to total track mileage cannot be employed in evaluating that portion of total railway property found in the State when the cost of the lines in the taxing State was much less than in other States and the most valuable terminals of the railroad were located in other States. *See also Fargo* v. *Hart*, 193 U.S. 490 (1904); *Union Tank Line Co.* v. *Wright*, 249 U.S. 275 (1919).

[14] *Great Northern Ry.* v. *Minnesota*, 278 U.S. 503 (1929).

reaches only revenues derived from local operations, and the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect.[15]

***Intangible Personalty.***—To determine whether a State, or States, may tax intangible personal property, the Court has applied the fiction, *mobilia sequuntur personam* and has also recognized that such property may acquire, for tax purposes, a business or commercial situs where permanently located, but it has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile; constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them, and, if the latter, which two, the State of the commercial situs and of the issuing corporation's domicile, or the State of the owner's domicile and that of the commercial situs.[16]

***Taxes on Intangibles Sustained.***—Thus far, the Court has sustained the following personal property taxes on intangibles:

(1) A debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the State of the debtor's residence.[17]

(2) A mortgage owned and kept outside the State by a nonresident but on land within the State.[18]

(3) Investments, in the form of loans to resident, made by a resident agent of a nonresident creditor, are taxable to the nonresident creditor.[19]

(4) Deposits of a resident in a bank in another State, where he carries on a business and from which these deposits are derived, but belonging absolutely to him and not used in the business, are subject to a personal property tax in the city of his residence, whether or not they are subject to tax in the State where the business is carried on. The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.[20]

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[15] *Illinois Cent. R. Co.* v. *Minnesota*, 309 U.S. 157 (1940).

[16] *Howard*, "State Jurisdiction to Tax Intangibles: A Twelve Year Cycle," 8 Mo. L. Rev. 155, 160–162 (1943); Rawlins, "State Jurisdiction to Tax Intangibles: Some Modern Aspects," 18 Tex. L. Rev. 196, 314–315 (1940).

[17] *Kirtland* v. *Hotchkiss*, 100 U.S. 491, 498 (1879).

[18] *Savings Society* v. *Multnomah County*, 169 U.S. 421 (1898).

[19] *Bristol* v. *Washington County*, 177 U.S. 133, 141 (1900).

[20] *Fidelity & Columbia Tr. Co.* v. *Louisville*, 245 U.S. 54 (1917).

(5) Membership owned by a nonresident in a domestic exchange, known as a chamber of commerce.[21]

(6) Membership by a resident in a stock exchange located in another State. "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden." [22]

(7) A resident owner may be taxed on stock held in a foreign corporation that does no business and has no property within the taxing State. The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or nonresidents." [23]

(8) Stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing State. The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ." [24]

(9) Shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder. The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the State, notwithstanding that ownership of the stock may also be a taxable subject in another State.[25]

(10) A tax on the dividends of a corporation may be distributed ratably among stockholders regardless of their residence outside the State, the stockholders being the ultimate beneficiaries of the corporation's activities within the taxing State and protected by the latter and subject to its jurisdiction.[1] This tax, though collected

[21] *Rogers* v. *Hennepin County*, 240 U.S. 184 (1916).
[22] *Citizens National Bank* v. *Durr*, 257 U.S. 99, 109 (1921).
[23] *Hawley* v. *Malden*, 232 U.S. 1, 12 (1914).
[24] *First Bank Corp.* v. *Minnesota*, 301 U.S. 234, 241 (1937).
[25] *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U.S. 506 (1938).
[1] *International Harvester Co.* v. *Dept. of Taxation*, 322 U.S. 435 (1944).

by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments.[2]

(11) Stamp taxes on the transfer within the taxing State by one nonresident to another of stock certificates issued by a foreign corporation,[3] and upon promissory notes executed by a domestic corporation, although payable to banks in other States.[4] These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing State.

***Taxes on Intangibles Invalidated.***—The following personal property taxes on intangibles have not been upheld:

(1) Debts evidenced by notes in safekeeping within the taxing State, but made and payable and secured by property in a second State and owned by a resident of a third State.[5]

(2) A property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another State and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom.[6] However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, not withstanding that the trust was created by the will of a resident of another State in respect of intangible property located in the latter State, at least where it does not appear that the trustee is exposed to the danger of other *ad valorem* taxes in another State.[7] The first case, *Brooke* v. *Norfolk,*[8] is distinguishable by virture of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Different too is *Safe Deposit & T. Co.* v. *Virginia,*[9] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

(3) A tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the State and some outside), the holder of the certificates, though without a voice in the management of the property,

[2] *Wisconsin Gas Co.* v. *United States,* 322 U.S. 526 (1944).
[3] *New York ex rel. Hatch* v. *Reardon,* 204 U.S. 152 (1907).
[4] *Graniteville Mfg. Co.* v. *Query,* 283 U.S. 376 (1931).
[5] *Buck* v. *Beach,* 206 U.S. 392 (1907).
[6] *Brooke* v. *Norfolk,* 277 U.S. 27 (1928).
[7] *Greenough* v. *Tax Assessors,* 331 U.S. 486, 496–497 (1947).
[8] 277 U.S. 27 (1928).
[9] 280 U.S. 83 (1929).

being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[10]

***Corporate Intangible Personality.***—A State in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the latter's bank deposits and accounts receivable even though the deposits are outside the State and the accounts receivable arise from manufacturing activities in another State.[11] Similarly, a nondomiciliary State in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing State.[12] On the other hand, when the foreign corporation transacts only interstate commerce within a State, any excise tax on such excess is void, irrespective of the amount of the tax.[13] A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise.[14] Also a domiciliary State, which imposes no franchise tax on a stock fire insurance corporation, validly may assess a tax on the full amount of its paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary State only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered . . .," the presumption persists that intangible property is taxable by the State of origin.[15] But a

[10] *Senior* v. *Braden*, 295 U.S. 422 (1935).

[11] *Wheeling Steel Corp* v. *Fox*, 298 U.S. 193 (1936). *See also Memphis Gas Co.* v. *Beeler*, 315 U.S. 649, 652 (1942).

[12] *Adams Express Company* v. *Ohio*, 165 U.S. 194 (1897).

[13] *Alpha Cement Co.* v. *Massachusetts*, 268 U.S. 203 (1925).

[14] *Cream of Wheat Co.* v. *Grand Forks*, 253 U.S. 325 (1920).

[15] *Newark Fire Ins. Co.* v. *State Board*, 307 U.S. 313, 318, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice Stone in *Curry* v. *McCanless*, 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a State where it does business, measured by the value of the intangibles used in its business there, does not preclude the State of incorporation from imposing a tax measured by all its intangibles.

property tax on the capital stock of a domestic company which includes in the appraisal thereof the value of coal mined in the taxing State but located in another State awaiting sale deprives the corporation of its property without due process of law.[16] Also void for the same reason is a state tax on the franchise of a domestic ferry company which includes in the valuation thereof the worth of a franchise granted to the said company by another State.[17]

***Transfer (Inheritance, Estate, Gift) Taxes.***—Being competent to regulate exercise of the power of testamentary disposition and the privilege of inheritance, a State may base its succession taxes upon either the transmission or an exercise of the legal power of transmission, of property by will or by descent, or the enjoyment of the legal privilege of taking property by devise or descent.[18] But whatever may be the justification of their power to levy such taxes, States have consistently found themselves restricted by the rule, established as to property taxes in 1905 in *Union Transit Co.* v. *Kentucky,*[19] and subsequently reiterated in *Frick* v. *Pennsylvania* [20] in 1925, which precludes imposition of transfer taxes upon tangible personal property by any State other than the one in which such tangibles are permanently located or have an actual situs. In the case of intangibles, however, the States have been harassed by the indecision of the Supreme Court; to an even greater extent than is discernible in its treatment of property taxes on intangibles, it has oscillated in upholding, then rejecting, and again currently sustaining the levy by more than one State of death taxes upon intangibles comprising the estate of a decedent.

Until 1930, transfer taxes upon intangilbes levied by both the domiciliary as well as nondomiciliary, or situs State, were with rare exceptions approved. Thus, in *Bullen* v. *Wisconsin,*[21] the domi-

[16] *Delaware, L. & W.P. R. Co.* v. *Pennsylvania,* 198 U.S. 341 (1905).

[17] *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U.S. 385 (1903).

[18] *Stebbins* v. *Riley,* 268 U.S. 137, 140–141 (1925).

[19] 199 U.S. 194 (1905), In dissenting in *State Tax Comm.* v. *Aldrich,* 316 U.S. 174, 185 (1942). Justice Jackson asserted that a reconsideration of this principle had become timely.

[20] 268 U.S. 473 (1925). *See also Treichler* v. *Wisconsin,* 338 U.S. 251 (1949); *City Bank Co.* v. *Schnader,* 293 U.S. 112 (1934).

[21] 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was *Wachovia Bank & Trust Co.* v. *Doughton,* 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter State. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in *Graves* v. *Schmidlapp,* 315 U.S. 657 (1942).

ciliary State of the creator of a trust was held competent to levy an inheritance tax, upon the death of the settlor, on his trust fund consisting of stocks, bonds, and notes kept and administered in another State and as to which the settlor reserved the right to control disposition and to direct payment of income for life, such reserved powers being equivalent to a fee. Cognizance was taken of the fact that the State in which these intangibles had their situs had also taxed the trust. Levy of an inheritance tax by a nondomiciliary State was sustained on similar grounds in *Wheeler* v. *New York*, wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.[22] On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary State was held insufficient to support a tax by that State on the succession to shares of stock in that corporation owned by a nonresident decedent.[23] Also against the trend was *Blodgett* v. *Siberman* [24] wherein the Court defeated collection of a transfer tax by the domiciliary State by treating coins and bank notes deposited by a decedent in a safe deposit box in another State as tangible property, albeit it conceded that the domiciliary State could tax the transfer of books and certificates of indebtness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

In the course of about two years following the Depression, the Court handed down a group of four decisions which placed the stamp of disapproval upon multiple transfer and—by inference—other multiple taxation of intangibles. Asserting, as it did in one of these cases, that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile," [25] the Court, through consistent application of the maxim, *mobilia sequuntur personam*, proceeded to deny the right of nondomiciliary States to tax and to reject as inadequate jurisdictional claims of the latter founded upon such bases as control, benefit, and protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the due process clause.

Beginning in 1930, with *Farmer's Loan Co.* v. *Minnesota*,[1] the Court reversed its former ruling in *Blackstone* v. *Miller*,[2] in which

[22] 233 U.S. 434 (1914).
[23] *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69 (1926).
[24] 277 U.S. 1 (1928).
[25] *First National Bank* v. *Maine*, 284 U.S. 312, 330–331 (1932).
[1] 280 U.S. 204 (1930).
[2] 188 U.S. 189 (1903).

it had held that the State in which a debtor was domiciled or a bank located could levy an inheritance tax on the transfer of the debt or the deposit, notwithstanding that the creditor had his domicile in a different State. *Farmers' Loan Co.* v. *Minnesota,* strictly appraised, was authority simply for the proposition that jurisdiction over a debtor, in this instance a State which had issued bonds held by a nonresident creditor, was inadequate to sustain a tax by that debtor State on the transfer of such securities. The securities in question, which had never been used by the creditor in any business in the issuing State, were located in the State in which the creditor had his domicile and were deemed to be taxable only in the latter. In *Baldwin* v. *Missouri,*[3] a nondomiciliary State was prevented from applying its inheritance tax to bonds, bank deposits, and promissory notes, all physically present within its limits and some of them secured by lands therein, when the owner thereof was domiciled in another State. A like result, although on this occasion on ground of lack of evidence of any "business situs," was reached in *Beidler* v. *South Carolina Tax Comm.,*[4] in which the Court ruled that a State, upon the death of a nonresident creditor, may not apply its inheritance tax to a debt (open account) owned by one of its domestic corporations. Finally, in *First National Bank* v. *Maine,*[5] which has since been overruled in *State Tax Comm.* v. *Aldrich,*[6] the Court declared that only the State in which the owner or corporate stock died domiciled was empowered to tax the succession to the shares by will or inheritance and that the State in which the issuing corporation was domiciled could not do so.

Without expressly overruling more than one of these four cases condemning multiple succession taxation of intangibles, the Court, beginning with *Curry* v. *McCanless*[7] in 1939, announced a departure from the "doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one State. . . ." Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, where the concepts of business situs as well as of domiciliary situs had been utilized to sustain double taxation, especially in connection with shares of corporate stock, the Court declared that a

[3] 281 U.S. 586 (1930). In dissenting, Justice Holmes observed that *Wheeler* v. *New York,* 233 U.S. 434 (1914), previously mentioned apparently joined *Blackstone* v. *Miller* on the "*Index Expurgatorious.*"

[4] 282 U.S. 1 (1930).

[5] 284 U.S. 312 (1932).

[6] 316 U.S. 174 (1942).

[7] 307 U.S. 357, 363, 366–368, 372 (1939).

correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another State, in such a way as to bring his person or . . . [his intangibles] within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, . . . [However], the State of domicile is not deprived, by the taxpayer's activities, elsewhere, of it constitutional jurisdiction to tax." In accordance with this line of reasoning, Tennessee, where a decedent died domiciled, and Alabama, where a trustee, by conveyance from said decedent, held securities on specific trusts, were both deemed competent to impose a tax on the transfer of these securities passing under the will of the decedent. "In effecting her purposes," the testatrix was viewed as having "brought some of the legal interests which she created within the control of one State by selecting a trustee there, and others within the control of the other State, by making her domicile there." She had found it necessary to invoke "the aid of the law of both States and her legatees" were subject to the same necessity.

These statements represented a belated adoption of the views advanced by Chief Justice Stone in dissenting or concurring opinions which he filed in three of the four decisions during 1930–1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many States as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary State would invariably qualify as a State competent to tax as would a nondomiciliary State, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.

On the authority of *Curry* v. *McCanless*, the Court, in *Pearson* v. *McGraw*,[8] also sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company and never physically present in Oregon, jurisdiction to tax being viewed as de-

[8] 308 U.S. 313 (1939).

pendent, not on the location of the property in the State, but on control over the owner who was a resident of Oregon. In *Graves* v. *Elliott*,[9] the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that "the power of disposition of property is the equivalent of ownership, . . . and its exercise in the case of intangibles is . . . [an] appropriate subject of taxation at the place of the domicile of the owner of the power. Relinquishment at death, in consequence of the nonexercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation." [10] Consistent application of the principle enunciated in *Curry* v. *McCanless* is also discernible in two later cases in which the Court sustained the right of a domiciliary State to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoyed." In *Graves* v. *Schmidlapp*,[11] an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in the intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted from *McCulloch* v. *Maryland* [12] to the effect that the power to tax "'is an incident of sovereignty, and is coextensive with that to which it is an incident.'" Again, in *Central Hanover Bank Co.* v. *Kelly*,[13] the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust executed, and consisting of securities located in New York, and providing for the disposition of the corpus to two nonresident sons.

The costliness of multiple taxation of estates comprising intangibles is appreciably aggravated when each of several States founds its tax not upon different events or property rights but upon an identical basis, namely that, the decedent died domiciled within its

[9] 307 U.S. 383 (1939).
[10] Id., 386.
[11] 315 U.S. 657, 660, 661 (1942).
[12] 4 Wheat. (17 U.S.) 316, 429 (1819).
[13] 319 U.S. 94 (1943).

borders. Not only is an estate then threatened with excessive contraction but the contesting States may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in *Texas* v. *Florida,*[14] the State of Texas filed an original petition in the Supreme Court, in which it asserted that its claim, together with those of three other States, exceeded the value of the estate, that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other States. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate did not exceed in value the total of the conflicting demands of several States and that the latter were confronted with a prospective inability to collect.

***Corporate Privilege Taxes Measured by Corporate Stock.***—Since the tax is levied not on property but on the privilege of doing business in corporate form, a domestic corporation may be subjected to a privilege tax graduated according to paid up capital stock, even though the latter represents capital not subject to the taxing power of the State.[15] By the same token, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the State.[16] However, a State, under the guise of taxing the privilege of doing an intrastate business, cannot levy on property beyond its borders; therefore, as applied to foreign corporations, a

[14] 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in *Worcester County Trust Co.* v. *Riley,* 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two States as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct State of domicile. In *California* v. *Texas,* 437 U.S. 601 (1978), a case on all points with *Texas* v. *Florida,* the Court denied leave to file an original action to adjudicate a dispute between the two States about the actual domicile of Howard Hughes, a number of Justices suggesting that *Worcester County* no longer was good law. Subsequently, the Court reaffirmed *Worcester County, Cory* v. *White,* 457 U.S. 85 (1982), and then permitted an original action to proceed, *California* v. *Texas,* 457 U.S. 164 (1982), several Justices taking the position that neither *Worcester County* nor *Texas* v. *Florida* was any longer viable.

[15] *Kansas City Ry.* v. *Kansas,* 240 U.S. 227 (1916); *Kansas City, M. & B.R. Co.* v. *Stiles,* 242 U.S. 111 (1916).

[16] *Schwab* v. *Richardson,* 263 U.S. 88 (1923).

license tax based on authorized capital stock is void,[17] even though there be a maximum to the fee,[18] unless apportioned according to some method, as, for example, a franchise tax based on such proportion of outstanding capital stock as it represented by property owned and used in business transacted in the taxing State.[19] An entrance fee, on the other hand, collected only once as the price of admission to do an intrastate business, is distinguishable from a tax and accordingly may be levied on a foreign corporation on the basis of a sum fixed in relation to the amount of authorized capital stock (in this instance, a $5,000 fee on an authorized capital of $100,000,000).[20]

***Corporate Privilege Taxes Measured by Gross Receipts.***—A municipal license tax imposed as a percentage of the receipts of a foreign corporation derived from the sales within and without the State of goods manufactured in the city is not a tax on business transactions or property outside the city and therefore does not violate the due process clause.[21] But a State is wanting in jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for work done outside the taxing State in fabricating equipment later installed in the taxing State. Unless the activities which are the subject of the tax are carried on within its territorial limits, a State is not competent to impose such a privilege tax.[22]

***Individual Income Taxes.***—Consistent with due process of law, a State annually may tax the entire net income of resident individuals from whatever source received,[23] and that portion of a nonresident's net income derived from property owned, and from any business, trade, or profession carried on, by him within its borders.[24] Jurisdiction, in the case of residents, is founded upon the

[17] *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1 (1910); *Pullman Co.* v. *Kansas*, 216 U.S. 56 (1910); *Looney* v. *Crane Co.*, 245 U.S. 178 (1917); *International Paper Co.* v. *Massachusetts*, 246 U.S. 135 (1918).

[18] *Cudahy Co.* v. *Hinkle*, 278 U.S. 460 (1929).

[19] *St. Louis S. W. Ry.* v. *Arkansas*, 235 U.S. 350 (1914).

[20] *Atlantic Refining Co.* v. *Virginia*, 302 U.S. 22 (1937).

[21] *American Mfg. Co.* v. *St. Louis*, 250 U.S. 459 (1919). Nor does a state license tax on the production of electricity violate the due process clause because it may be necessary, to ascertain, as an element in its computation, the amounts delivered in another jurisdiction. *Utah Power & L Co.* v. *Pfost*, 286 U.S. 165 (1932).

[22] *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937).

[23] *Lawrence* v. *State Tax Comm.*, 286 U.S. 276 (1932).

[24] *Shaffer* v. *Carter*, 252 U.S. 37 (1920); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).

rights and privileges incident to domicile; that is, the protection afforded the recipient of income in his person, in his right to receive the income, and in his enjoyment of it when received, and, in the case of nonresidents, upon dominion over either the receiver of the income or the property or activity from which it is derived and upon the obligation to contribute to the support of a government which renders secure the collection of such income. Accordingly, a State may tax residents on income from rents of land located outside the State and from interest on bonds physically without the State and secured by mortgage upon lands similarly situated [25] and from the income received by a resident beneficiary from securities held by a trustee in a trust created and administered in another State, and not directly taxable to the trustee.[1] Nor does the fact that another State has lawfully taxed identical income in the hands of trustees operating therein necessarily destroy a domiciliary State's right to tax the receipt of said income by a resident beneficiary. "The taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them." [2] Likewise, even though a nonresident does no business within a State, the latter may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders.[3]

***Corporate Income Taxes: Foreign Corporations.***—A tax based on the income of a foreign corporation may be determined by allocating to the State a proportion of the total.[4] However, such a basis may work an unconstitutional result if the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. Evidence may always be submitted which tends to show that a State has applied a method which, albeit fair on its face, operates so as to reach profits which

[25] *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308 (1937).

[1] *Maguire* v. *Trefy*, 253 U.S. 12 (1920).

[2] *Guaranty Trust Co.* v. *Virginia*, 305 U.S. 19, 23 (1938).

[3] *New York ex. rel. Whitney* v. *Graves*, 299 U.S. 366 (1937).

[4] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton Ltd.* v. *Tax Comm*, 266 U.S. 271 (1924). The Court has recently considered and expanded the ability of the States to use apportionment formulae to allocate to each State for taxing purposes a fraction of the income earned by an integrated business conducted in several States as well as abroad. *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978); *Mobil Oil Corp.* v. *Comr. of Taxes*, 445 U.S. 425 (1980); *Exxon Corp.* v. *Dept. of Revenue*, 447 U.S. 207 (1980). *Exxon* refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a State's formulary apportionment taxes extraterritorial income improperly. *Bair, supra*, 276–280, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

are in no sense attributable to transactions within its jurisdication.[5] Nevertheless, a foreign corporation is in error when it contends that due process is denied by a franchise tax measured by income, which is levied, not upon net income from intrastate business alone, but on net income justly attributable to all classes of business done within the State, interstate and foreign, as well as intrastate business.[6] Inasmuch as the privilege granted by a State to a foreign corporation of carrying on local business supports a tax by that State on the income derived from that business, it follows that the Wisconsin privilege dividend tax, consistent with the due process clause, may be applied to a Delaware corporation, having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax is imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in the State, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders and pay it over to the State.[7]

***Chain Store Taxes.***—A tax on chain stores, at a rate per store determined by the number of stores both within and without the State is not unconstitutional as a tax in part upon things beyond the jurisdiction of the State.[8]

***Insurance Company Taxes.***—A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the State does not deprive the company of property without due process,[9] but a tax is bad when the company has withdrawn all its agents from the State and has ceased to do business, merely continuing to be bound to policyholders resident therein and receiving at its home office the renewal

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[5] *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123 (1931).

[6] *Matson Nav. Co.* v. *State Board*, 297 U.S. 441 (1936).

[7] *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 448–449 (1940). Dissenting, Justice Roberts, along with Chief Justice Hughes and Justices McReynolds and Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many States does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as dividends, he contended is "one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition." The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, "if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad." *See also Wisconsin*, v. *Minnesota Mining Co.*, 311 U.S 452 (1940).

[8] *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412 (1937).

[9] *Equitable Life Society* v. *Pennsylvania*, 238 U.S. 143 (1915).

premiums.[10] Also violative of due process is a state gross premium tax imposed on a nonresident firm, doing business in the taxing jurisdiction, which purchased coverage of property located therein from an unlicensed out-of-state insurer which consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.[11] Distinguishable therefrom is the following tax which was construed as having been levied, not upon annual premiums nor upon the privilege merely of doing business during the period that the company actually was within the State, but upon the privilege of entering and engaging in business, the percentage "on the annual premiums *to be paid throughout the life of the policies issued.*" By reason of this difference a State may continue to collect such tax even after the company's withdrawal from the State.[12]

A State which taxes the insuring of property within its limits may lawfully extend its tax to a foreign insurance company which contracts with an automobile sales corporation in a third State to insure its customers against loss of cars purchased through it, so far as the cars go into possession of purchaser within the taxing State.[13] On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other States who are not authorized to do business in the taxing State, cannot constitutionally be subjected to a 5% tax on the amount of premiums paid for such coverage.[14] Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums thereon in Connecticut, and was there liable for payment of losses claimed thereunder, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of residents therein. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that State.[15]

When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within

[10] *Provident Savings Assn.* v. *Kentucky*, 239 U.S. 103 (1915).
[11] *State Bd. of Ins.* v. *Todd Shipyards*, 370 U.S. 451 (1962).
[12] *Continental Co.* v. *Tennessee*, 311 U.S. 5, 6 (1940). (Emphasis supplied).
[13] *Palmetto Ins. Co.* v. *Connecticut*, 272 U.S. 295 (1926).
[14] *St. Louis Compress Co.* v. *Arkansas*, 260 U.S. 346 (1922).
[15] *Connecticut General Co.* v. *Johnson*, 303 U.S. 77 (1938).

the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer.[16] But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company.[17] Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor's domicile;[18] the mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.[19]

**Procedure in Taxation**

***Generally.***—Exactly what due process requires in the assessment and collection of general taxes has never been decided by the Supreme Court. While it was held that "notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential" for imposition of special taxes, it has also ruled that laws for assessment and collection of general taxes stand upon a different footing and are to be construed with the utmost liberality, even to the extent of acknowledging that no notice whatever is necessary.[1] Due process of law as applied to taxation does not mean judicial process;[2] neither does it require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.[3] If a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether the proceedings for review take place before a board having a quasi-judicial character, or before a tribunal provided by the State for the propose of determining such questions, due process of law is not denied.[4]

***Notice and Hearing in Relation to Taxes.***—"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business),

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[16] *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U.S. 395 (1907).
[17] *Orleans Parish* v. *New York Life Ins. Co.*, 216 U.S 517 (1910).
[18] *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 221 U.S. 346 (1911).
[19] *Orient Ins. Co.* v. *Assessors of Orleans*, 221 U.S. 358 (1911).
[1] *Turpin* v. *Lemon*, 187 U.S. 51, 58 (1902); *Glidden* v. *Harrington*, 189 U.S. 255 (1903).
[2] *McMillen* v. *Anderson*, 95 U.S. 37, 42 (1877).
[3] *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 239 (1890).
[4] *Hodge* v. *Muscatine County*, 196 U.S. 276 (1905).

and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it." [5]

***Notice and Hearing in Relation to Assessments.***—"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." [6]

Nevertheless, it has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed.[7] Where a tax board has its time of sitting fixed by law

[5] *Hagar* v. *Reclamation District*, 111 U.S. 701, 709–710 (1884).
[6] Id., 710.
[7] *McMillen* v. *Anderson*, 95 U.S. 37, 42 (1877).

and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong and in the business of assessing taxes, this is all that can be reasonably asked.[8] Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assesment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the State for remittance becomes final.[9] A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law.[10] One hearing is sufficient to constitute due process,[11] and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is privileged to appeal it and, on appeal, to present evidence and be heard on the valuation of his property.[12]

***Notice and Hearing in Relation to Special Assessments.***—However, when assessments are made by a political subdivision, a taxing board or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination.[13] The hearing need not amount to a judicial inquiry,[14] but a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[15] If an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits.[16] On the other hand,

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[8] *State Railroad Tax Cases*, 92 U.S. 575, 610 (1876).

[9] *Nickey* v. *Mississippi*, 292 U.S. 393, 396 (1934). *See also Clement National Bank* v. *Vermont*, 231 U.S. 120 (1913).

[10] *Pittsburgh C. C. & St. P. Ry. Co.* v. *Backus*, 154 U.S. 421 (1894).

[11] *Michigan Central Railroad* v. *Powers*, 201 U.S. 245, 302 (1906).

[12] *Pittsburgh C. C. & St. P. Ry. Co.* v. *Board of Pub. Works*, 172 U.S. 32, 45 (1898).

[13] *St. Louis Land Co.* v. *Kansas City*, 241 U.S. 419, 430 (1916); *Paulsen* v. *Portland*, 149 U.S. 30, 41 (1893); *Bauman* v. *Ross*, 167 U.S. 548, 590 (1897).

[14] *Tonawanda* v. *Lyon*, 181 U.S. 389, 391 (1901).

[15] *Londoner* v. *Denver*, 210 U.S. 373 (1908).

[16] *Withnell* v. *Ruecking Constr. Co.*, 249 U.S. 63, 68 (1919); *Browning* v. *Hooper*, 269 U.S. 396, 405 (1926). Likewise, the committing to a board of county supervisors of authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. *Breiholz* v. *Board of Supervisors*, 257 U.S. 118 (1921).

if the area of the assessment district was not determined by the legislature, a landowner does have the right to be heard respecting benefits to his property before it can be included in the improvement district and assessed, but due process is not denied if, in the absence of actual fraud or bad faith, the decision of the agency vested with the initial determination of benefits is made final.[17] The owner has no constitutional right to be heard in opposition to the launching of a project which may end in assessment, and once his land has been duly included within a benefit district, the only privilege which he thereafter enjoys is to a hearing upon the apportionment, that is, the amount of the tax which he has to pay.[18] Nor can he rightfully complain because the statute renders conclusive, after a hearing, the determination as to apportionment by the same body which levied the assessment.[19]

More specifically, where the mode of assessment resolves itself into a mere mathematical calculation, there is no necessity for a hearing.[20] Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law.[21] In contrast, when an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.[22]

***Collection of Taxes.***—To reach property which has escaped taxation, a State may tax estates of decedents for a period anterior to death and grant proportionate deductions for all prior taxes which the personal representative can prove to have been paid.[23] Collection of an inheritance tax also may be expedited by a statute requiring the sealing of safe deposit boxes for at least ten days after the death of the renter and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the State.[24]

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[17] *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 168, 175 (1896); *Browning* v. *Hooper*, 269 U.S. 396, 405 (1926).

[18] *Utley* v. *Petersburg*, 292 U.S. 106, 109 (1934); *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 341 (1901). *See also Soliah* v. *Heskin*, 222 U.S. 522 (1912).

[19] *Hibben* v. *Smith*, 191 U.S. 310, 321 (1903).

[20] *Hancock* v. *Muskogee*, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization preliminary to issuance by it of an order increasing the valuation of all property in a city by 40%. *Bi-Metallic Co.* v. *Colorado*, 239 U.S. 441 (1915).

[21] *Detroit* v. *Parker*, 181 U.S. 399 (1901).

[22] *Paulsen* v. *Portland*, 149 U.S. 30, 38 (1893).

[23] *Bankers Trust Co.* v. *Blodgett*, 260 U.S. 647 (1923).

[24] *National Safe Dep. Co.* v. *Stead*, 232 U.S. 58 (1914).

Moreover, with a view to achieving a like result in the case of gasoline taxes, a State may compel retailers to collect such taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[25] Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property.[1] In collecting personal income taxes, however, most States require employers to deduct and withhold the tax from the wages of only nonresident employees, but the duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting and paying salaries which withholding entails been viewed as an unreasonable regulation of the conduct of his business.[2]

Moreover, no unconstitutional deprivation of the property rights of vendors of trucks, sold under conditional sales contract to a carrier, results when a State asserts against such trucks a prior lien for highway use taxes levied against the carrier and (1) accruing from the operation by the carrier of trucks, other than those sold by the vendors, either before or during the time the carrier operated the vendors' trucks, or (2) arising from assessments against the carrier, after vendors repossessed their trucks, and based upon the carrier's operations preceding such repossession. A vendor is not privileged to contend that the lien asserted must be limited to taxes attributable solely to operation of its own trucks; for the wear on the highways occasioned by the carrier's operation is in no way altered by the vendor's retention of title.[3]

As a State may provide in advance that taxes shall bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent shall bear interest from the time the delinquency commenced. A State may adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent.[4] After liability of a taxpayer has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.[5] Nor is a foreign insurance company denied due

[25] *Pierce Oil Corp.* v. *Hopkins*, 264 U.S. 137 (1924).

[1] *Carstairs* v. *Cochran*, 193 U.S. 10 (1904); *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 285 (1910).

[2] *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 75, 76 (1920).

[3] *International Harvester Corp.* v. *Goodrich*, 350 U.S. 537 (1956).

[4] *League* v. *Texas*, 184 U.S. 156 (1902).

[5] *Palmer* v. *McMahon*, 133 U.S. 660, 669 (1890).

process of law when its personal property is distrained to satisfy unpaid taxes.[6]

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.[7] No less constitutional, as a means of facilitating collection, is an *in rem* proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree in said proceeding.[8] On the other hand, while the conversion of an unpaid special assessment into both a personal judgment therefor against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,[9] a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void.[10] Apart from such restraints, however, a State is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent.[11]

***Sufficiency and Manner of Giving Notice.***—Notice, insofar as it is required, may be either personal, or by publication, or by statute fixing the time and place of hearing.[12] A state statute, consistent with due process, may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessment.[13] Also "where the State . . . [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment. . . ."[14] A de-

[6] *Scottish Union & Nat. Ins. Co.* v. *Bowland*, 196 U.S. 611 (1905).
[7] *King* v. *Mullins*, 171 U.S. 404 (1898); *Chapman* v. *Zobelein*, 237 U.S. 135 (1915).
[8] *Leigh* v. *Green*, 193 U.S. 79 (1904).
[9] *Davidson* v. *New Orleans*, 96 U.S. 97, 107 (1878).
[10] *Dewey* v. *Moines*, 173 U.S. 193 (1899).
[11] *League* v. *Texas*, 184 U.S. 156, 158 (1902). *See also Straus* v. *Foxworth*, 231 U.S. 162 (1913).
[12] *Londoner* v. *Denver*, 210 U.S. 373 (1908). *See also Kentucky Railroad Tax Cases*, 115 U.S. 321, 331 (1885); *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U.S. 526, 537 (1895); *Merchants, Bank* v. *Pennsylvania*, 167 U.S. 461, 466 (1897); *Glidden* v. *Harrington*, 189 U.S. 255 (1903).
[13] *Corry* v. *Baltimore*, 196 U.S. 466, 478 (1905).
[14] *Leigh* v. *Green*, 193 U.S. 79, 92-93 (1904).

scription, even though it not be technically correct, which identifies the land will sustain an assessment for taxes and a notice of sale therefor when delinquent. If the owner knows that the property so described is his, he is not, by reason of the insufficient description, deprived of his property without due process. Where tax proceedings are *in rem,* owners are bound to take notice thereof, and to pay taxes on their property, even if assessed to unknown or other persons, and if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property.[15]

However, due process was deemed not to have been accorded an incompetent taxpayer, for whom a guardian had not yet been appointed, but who was well known to town officials to be financially responsible, when, in accordance with statutory procedure, notice of a real property tax delinquency was mailed to her and published in local papers as well as posted in the town post office, and thereafter, without appearance on her part, the property was foreclosed and deeded to the town.[16] On the other hand, due process was not denied to appellants when, through dereliction of their bookkeeper, they were not apprised of the receipt of mailed notices, and thus were unable to avert foreclosure of liens for unpaid water charges outstanding against two parcels of land held by them in trust; this conclusion is unaffected by the disparity between the value of the land taken and the amount owed nor by the fact that the city, in one instance, retained the proceeds of sale after lapse of time to redeem. Having issued appropriate notices, the city cannot be held responsible for the negligence of the bookkeeper and the managing trustee in overlooking arrearages on tax bills, nor is it obligated to inquire why appellants regularly paid real estate taxes on their property.[17]

***Sufficiency of Remedy.***—When no other remedy is available, due process is denied by a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax.[18] Requirements of due process are similarly violated by a statute which limits a taxpayer's right to challenge an assessment to cases of fraud or corruption,[19] and by a state tribunal which prevents a re-

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[15] *Ontario Land Co.* v. *Yordy,* 212 U.S. 152 (1909). *See also Longyear* v. *Toolan,* 209 U.S. 414 (1908).

[16] *Covey* v. *Town of Somers,* 351 U.S. 141 (1956).

[17] *Nelson* v. *New York City,* 352 U.S. 103 (1956).

[18] *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673 (1930).

[19] *Central of Georgia R. Co.* v. *Wright,* 207 U.S. 127 (1907).

covery of taxes imposed in violation of the Constitution and laws of the United States by invoking a state law limiting suits to recover taxes alleged to have been assessed illegally to taxes paid at the time and in the manner provided by said law.[20]

*Laches.*—Persons failing to avail themselves of an opportunity to object and be heard cannot thereafter complain of assessments as arbitrary and unconstitutional.[21] Likewise a car company, which failed to report its gross receipts as required by statute, has no further right to contest the state comptroller's estimate of those receipts and his adding thereto the 10 percent penalty permitted by law.[22]

**Eminent Domain**

The due process clause of the Fourteenth Amendment has been held to require that when a state or local governmental body, or a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose.[23]

**Substantive Due Process and Noneconomic Liberty**

At the heyday of economic substantive due process, the Court ruled in two cases which, while they also involved property, promised substantially to extend judicial supervision of the reasonableness of legislation. This promise was not realized, but recent cases have brought forth an avalanche of exposition. In *Meyer* v. *Nebraska*,[1] the Court struck down a state law forbidding the teaching in any school in the State, public or private, of any modern foreign language, other than English, to any child who had not successfully finished the eighth grade; in *Pierce* v. *Society of Sisters*,[2] it declared unconstitutional a state law which required public school education of children aged eight to sixteen. Both cases involved, as noted, property rights which the Court asserted were protected; the statute in *Meyer* interfered with the occupation of a teacher of German who had been convicted of teaching that language, while the private school plaintiffs in *Pierce* were threatened with destruction of their businesses and the values of their properties.[3] Yet in both

[20] *Carpenter* v. *Shaw*, 280 U.S. 363 (1930). *See also Ward* v. *Love County*, 253 U.S. 17 (1920).

[21] *Farncomb* v. *Denver*, 252 U.S. 7 (1920).

[22] *Pullman Co.* v. *Knott*, 235 U.S. 23 (1914).

[23] *Supra*, *pp.* 1177-1191.

[1] 262 U.S. 390 (1923). Justices Holmes and Sutherland entered a dissent, applicable to *Meyer*, in *Bartels* v. *Iowa*, 262 U.S. 404, 412 (1923).

[2] 268 U.S. 510 (1925).

[3] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 531, 533, 534 (1928).

cases the Court also permitted these persons adversely affected in their property interests to represent the interests of parents and children in the assertion of other aspects of "liberty" of which they could not be denied.

"Without doubt," Justice McReynolds said, liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." [4] The right of the parents to have their children instructed in a foreign language was "within the liberty of the [Fourteenth] Amendment." [5] *Meyer* was relied on in *Pierce* by the Court in asserting that the statute there "unreasonably interferes with the liberty of parents and guardians to direct the unbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [6]

Other assertions of the liberty to be free from compulsory state provisions proved unsuccessful,[7] although dicta in these cases continued to broadly define liberty.[8] And in *Loving* v. *Virginia*,[9] a statute prohibiting interracial marriage was held to deny due process. Marriage was termed "one of the 'basic civil rights of man' " and a "fundamental freedom." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." The classification of marriage rights on a racial basis was "unsupportable." But the expansion of the Bill of Rights to restrict state action, especially the religion and free expression provisions of the First Amendment, af-

[4] 262 U.S., 399.

[5] Id., 400.

[6] 268 U.S., 534-535.

[7] E.g., *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Zucht* v. *King*, 260 U.S. 174 (1922) (compulsory vaccination); *Buck* v. *Bell*, 274 U.S. 200 (1927) (sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of insanity or imbecility); *Minnesota* v. *Probate Court ex rel. Pearson*, 309 U.S. 270 (1940) (institutionalization of habitual sexual offenders as psychopathic personalities).

[8] *See also Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) (marriage and procreation are among "the basic civil rights of man."); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (care and nurture of children by the family are within "the private realm of family life which the state cannot enter.").

[9] 388 U.S. 1, 12 (1967).

forded the Court an opportunity to base certain decisions voiding state policies on these grounds rather than on due process.[10]

In *Poe* v. *Ullman*,[11] Justice Harlan, who would have applied a restrained substantive due process approach when economic legislation was concerned also, advocated the application to a Connecticut statute banning the use of contraceptives, even by married couples, of a due process standard of reasonableness. According to the Justice, due process is limited neither to procedural guarantees nor restricted to the rights enumerated in the first eight Amendments of the Bill of Rights but is rather "a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." The liberty protected by the clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Applying a lengthy analysis, he concluded that the statute infringed upon a fundamental liberty without the showing of a justification which would support the intrusion. Yet, when the same issue returned to the Court, a majority of the Justices, rejecting reliance on substantive due process,[12] decided it on the basis of the statute's invasion of privacy, a "penumbral" right protected by a matrix of constitutional provisions.[13] The analysis, however, approached the matter in terms, and in reliance on cases, reminiscent of substantive due process, although the separate concurrences of Justices Harlan and White specifically based on substantive due process,[14] indicates that the majority's

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[10] Indeed, in *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as having been based on the First Amendment. Note that in *Epperson* v. *Arkansas*, 393 U.S. 97, 105 (1968), and *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506–507 (1969), Justice Fortas for the Court approvingly noted the due process basis of *Meyer* and *Pierce* while deciding both cases on First Amendment grounds.

[11] 367 U.S. 497, 522, 539–545 (1961). Justice Douglas, also dissenting, relied on a due process analysis, which began with the texts of the first eight Amendments as the basis of fundamental due process and continued into the "emanations" from this as also protected. Id., 509.

[12] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) (opinion of Court by Justice Douglas).

[13] *Supra, pp.* 1414–1415.

[14] Id., 499, 502.

position was at least definitionally different. Subsequent cases, functionally grounded in equal protection analysis, relied in great degree upon a view of rationality and reasonableness not too different from Justice Harlan's dissent in *Poe* v. *Ullman.*[15] The resurgence of substantive due process reasoning became evident upon the Court's confrontation with cases raising the constitutionality of laws proscribing or limiting abortions.

***Abortion.***—Laws limiting or prohibiting abortions in practically all the States, the District of Columbia, and the territories were invalidated by a ruling recognizing a right of personal privacy protected by the due process clause that included a qualified right of a woman to determine whether to bear a child or not.[16] On the basis of its analysis of the competing individual rights and state interests, the Court discerned a three-stage balancing of rights and interests extending over the full nine-month term of pregnancy.

"(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." [17]

A lengthy history of the medical and legal views of abortion apparently convinced the Court that the prohibition of abortion lacked the solid foundation necessary to preserve such prohibitions from constitutional review now.[18] Similarly, a review of the con-

[15] *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), is the principal case. *See also Stanley* v. *Illinois*, 405 U.S. 645 (1972).

[16] *Roe* v. *Wade*, 410 U.S. 113 (1973). A companion case was *Doe* v. *Bolton*, 410 U.S. 179 (1973). The opinion by Justice Blackman was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id., 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother's life is in jeopardy to be a denial of due process, id., 173, while Justice White left the issue open. Id., 223.

[17] *Roe* v. *Wade*, 410 U.S. 113, 164–165 (1973).

[18] Id., 129–147.

cept of "person" as protected in the due process clause and in other provisions of the Constitution established to the Court's satisfaction that the word "person" did not include the unborn and therefore that the unborn lacked federal constitutional protection.[19] Without treating the question in more than summary fashion, the Court announced that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist in the Constitution" and that it is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." [20] "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [21] Moreover, this right of privacy is "fundamental" and, drawing upon the strict standard of review in equal protection litigation, the Court held that the due process clause required that the regulations limiting this fundamental right may be justified only by a "compelling state interest" and must be narrowly drawn to express only the legitimate state interests at stake.[22] Assessing the possible interests of the States, the Court rejected as unsupported in the record and ill-served by the laws in question justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions. The state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue when life begins. Two valid state interests were recognized, however. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' " [23]

This approach led to three-stage concept quoted above. Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no capability of meaningful life outside the mother's womb, the State has no "compelling interest" in the first trimester and "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the pa-

[19] Id., 156–159.
[20] Id., 152–153.
[21] Ibid.
[22] Id., 152, 155–156. The "compelling state interest" test in equal protection cases is reviewed *infra, pp.* 1701–1707.
[23] 410 U.S., 147–152, 159–163.

tient's pregnancy should be terminated.[24] In the intermediate trimester, the danger to the woman increases and the State may therefore regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health," but the fetus is still not able to survive outside the womb so that the actual decision to have an abortion cannot be otherwise impeded.[25] "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." [1]

In a companion case, the Court struck down three procedural provisions of a permissive state abortion statute.[2] These required that the abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by the independent examination of the patient by two other licensed physicians. These provisions were held not to be justified by the State's interest in maternal health because they were not reasonably related to that interest.[3] And a residency provision was struck down as violating the privileges and immunities clause.[4] But a clause making the performance of an abortion a crime except when it is based upon the doctor's "best clinical judgment that an abortion is necessary" was upheld against vagueness attack and was further held to benefit women seeking abortions inasmuch as the doctor could utilize his best clinical judgment in light of all the attendant circumstances.[5]

[24] Id., 163.

[25] Ibid.

[1] Id., 163–164. A fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id., 160 (footnotes omitted).

[2] *Doe* v. *Bolton*, 410 U.S. 179 (1973).

[3] Id., 192–200.

[4] Id., 200. The clause is Article IV, § 2. *See supra, pp.* 870–880.

[5] 410 U.S., 191–192. "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Id., 192. Presumably this discussion applies to the Court's ruling in *Roe* holding that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S., 163–164, a holding which is unelaborated in the opinion. *See also United States* v. *Vuitch*, 402 U.S. 62 (1971).

These decisions were reaffirmed and extended when subsequently the Court was faced with a restrictive state statute enacted after *Roe* making access to abortions contingent upon spousal or parental consent and imposing restraints upon methods.[6] Striking down all the substantial limitations, the Court held (1) that the spousal consent provision was an attempt by the State to delegate a veto power over the decision of the woman and her doctor that the State itself could not exercise,[7] (2) that no significant state interests justified the imposition of a blanket parental consent requirement as a condition of the obtaining of an abortion by an unmarried minor during the first 12 weeks of pregnancy,[8] and (3) that a criminal provision requiring the attending physician to exercise all care and diligence to preserve the life and health of the fetus without regard to the stage of viability was inconsistent with *Roe*.[9] Sustained were provisions that required the woman's written

[6] *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976). *See also Bellotti* v. *Baird*, 443 U.S. 622 (1979) (parental consent to minor's abortion); *Colautti* v. *Franklin*, 439 U.S. 379 (imposition on doctor determination of viability of fetus and obligation to take life-saving steps); *Singleton* v. *Wolff*, 428 U.S. 106 (1976) (standing of doctors to litigate right of patients to Medicaid-financed abortions), *Bigelow* v. *Virginia*, 421 U.S. 809 (1975) (ban on newspaper ads for abortions); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (state ban on performance of abortion by "any person" may constitutionally be applied to prosecute nonphysicians performing abortions).

[7] *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 67–72 (1976). The Court recognized the husband's interests and the state interest in promoting marital harmony. But the latter was deemed not served by the requirement, and, since when the spouses disagree on the abortion decision one has to prevail, the Court thought the person who bears the child and who is the more directly affected should be the one to prevail. Justices White and Rehnquist and Chief Justice Burger dissented. Id., 92.

[8] Id., 72–75. Minors have rights protected by the Constitution, but the States have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman's right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id., 101. In *Bellotti* v. *Baird*, 443 U.S. 622 (1979), eight Justices agreed that a parental consent law, applied to a mature minor, found to be capable of making, and having made, an informed and reasonable decision to have an abortion, was void but split on the reasoning. Four Justices would hold that neither parents nor a court could be given an absolute veto over a mature minor's decision, while four others would hold that if parental consent is required the State must afford an expeditious access to court to review the parental determination and set it aside in appropriate cases. In *H. L.* v. *Matheson*, 450 U.S. 398 (1981), the Court upheld, as applied to an unemancipated minor living at home and dependent on her parents, a statute requiring a physician, "if possible," to notify the parents or guardians of a minor seeking an abortion. The decisions leave open a variety of questions, addressed by some concurring and dissenting Justices, dealing with when it would not be in the minor's best interest to avoid notifying her parents and with the alternatives to parental notification and consent.

[9] *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 81–84 (1976). A law requiring a doctor, subject to penal sanction, to determine if a fetus is viable or may be viable and to take steps to preserve the life and health of viable fetuses was held to be unconstitutionally vague. *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

consent to an abortion with assurances that it is informed and freely given and provisions mandating reporting and recordkeeping for public health purposes with adequate assurances of confidentiality. A provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional since in the absence of another comparably safe technique it did not qualify as a reasonble protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.[10]

But when the Court dealt with the issue of public funding to pay for abortions for the pregnant indigent, it drew back from the broad holdings previously issued and held that neither due process nor equal protection required government to use public funds for this purpose.[11] Due process, the Court held, does not obligate the States to pay the pregnancy-related medical expenses of indigent women, even though both abortion and the right to bear the child to birth are "fundamental" rights.[12] But the more critical question was the equal protection restraint imposed when government does provide public funds for medical care to indigents; may it accord differential treatment to abortion and childbirth and prefer the latter? The States may do so, the Court continued, because it is rationally related to a lawful purpose to encourage normal childbirth. The use of the rational basis test required a rejection of the compelling state interest test in the following manner. First, the more severe test was not activated by a classification impacting on a suspect class, wealth or indigency not being such a class. Second, and most significant for abortion adjudication, the Court held that state refusal to pay for abortions did not impinge upon a fundamental right. Prior state restrictions which had been invalidated, the Court continued, had created absolute obstacles to the obtaining of an abortion, had barred the obtaining of an abortion. While a state-created obstacle need not be absolute to be impermissible, it must at least at a minimum "unduly burden" the right to terminate a pregnancy. To allocate public funds so as to further a state interest in normal childbirth does not create an absolute obstacle to obtaining an abortion nor does it unduly burden the right. The condi-

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[10] *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 75–79 (1976).

[11] *Maher* v. *Roe*, 432 U.S. 464 (1977); *Harris* v. *McRae*, 448 U.S. 297 (1980). See also *Beal* v. *Doe*, 432 U.S. 438 (1977) (States are not required by federal law to fund abortions); *Harris* v. *McRae*, *supra*, 306–311 (same). The state restriction in *Maher* *supra*, 466, applied to nontherapeutic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, *Harris*, *supra*, 323, although it provided the basis for reaching different results for Justice Stevens. Id., 349 (dissenting).

[12] *Maher*, 432 U.S., 469 & n. 5; *Harris*, 448 U.S., 312–318.

tion—indigency—that is the barrier to getting an abortion was not created by government nor does the State add to the burden that exists already. "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." [13] Applying the same principles, the Court held that a municipal hospital could constitutionally provide hospital services for indigent women for childbirth but deny services for abortion.[14]

While the more recent decisions, especially in the development of a concept of absolute obstacles and permissible burdening, indicate some falling away within the Court from a commitment to the breadth of the holding in *Roe* and *Doe*, it is not at all clear that for litigation purposes the effect will be much felt outside the area that gave rise to the cases, public provision of services to indigents.

***Privacy: Its Constitutional Dimensions.***—Collatorally, the effect of the abortion decisions could have been greatest in the area of personal liberties beyond the issue of termination of pregnancy, inasmuch as the revitalization of substantive due process in the noneconomic regulation area, overlaid with the compelling state interest test, could call into question many governmental restraints upon the person. The Court's emphasis upon the privacy rationale seemed to presage an active judicial role in defining and protecting the interests of persons "to be let alone." Those developments have, however, not occurred and the cases reflect the intention of the court to curb the expansion of any doctrinal ramifications flowing beyond the abortion cases.

Privacy has in a number of cases been identified as a core value of the provisions of the Bill of Rights,[15] but it was not until *Griswold* v. *Connecticut* [16] that an independent right of privacy, derived from the confluence of several provisions of the Bill of Rights or discovered in the "penumbras" of these provisions, was expounded by the Court and actually used to strike down a governmental restraint. The abortion cases extended *Griswold* many degrees in several respects. First, the cases removed any lingering possibility

[13] *Maher*, 432 U.S., 469-474 (the quoted sentence is id., 474); *Harris*, 448 U.S., 321-326. Justices Brennan, Marshall, and Blackmun dissented in both cases and Justice Stevens joined them in *Harris*.

[14] *Poelker* v. *Doe*, 432 U.S. 519 (1977).

[15] E.g., Fourth Amendment.

[16] 381 U.S. 479 (1965).

that the right is a marital one that depends upon the relationship.[17] Second, the right of privacy was denominated a liberty which found its source and its protection in the due process clause of the Fourteenth Amendment.[18] Third, by designating the right as a "fundamental" right, the Court required a governmental restraint to be justified by a "compelling state interest." Necessary to assessment of the effect of this development is a close analysis of the limits of the right thus protected as well as of its contents.

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma,* 316 U.S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird,* 405 U.S., at 453–454; id., at 460, 463–465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925), *Meyer* v. *Nebraska,* supra." [19] In the pornography cases decided later in the same Term, the Court denied the existence of any privacy right of customers to view unprotected material in commercial establishments, repeating the above descriptive language from *Roe,* and saying further: "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." [20]

What is apparent from the Court's approach in these cases is that its concept of privacy is descriptive rather than analytical, making difficult an assessment of the potential of the doctrine. Privacy as a concept appears to encompass at least two different but

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[17] In *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), the court had declined to extend the *Griswold* principle to the unmarried on privacy grounds, relying on an equal protection analysis instead.

[18] *Roe* v. *Wade,* 410 U.S. 113, 153 (1973). *See* id., 167–171 (Justice Stewart concurring). Justice Douglas continued to deny that substantive due process is the basis of the decisions. *Doe* v. *Bolton,* 410 U.S. 179, 209, 212 n. 4 (1973) (concurring).

[19] *Roe* v. *Wade,* 410 U.S. 113, 152 (1973).

[20] *Paris Adult Theatre* v. *Slaton,* 413 U.S. 49, 66 n. 13 (1973).

related aspects. First, it relates to the right or the ability of individuals to determine how much and what information about themselves is to be revealed to others. Second, it relates to the idea of autonomy, the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.[21] Governmental commands to do or not to do something may well implicate one or the other or both of these aspects and judicial decision about the validity of such governmental commands must necessarily be informed by use of an analytical framework balancing the governmental interests against the individual interests in maintaining freedom in one or both of the aspects of privacy. That framework cannot now be constructed on the basis of the Court's decided cases.

*Griswold* v. *Connecticut,*[22] voiding a state statute proscribing the use of contraceptives, seems primarily to be based upon a judicial concept of privacy flowing from the first aspect of privacy described above. That is, the predominant concern flowing through the several opinions is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the outward pressures upon the confines of such provisions as the Fourth Amendment's search and seizure clause but extended to techniques that would have been within the range of permissible investigation. Subsequent cases, however, have returned to Fourth and Fifth Amendment principles to regulate official invasions of privacy.[23]

For example, in *United States* v. *Miller,*[24] the Court evaluated in Fourth Amendment terms the right of privacy of depositors in restricting Government access to their cancelled checks maintained by the bank as required by the Bank Secrecy Act. The cancelled checks, the Court held, were business records of the bank in which the depositors had no expectation of privacy and therefore no Fourth Amendment standing to challenge government legal process directed to the bank and this status was unchanged by the fact that the banks kept the records under government mandate in the first place. And in *Fisher* v. *United States,*[25] the Court denied the

[21] *Whalen* v. *Roe,* 429 U.S. 589, 598–600 (1977).

[22] 381 U.S. 479 (1965).

[23] E.g., *California Bankers Assn.* v. *Schultz,* 416 U.S. 21 (1974). *See also Laird* v. *Tatum,* 408 U.S. 1 (1972); *United States* v. *United States District Court,* 407 U.S. 297 (1972); *United States* v. *Dionisio,* 410 U.S. 1 (1973); *Zurcher* v. *Stanford Daily,* 436 U.S. 547 (1978).

[24] 425 U.S. 435 (1976). *See also Fisher* v. *United States,* 425 U.S. 391, 401 (1976); *Paul* v. *Davis,* 424 U.S. 693, 712–713 (1976); *United States* v. *Bisceglia,* 420 U.S. 141 (1975).

[25] 425 U.S. 391 (1976).

Fifth Amendment's self-incrimination clause operated in any way to prevent the IRS to obtain by summons the tax records of taxpayers prepared by their accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. "[T]he Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." [1] Further, "[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment." [2] The First Amendment itself affords some limitation upon governmental acquisition of information but here again the gravamen is a violation of speech or association or the like concomitant with exposure of personal information and not exposure itself.[3]

A cryptic opinion in *Whalen* v. *Roe* [4] may indicate the Court's willingness to recognize privacy interests as independent constitutional rights. At issue was a state pervasive regulation of prescription drugs that could be abused and the centralized recordkeeping through computers of all such prescriptions identifying the patients. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected but because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to "pose a sufficiently grievous threat to either interest to establish a constitutional violation." [5]

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[1] Id., 399.

[2] Id., 401.

[3] *See Buckley* v. *Valeo*, 424 U.S. 1, 60–82 (1976); *Whalen* v. *Roe*, 429 U.S. 589, 601 n. 27, 604 n. 32 (1977); *see also United States* v. *Miller*, 425 U.S. 435, 444 n. 6 (1976). The Court continues to reserve the question of the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary." *Fisher* v. *United States*, 425 U.S. 391, 401 n. 7 (1976).

[4] 429 U.S. 589 (1977).

[5] Id., 598–604. The Court cautioned that it had not decided anything with respect to the privacy implications of the accumulation of vast amounts of informa-

Not the method of enforcement but the fact of enforcement was the issue in *Roe* and *Doe*. That is, the power of the State to deny women access to abortions, the power to proscribe the effectuation of the will and desire of women to terminate pregnancy, was at issue. Because the Court determined that the will and desire constituted a protected "liberty," the State was required to justify its proscription by a compelling interest. Once the question of the personhood of the fetus was resolved, the Court confronted in effect only two asserted interests. The health of the mother was recognized as a valid interest, thus, as we shall see, departing from a *laissez faire* "free will" approach to individual autonomy. A state interest in morality was mentioned by the Court, not because the State had raised it, but simply to defer deciding it; however, the morality issue raised concern not the morality of abortion but the promotion of sexual morality through making abortion unavailable.[6]

*Stanley* v. *Georgia*,[7] holding that government may not make private possession of obscene materials for private use a crime, approaches a judicial recognition of the autonomy aspect of privacy. True it is that the possession there was in Stanley's home, a fact heavily relied on by the Court, but the police had lawfully invaded his privacy upon the authority of a valid warrant and a subsidiary Fourth Amendment issue that was available for decision was passed over in favor of a broader resolution. Inasmuch as the materials were obscene, they were outside the scope of First Amendment protection. But the Court premised its decision upon one's protected right to receive what information and ideas he wished and upon one's protected "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." [8] These rights were held superior to the interests Georgia asserted to override them. That is, first, the State was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second,

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tion in data banks and the threat of disclosure of it. Safeguarding such information from disclosure "arguably has its roots in the Constitution," at least "in some circumstances," the Court seemed to indicate. Id., 605. Compare id., 606 (Justice Brennan concurring). What the Court's careful circumscription of the privacy issue through balancing does to the concept is unclear after *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455–465 (1977), but note the dissents. Id., 504, 525–536 (Chief Justice Burger), and 545 n. 1 (Justice Rehnquist).

[6] *Roe* v. *Wade*, 410 U.S. 113, 148 (1972). Additionally, if the purpose of the statute was to deter illicit sexual conduct, the law was overbroad since it included both unmarried and married women. This morality rationale also fell afoul of overinclusion and underinclusion in *Eisenstadt* v. *Baird*, 405 U.S. 438, 477–450 (1972).

[7] 394 U.S. 557 (1969).

[8] Id., 564–565.

the State's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.

*Stanley* was quickly restricted to its facts, to possession of pornography in the home.[9] But in its important reconsideration of and reaffirmation of governmental interests in the control of pornography, the Court went beyond this restriction and recognized governmental interest that included the promotion of public morality, protection of the individual's physiological health, and improving the quality of life. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." Furthermore, continued the Court: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always behond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.' " [10]

Evidently, then, the fundamental right of privacy that is protected by the due process clause is one functionally related to "family, marriage, motherhood, procreation, and child rearing." [11]

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[9] *United States* v. *Reidel*, 402 U.S. 351, 354-356 (1971); *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 375-376 (1971).

[10] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 57-63, 63-64, 68-69 (1973); *and see* id., 68 n. 15.

[11] Id., 66 n. 13. *See also Paul* v. *Davis*, 424 U.S. 693, 713 (1976).

Even so limited the concept can have numerous significant aspects occasioning major constitutional decisions. Thus, in *Carey* v. *Population Services International,*[12] the *Griswold-Baird* line of cases was significantly extended so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not forbid or burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to express only that interest or interests. This "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[13] As to the former, limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the State. As to the latter, instead of the compelling state interest test, the Court applied to state restrictions on the privacy rights of minors a test of validity requiring that they serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity.[14]

Important as the result of *Carey* is to resolution of the immediate issue before the Court, even more important would be extension of the principle there firmly established—the "constitutionally protected right of decision in matters of childbearing"—to the wider question of the degree to which government may regulate or

[12] 431 U.S. 678 (1977).

[13] Id., 684–691. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id., 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id., 703. Chief Justice Burger, id., 702, and Justice Rehnquist, id., 717, dissented.

[14] Id., 691–699. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id., 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id., 702, 717.

ban sexual activities of adults, with wide implications for questions of homosexuality as well as other relationships.[15] And, similarly, the extent to which governmental regulation of the sexual activities of minors is subject to constitutional scrutiny is of great and continuing importance.[16] Analysis of these questions is hampered because the Court has not told us what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty and what does not and how indeed these factors vary significantly enough from other human relationships to result in differing constitutional treatment. The Court's observation in the abortion cases "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[17] little elucidates the answers inasmuch as in the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—"compelling" interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is whether it is "explicitly or implicitly guaranteed by the Constitution." [18]

Whether an independent, discrete concept of privacy, in either of its major aspects, emerges from developing judicial doctrines is largely problematical. There appears to be a tendency to designate as a right of privacy a right or interest which extensions of prece-

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[15] In Justice Powell's view, the Court "would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review," a position he rejected. Id., 703. The Court disclaimed this view, arguing that it had decided only the question of the protected nature of the decision to prevent conception or terminate pregnancy; "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." Id., 688 n. 5, 694 n. 17. Justice Rehnquist noted that while not every conceivable regulation affecting such conduct had been passed on, the facial constitutional validity of criminal statutes prohibiting consensual homosexual relations had been "definitively" established, id., 718 n. 2, citing *Doe* v. *Commonwealth*, 425 U.S. 901 (1976). In the case, the Court summarily affirmed the upholding of a state law banning homosexual relations. *See* 403 F. Supp. 1199 (D.C.E.D.Va. 1975). In *Moore* v. *City of East Cleveland*, 431 U.S. 494, 500–506 (1977) (plurality opinion), Justice Powell argued that substantive due process protection is limited in accordance with traditional values, a standard that would deny protection to homosexual relationships.

[16] The Court reserved this question, 431 U.S., 694 n. 17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id., 702, 703, 712.

[17] *Roe* v. *Wade*, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, *supra*, 431 U.S. 684–685.

[18] *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 33–34 (1973). That this restriction is not holding with respect to equal protection analysis or due process analysis can be discerned easily. *Compare Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (opinion of Court), with id., 391 (Justice Stewart concurring), and id., 396 (Justice Powell concurring).

dent or applications of logical analysis have led the Court to conclude to protect. Because this protection is now settled to be a "liberty" which the due process clause includes, the analytical validity of denominating the particular right or interest as an element of privacy rather than as an element of "liberty" seems open to question.

***Family Relationships.***—While the "privacy" basis of autonomy seems to be definitionally based, the Court's drawing on the line of cases since *Meyer* and *Pierce* [19] has "established that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." [20] Recognition of the protected "liberty" of the familial relationship affords the Court a principled and doctrinal basis of review of governmental regulations that adversely impact upon the ability to enter into the relationship, to maintain it, to terminate it, and to resolve conflicts within the relationship. This liberty, unlike the interest in property which has its source in statutory law, springs from the base of "intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' " [21] Being of fundamental importance, the familial relationship is ordinarily subject only to regulation that can survive rigorous judicial scrutiny, although "reasonable regulations that do not significantly interfere with decisions to enter into the maritial relationship may legitimately be imposed." [22] Recent decisions cast light in all areas of the family relationship.

The right to marry is a fundamental right protected by the due process clause.[23] Therefore, a state statute is invalid which denies the right to marry to someone under obligation to support minor children when he has failed to meet the obligation, because the law does not serve any legitimate interest which the State could assert to be compelling enough to justify it.[24]

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[19] *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1928).

[20] *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality).

[21] *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977).

[22] *Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978).

[23] *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965); *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632, 639-640 (1974); *Zablocki* v. *Redhail*, 434 U.S. 374, 383-387 (1978).

[24] *Zablocki* v. *Redhail*, 434 U.S. 374 (1978). The majority of the Court deemed the statute to fail under equal protection, whereas Justices Stewart and Powell found the due process clause to be violated. Id., 391, 396. *Compare Califano* v. *Jobst*, 434 U.S. 47 (1977).

There is a constitutional right to live together as a family,[25] one not limited to the nuclear family. Thus, a city ordinance which zoned for single family occupancy and so defined "family" as to bar extended family relationships and thereby prevented a grandmother from having in her household two grandchildren of different children was found to violate the due process clause.[1] And the concept of "family" may extend beyond the biological, blood relationship of extended families to the situation of foster families, although the Court has acknowledged that such a claim to constitutionally protected liberty interests raises complex and novel questions.[2] In the conflict between natural and foster families, other difficult questions inhere and it may well be that a properly constituted process under state law of determining the best interests of the child will be deferred to.[3]

In the nature of complex and novel questions are the varied issues turning on the possible conflicts between parental rights and children's rights, on which the Court has touched but not dealt with definitively.[4]

***Liberty Interests of Retarded and Handicapped: Commitment and Treatment.***—Potentially a major development in substantive due process is the formulation of a liberty right of those retarded or handicapped individuals who are involuntarily committed or who voluntarily seek commitment to public institutions. The States, of course, pursuant to their *parens patriae* power have a substantial interest in institutionalizing persons in need of care for their protection and the protection of others. Each individual, on

[25] "If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'" *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Justice Stewart concurring), cited with approval in *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978).

[1] *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion). The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. Id., 513.

[2] *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977). The natural family, the Court observed, had its source not in statutory law whereas the ties that develop between foster parent and foster child have their origins in an arrangement which the State brought about. But some liberty interests do arise from positive law, although the expectations and entitlements are thereby limited as well by state law. And such a liberty interest may not be recognized without derogating from the substantive liberty interests of the natural parents. Thus, the interest of foster parents must be quite limited and attenuated, but *Smith* does not define what it is. Id., 842-847.

[3] *See Quilloin* v. *Walcott*, 434 U.S. 246 (1978).

[4] The clearest conflict presented to date raised the issue of giving a veto to parents over their minor children's right to have an abortion. *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976). *See also Parham* v. *J. R.*, 442 U.S. 584 (1979).

the other hand, has a due process protected interest in freedom from confinement and personal restraint, and even if he is properly committed he still retains substantive liberty interests in reducing the degree of confinement.[5] Little controversy has attended the gradual accretion of case law, now confirmed by the Supreme Court, that due process guarantees freedom from undue physical restraint and from unsafe conditions.[6] Whether it also guarantees a considerable right to treatment, to "habilitation," [7] is the focus of the cases now being litigated, and while the right has been strongly recognized by a number of influential lower court decisions [8] its treatment in the Supreme Court is as yet tentative. Thus, *Youngberg* v. *Romeo* recognized a liberty right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." [9] While the lower court had passed upon and agreed with plaintiff's theory of entitlement to "such treatment as will afford a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit," [10] the Supreme Court thought that before it plaintiff had reduced his theory to one of "training related to safety and freedom from restraint." [11] But the Court's concern for federalism, its reluctance to

[5] *Youngberg* v. *Romeo*, 457 U.S. 307, 314-316 (1982). *See Jackson* v. *Indiana*, 406 U.S. 715 (1972); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Vitek* v. *Jones*, 445 U.S. 480, 491-494 (1980).

[6] *Youngberg* v. *Romeo*, 457 U.S. 307, 314-316 (1982). Thus, personal security constitutes a "historic liberty interest" protected substantively by the due process clause. *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977) (liberty interest in being free from undeserved corporal punishment in school); *Greehholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Justice Powell concurring) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental actions").

[7] "The word 'habilitation' is commonly used to refer to programs for the mentally retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills." *Youngberg* v. *Romeo*, 457 U.S. 307, 309 n. 1 (1982) (quoting *amicus* brief for American Psychiatric Association).

[8] In *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972), the Court had said that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Reasoning that if commitment is for treatment and betterment of individuals, it must be accompanied by adequate treatment, several lower courts recognized a due process right. E.g., *Wyatt* v. *Stickney*, 325 F. Supp. 781 (D.C.M.D.Ala), *enforced*, 334 F. Supp. 1341 (1971), *supplemented*, 334 F. Supp. 373 and 344 F. Supp. 387 (D.C.M.D.Ala. 1972), *aff'd in part, reserved in part, and remanded, sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (C.A. 5, 1974); *Donaldson* v. *O'Connor*, 493 F.2d 507 (C.A. 5 1974), *vacated on other grounds*, 432 U.S. 563 (1975).

[9] *Youngberg* v. *Romeo*, 457 U.S. 307, 319 (1982).

[10] Id., 318 n. 23.

[11] Id., 317-318. Concurring, Justices Blackmun, Brennan, and O'Connor, argued that due process guaranteed patients at least that training necessary to prevent them from losing the skills they entered the institution with and probably more. Id.,

approve judicial activism in supervising institutions, its recognition that budgetary constraints interfered with state provision of services caused it to require the lower federal courts to defer to professional decisionmaking in determining what care was adequate. Professional decisions are presumptively valid and liability can be imposed "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." [12] Presumably, however, the difference between liability for damages and injunctive relief will still afford federal courts considerable latitude in enjoining institutions to better their services in the future, even if they cannot award damages for past failures.[13]

Still other issues await plumbing. The whole area of the rights of committed individuals will likely be explored under a substantive and procedural due process analysis.[14] Additionally, federal legislation is becoming extensive,[15] and state legislative and judicial development of law is highly important because the Supreme Court looks to this law as one source of the interests which the due process clause protects.[16]

325. Chief Justice Burger rejected any protected interest in training. Id., 329. The Court had also avoided a decision on a right to treatment in *O'Connor* v. *Donaldson*, 422 U.S. 563, 573 (1975), vacating and remanding a decision recognizing the right and thus depriving the decision of precedential value. Chief Justice Burger expressly rejected the right there also. Id., 578. But just four days later the Court denied *certiorari* to another panel decision from the same circuit relying on its *Donaldson* decision to establish such a right, leaving the principle alive in that circuit. *Burnham* v. *Dept. of Public Health*, 503 F.2d 1319 (C.A. 5, 1974), cert. den., 422 U.S. 1057 (1975).

[12] Id., 457 U.S., 323.

[13] E.g., *Ohlinger* v. *Watson*, 652 F. 2d 775, 779 (C.A. 9, 1980); *Welsch* v. *Likins*, 550 F.2d 1122, 1132 (C.A. 8, 1977). Of course, lack of funding will create problems with respect to injunctive relief as well. *Cf. New York State Assn. for Retarded Children* v. *Carey*, 631 F.2d 162, 163 (C.A. 2, 1980). It should be noted that the Supreme Court has limited the injunctive powers of the federal courts in similar situations also.

[14] *See* "Developments in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190 (1974). In *Mills* v. *Rogers*, 457 U.S. 291 (1982), the Court had before it the issue of the due process right of committed mental patients at state hospitals to refuse administration of antipsychotic drugs. An intervening decision of the State's highest court had measurably strengthened the patients' rights under both state and federal law and the Court remanded for reconsideration in light of the state court decision *See also Rennie* v. *Klein*, 653, F.2d 836 (C.A. 3, 1981).

[15] Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, as amended, 42 U.S.C. § 6000 *et seq.*, as to which *see Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981); Mental Health Systems Act, 94 Stat. 1565, 42 U.S.C. § 9401 *et seq.*

[16] *See*, e.g., *Mills* v. *Rogers*, 457 U.S. 291, 299-300 (1982). *And see infra*, pp. 1622-1631 (procedural due process).

## PROCEDURAL DUE PROCESS: CIVIL

### Some General Criteria

What is due process of law depends on the circumstances. It varies with the subject matter and the necessities of the situation. By due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.[1]

***Ancient Use and Uniformity.***—What is due process of law may be ascertained in part by an examination of those settled usages and modes of proceedings existing in the common and statutory law of England before the emigration of our ancestors and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. If it can show the sanction of settled usage both in England and in this country, a process of law which is not otherwise forbidden may be taken to be due process of law. In other words, the antiquity of a procedure is a fact of weight in its behalf. However, it does not follow that a procedure settled in English law at the time of the emigration and brought to this country and practiced by our ancestors is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment. Fortunately, the States are not tied down by any provision of the Constitution to the practice and procedure which existed at the common law but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.[2]

***Equality.***—If due process is to be secured, the laws must operate alike upon all and not subject the individual to the arbitrary exercise of governmental power unrestrained by established princi-

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[1] *Hagar* v. *Reclamation District*, 111 U.S. 701, 708 (1884); *Hurtado* v. *California*, 110 U.S. 516, 537 (1884).

[2] *Brown* v. *New Jersey*, 175 U.S. 172, 175 (1899); *Hurtado* v. *California*, 110 U.S. 516, 529 (1884); *Twining* v. *New Jersey*, 211 U.S. 78, 101 (1908); *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 244 (1944).

ples of private rights and distributive justice. Where a litigant has the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result.[3]

***Due Process and Judicial Process.***—Due process of law does not always mean a proceeding in court.[4] Proceedings to raise revenue by levying and collecting taxes are not necessarily judicial, neither are administrative and executive proceedings, yet their validity is not thereby impaired.[5] Moreover, the due process clause has been interpreted as not requiring that the judgment of an expert commission be supplanted by the independent view of judges based on the conflicting testimony, prophecies, and impressions of expert witnesses when judicially reviewing a formula of a state regulatory commission for limiting daily production in an oil field and for proration among the several well owners.[6]

Nor does the Fourteenth Amendment prohibit a State from conferring upon nonjudicial bodies certain functions that may be called judicial, or from delegating to a court powers that are legislative in nature. For example, state statutes vesting in a parole board certain judicial functions,[7] or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade,[8] or vesting in a probate court authority to appoint park commissioners and establish park districts [9] are not in conflict with the due process clause and present no federal question. Whether legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether they should in some particulars be merged, is for the determination of the State.[10]

**Power of the States to Regulate Procedure**

***Generally.***—The due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or

[3] *Marchant* v. *Pennsylvania Railroad*, 153 U.S. 380, 386 (1894).

[4] *Ballard* v. *Hunter*, 204 U.S. 241, 255 (1907); *Palmer* v. *McMahon*, 133 U.S. 660, 668 (1890).

[5] *McMillen* v. *Anderson*, 95 U.S. 37, 41 (1877).

[6] *Railroad Commission* v. *Oil Co.*, 311 U.S. 570 (1941). *See also Railroad Commission* v. *Oil Co.*, 310 U.S. 573 (1940).

[7] *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902).

[8] *New York ex rel. Lieberman* v. *Van De Carr*, 199 U.S. 552, 562, (1905).

[9] *Ohio ex rel. Bryant* v. *Akron Park Dist.*, 281 U.S. 74, 79 (1930).

[10] *Carfer* v. *Caldwell*, 200 U.S. 293, 297 (1906).

regulate practice therein.[1] A State "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [2] Pursuant to such power, the States have regulated the manner in which rights may be enforced and wrongs remedied,[3] and, in connection therewith have created courts and endowed them with such jurisdiction as, in the judgment of their legislatures, seemed appropriate.[4] Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure are issues which can ordinarily give rise to no conflict with the Fourteenth Amendment, inasmuch as its function is negative rather than affirmative and in no way obligates the States to adopt specific measures of reform.[5] The most recent decisions, however, often impose such restrictions on state procedures as to require substantial reorientation of process.[6]

[1] *Holmes* v. *Conway*, 241 U.S. 624, 631, (1916); *Louisville & Nashville Railroad Co.* v. *Schmidt*, 177 U.S. 230, 236 (1900).

[2] *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); *West* v. *Louisiana*, 194 U.S. 258, 263 (1904); *Chicago, B. & Q. R.* v. *Chicago*, 166 U.S. 226 (1897); *Jordan* v. *Massachusetts*, 225 U.S. 167, 176, (1912). *See Boddie* v. *Connecticut*, 401 U.S. 371 (1971), for one recent limitation. The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the contract, full faith and credit, and privileges and immunities clauses of the Constitution. *Angel* v. *Bullington*, 330 U.S. 183 (1947).

[3] *Insurance Co.* v. *Glidden Co.*, 284 U.S. 151, 158 (1931); *Iowa Central Ry. Co.* v. *Iowa*, 160 U.S. 389, 393 (1896); *Honeyman* v. *Hanan*, 302 U.S. 375 (1937). *See also Lindsey* v. *Normet*, 405 U.S. 56 (1972).

[4] *Cincinnati Street Ry. Co.* v. *Snell*, 193 U.S. 30, 36 (1904).

[5] *Ownbey* v. *Morgan*, 256 U.S. 94, 112 (1921). Thus the Fourteenth Amendment does not constrain the States to accept modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to make amendments. Note that the Supreme Court did once grant review to determine whether due process required the States to provide some form of post-conviction remedy to assert federal constitutional guarantee violations, a review which was mooted when the State enacted such a process. *Case* v. *Nebraska*, 381 U.S. 336 (1965). When a State, however, through its legal system exerts a monopoly over the pacific settlement of private disputes, as with the dissolution of marriage, due process may well impose affirmative obligations on that State. *Boddie* v. *Connecticut*, 401 U.S. 371, 374-377 (1971).

[6] This statement is more generally true in the context of criminal cases in which the appellate process and post-conviction remedial process have been subject to considerable revision in the treatment of indigents, *infra*, but a trend is apparent as well in civil cases. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Lindsey* v. *Normet*, 405 U.S. 56, 74-79 (1972); *Santosky* v. *Kramer*, 455 U.S. 745 (1982). Review has, however, been restrained with regard to details. *Lindsay* v. *Normet*, *supra*, 64-69.

***Commencement of Actions.***—A state may impose certain conditions on the right to institute litigation. Access to the courts has been denied to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.[7] But, at least in those situations in which the State has monopolized the avenues of settlement of disputes between persons by prescribing judicial resolution, and where the dispute involves such a fundamental interest as marriage and its dissolution, no State may deny to those persons unable to pay its fees access to those judicial avenues.[8] It must be considered, then, that all foreclosure of access to the courts, at least of a financial nature and perhaps of other sources as well, are subject to federal constitutional scrutiny at the present time and must be justified by reference to a state interest of suitable importance, a development of note. In older cases, not questioned by the more recent ones, it was held that when a nonresident files suit in a local court, the State, as the price of opening its tribunals to such plaintiff, may exact the condition that the former stand ready to answer all cross actions filed and accept any *in personam* judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of record,[9] and for similar reasons, a requirement, without excluding other evidence, of a chemical analysis as a condition precedent to a suit to recover damages resulting to crops from allegedly deficient fertilizers is not deemed to be arbitrary or unreasonable.[10]

***Pleas in Abatement.***—State legislation which forbids a defendant to come into court and challenge the validity of service upon him in a personal action without thereby surrendering himself to the jurisdiction of the court, but which does not restrain him from protecting his substantive rights against enforcement of a judgment rendered without service of process is constitutional and does not deprive him of property without due process of law. Such a defendant, if he pleases, may ignore the proceedings as wholly inef-

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[7] *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Nor was the retroactive application of this statutory requirement to actions pending at the time of its adoption violative of due process as long as no new liability for expenses incurred before enactment was imposed thereby and the only effect thereof was to stay such proceedings until the security was furnished.

[8] *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). *See also Little* v. *Streater*, 452 U.S. 1 (1981) (state-mandated paternity suit); *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18 (1981) (parental status termination proceeding); *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (permanent termination of parental custody).

[9] *Young Co.* v. *McNeal-Edwards Co.*, 283 U.S. 398 (1931); *Adam* v. *Saenger*, 303 U.S. 59 (1938).

[10] *Jones* v. *Union Guano Co.*, 264 U.S. 171 (1924).

fective, and set up the invalidity of the judgment if and when an attempt is made to take his property thereunder. However, if he desires to contest the validity of the proceedings in the court in which it is instituted, so as to avoid even a semblance of a judgment against him, it is within the power of a State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised by him as to its jurisdiction over his person shall be overruled.[11]

***Defenses.***—Just as a State may condition the right to institute litigation, so may it establish its terms for the interposition of certain defenses. It may validly provide that one sued in a possessory action cannot bring an action to try title until after judgment shall have been rendered in the possessory action and until he shall have paid the judgment, if the decision shall have so awarded.[12] A State may limit the defense in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises.[13]

Similarly, a nonresident defendant in a suit begun by foreign attachment, even though he has no resources or credit other than the property attached, cannot challenge the validity of a statute which requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend.[14]

***Amendments and Continuances.***—Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal. Accordingly, where the defense sought to be interposed is without a merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation.[15]

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[11] *York* v. *Texas*, 137 U.S. 15 (1890); *Kauffman* v. *Wootters*, 138 U.S. 285, 287 (1891).

[12] *Grant Timber & Mfg. Co.* v. *Gray*, 236 U.S. 133 (1915).

[13] *Lindsey* v. *Normet*, 405 U.S. 56, 64–69 (1972). *See also Bianchi* v. *Morales*, 262 U.S. 170 (1923) (upholding mortgage law providing for summary foreclosure of a mortgage without allowing any defense except payment).

[14] *Ownbey* v. *Morgan*, 256 U.S. 94 (1921). A State may provide that the doctrines of contributory negligence, assumption of risk, and fellow servant should not bar recovery in certain employment-related accidents. No person has a vested right in such defense. *Bowersock* v. *Smith*, 243 U.S. 29, 34, (1917); *Chicago, R.I. & P. Ry. Co.* v. *Cole*, 251 U.S. 54, 55 (1919); *Herron* v. *Southern Pacific Co.*, 283 U.S. 91 (1931). *See also Martinez* v. *California*, 444 U.S. 277, 280–283 (1980) (State interest in fashioning its own tort law permits it to provide immunity defenses for its employees and thus defeat recovery).

[15] *Sawyer* v. *Piper*, 189 U.S. 154 (1903).

***Costs, Damages, and Penalties.***—What costs are allowed by law is for the court to determine; an erroneous judgment of what the law allows does not deprive a party of his property without due process of law.[16] Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.[17] Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives.[18] Also, as a reasonable incentive for prompt settlement without suit of just demands of a class admitting of special legislative treatment, such as common carriers and insurance companies together with their patrons, a State through the exercise of its police power may permit harassed litigants to recover penalties in the form of attorney's fees or damages.[19] To deter careless destruction of human life, a State by law may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees.[20] By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a State may provide that a public officer embezzling public money shall, notwithstanding that he has made restitution, suffer not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled. Whatever this fine be called, whether it be a penalty, or punishment or civil judgment, it comes to the convict as the result of his crime.[21] On the other hand, when appellant, by its refusal to surrender certain assets, was adjudged in contempt for frustrating enforcement of a judgment obtained against it, dismissal of its appeal from the latter was not a penalty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the State's judicial process as against a judgment debtor who refused to post a supersedeas bond or to

[16] *Ballard* v. *Hunter*, 204 U.S. 241, 259 (1907).

[17] *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U.S. 642, 650 (1914).

[18] *Lowe* v. *Kansas*, 163 U.S. 81 (1896). Consider, however, the possible bearing of *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966).

[19] *Yazoo & Miss. R.R.* v. *Jackson Vinegar Co.*, 226 U.S. 217 (1912); *Chicago & Northwestern Ry.* v. *Nye, Schneider, Fowler Co.*, 260 U.S. 35, 43–44 (1922); *Hartford Life Ins. Co.* v. *Blincoe*, 255 U.S. 129, 139 (1921); *Life & Casualty Co.* v. *McCray*, 291 U.S. 566 (1934).

[20] *Pizitz Co.* v. *Yeldell*, 274 U.S. 112, 114 (1927).

[21] *Coffey* v. *Harlan County*, 204 U.S. 659, 663, 665 (1907).

comply with reasonable orders designed to safeguard the value of the judgment pending decision on its appeal.[22]

***Statutes of Limitation.***—A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. By the same token, a State may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.[23]

Thus, an interval of only one year is not so unreasonable as to be wanting in due process when applied to bar actions relative to the property of an absentee in instances when the receiver for such property has not been appointed until 13 years after the former's disappearance.[24] When a State, by law, suddenly prohibits, unless brought within six months after its passage, all actions to contest tax deeds which have been of record for two years, no unconstitutional deprivation is effected.[25] No less valid is a statute, applicable to wild lands, which provides that when a person has been in possession under a recorded deed continuously for 20 years and had paid taxes thereon during the same, the former owner in that interval paying nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.[1] Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.[2]

[22] *National Union* v. *Arnold*, 348 U.S. 37 (1954).

[23] *Wheeler* v. *Jackson*, 137 U.S. 245, 258 (1890); *Kentucky Union Co.* v. *Kentucky*, 219 U.S. 140, 156 (1911). *Cf. Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering the right to an adjudication or foreclosing it).

[24] *Blinn* v. *Nelson*, 222 U.S. 1 (1911).

[25] *Turner* v. *New York*, 168 U.S. 90, 94 (1897).

[1] *Soper* v. *Lawrence Brothers*, 201 U.S. 359 (1906). Nor is a former owner who had not been in possession for five years after and fifteen years before said enactment thereby deprived of any property without due process.

[2] *Mattson* v. *Dept. of Labor*, 293 U.S. 151, 154 (1934).

Moreover, as long as no agreement of the parties is violated, a State may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. As applied to actions for personal debts, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of debtor-defendant in whose favor such statute had already become a defense. "A right to defeat a just debt by the statute of limitation . . . [not being] a vested right," such as is protected by the Constitution, accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a child for the use of her property,[3] or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[4] or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a state-administered fund.[5] However, as respects suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.[6] Also unconstitutional is the application of a local statute of limitation declaring invalid any contractual limitation of the right to sue to a period shorter than two years to an insurance contract made and to be performed outside the forum State and containing a stipulation that suit thereon must be brought within one year from the date of loss. "When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired" unconstitutionally imposes a burden in excess of that contracted.[7]

***Evidence and Presumptions.***—The establishment of presumptions and rules respecting the burden of proof is clearly within the domain of the legislative branch of government.[8] Nonetheless, the

[3] *Campbell* v. *Holt*, 115 U.S. 620, 623, 628 (1885).

[4] *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945).

[5] *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295 (1945).

[6] *Campbell* v. *Holt*, 115 U.S. 620, 623 (1885). *See also Stewart* v. *Keyes*, 295 U.S. 403, 417 (1935).

[7] *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 398 (1930).

[8] *Hawkins* v. *Bleakly*, 243 U.S. 210, 214 (1917); *James-Dickinson Co.* v. *Harry*, 273 U.S. 119, 124 (1927). Congress' power to provide rules of evidence and standards of proof in the federal courts stems from its power to create such courts. *Vance* v. *Terrazas*, 444 U.S. 252, 264-267 (1980); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976). In the absence of congressional guidance, the Court has determined the evidentiary standard in certain statutory actions. *Nishikawa* v. *Dulles*, 356 U.S. 129 (1958); *Woodby* v. *INS*, 385 U.S. 276 (1966).

due process clause does impose limitations upon the power to provide for the deprivation of liberty or property by a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " [9] Applying the formula it has worked out for determining what process is due in a particular situation,[10] the Court has held that in a civil proceeding brought under statute to commit an individual involuntarily for an indefinite period to a state mental hospital, at least a standard of clear and convincing evidence is required.[11] Because the interest of parents in retaining custody of their children is fundamental, the State may not use a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action—but must prove by clear and convincing evidence that the parents are unfit.[12] Unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics but must be established.[13]

As long as a presumption is not unreasonable and is not conclusive of the rights of the person against whom raised, however, it does not violate the due process clause. Legislative fiat may not take the place of fact, though, in the determination of issues involving life, liberty, or property, and a statute creating a presumption which is entirely arbitrary and which operated to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void.[14] On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that the proof of one fact or group of facts shall constitute prima facie evidence of a main or ultimate fact will be sustained.[15]

[9] *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Justice Harlan concurring)).

[10] *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

[11] *Addington* v. *Texas*, 441 U.S. 418 (1979).

[12] *Santosky* v. *Kramer*, 455 U.S. 745 (1982). Four Justices dissented, arguing that considered as a whole the statutory scheme comported with due process. Id., 770 (Justices Rehnquist, White, O'Connor, and Chief Justice Burger).

[13] *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

[14] Presumptions voided include *Bailey* v. *Alabama*, 219 U.S. 219 (1911); *Manley* v. *Georgia*, 279 U.S. 1 (1929); *Western & Atlantic R. Co.* v. *Henderson*, 279 U.S. 639 (1929).

[15] Presumptions sustained include *Hawker* v. *New York*, 170 U.S. 189 (1898); *Hawes* v. *Georgia*, 258 U.S. 1 (1922); *Bandini Co.* v. *Superior Court*, 284 U.S. 8 (1931); *Atlantic Coast Line R.* v. *Ford*, 287 U.S. 502 (1933); *Mobile, J. & K. C. R.R. Co.* v. *Turnipseed*, 219 U.S. 35 (1910). *Compare Morrison* v. *California*, 288 U.S. 591 (1933), *with Morrison* v. *California*, 291 U.S. 82 (1934).

For a brief period, the Court utilized what it called the "irrebuttable presumption doctrine" to curb the legislative tendency to confer a benefit or to impose a detriment, depending for its application upon the establishment of certain characteristics from which the existence of other characteristics are presumed.[16] Thus, as noted, in *Stanley* v. *Illinois*,[17] the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented him from objecting to state wardship. Mandatory maternity leave rules of school boards requiring pregnant teachers to take unpaid maternity leave five and four months respectively prior to the date of the expected births of their babies were held to create a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of continuing and were therefore voided.[18] Major controversy developed with respect to the application of the doctrine in benefits cases. Thus, while a State may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite for the State to qualify for the lower tuition, it was held impermissible for the State to presume conclusively that because the legal address of a student was outside the State at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The due process clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.[19]

Moreover, a food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.[20]

[16] The approach was not unprecedented, some older cases having voided tax legislation that presumed conclusively an ultimate fact. *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926) (deeming any gift made by decedent within six years of death to be a part of estate denies estate's right to prove gift was not made in contemplation of death); *Heiner* v. *Donnan*, 285 U.S. 312 (1932); *Hoeper* v. *Tax Comm.*, 284 U.S. 206 (1931).

[17] 405 U.S. 645 (1972).

[18] *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

[19] *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

[20] *Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973).

The rule which emerged was that the legislature could not presume the existence of the decisive characteristic upon a given set of facts to subject one to detriment or to benefit one, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The doctrine in effect afforded the Court the opportunity to choose between resort to the equal protection clause or to the due process clause in judging the validity of certain classifications,[21] and it precluded Congress and legislatures from making general classifications that avoided the administrative costs of individualization in many areas.

Utilization of the doctrine was curbed, if not halted, in *Weinberger* v. *Salfi*,[22] in which there was in issue the validity of a Social Security provision requiring as a qualification of receipt of benefits as a spouse of a covered wage earner that one must have been married to the wage earner for at least nine months prior to his death. Purporting to approve but to distinguish the prior cases in the line,[23] the Court rather imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.[24] "Extensions" of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would, said the Court, "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." [25] Whether the Court will now limit the doctrine to the detriment area only, exclusive of benefit programs, whether it will limit it to those areas which involve fundamental rights or suspect classifications, in the equal protection sense of those expressions,[1] or whether it will simply permit the

[21] Thus, on the some day *Murry* was decided, a similar food stamp qualification was struck down on equal protection grounds. *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).

[22] 422 U.S. 749 (1975).

[23] *Stanley* and *LaFleur* were distinguished as involving fundamental rights of family and childbearing, id., 771, and *Murry* was distinguished as involving an irrational classification. Id., 772. For the Court, Justice Rehnquist thought that the holding in *Vlandis* was no more than that when a State fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity so to establish it. Id., 771. But see id., 802-803 (Justice Brennan dissenting).

[24] Id., 768-770, 775-777, 785 (utilizing *Dandridge* v. *Williams*, 397 U.S. 471 (1970), *Richardson* v. *Belcher*, 404 U.S. 78 (1971), and similar cases).

[25] *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975).

[1] *Vlandis*, which was approved but distinguished, is only marginally in this doctrinal area, involving as it does a right to travel feature, but it is like *Salfi* and *Murry* in its benefit context and order of presumption. The Court has avoided deciding whether to overrule, retain, or further limit *Vlandis*. *Elkins* v. *Moreno*, 435 U.S. 647, 658-662 (1978).

doctrine to pass from the scene remains unsettled, but it is noteworthy that it now rarely appears on the Court's docket.[2]

***Jury Trials.***—Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process and the Fourteenth Amendment has not been held to restrain the States in retaining or abolishing civil juries.[3] Thus, abolition of juries in proceedings to enforce liens,[4] mandamus[5] and quo warranto[6] actions, and in eminent domain[7] and equity[8] proceedings has been approved. States are free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity,[9] and petit juries containing eight rather than the conventional number of twelve members may be established.[10]

***Appeals.***—If a full and fair trial on the merits is provided, due process does not require a State to provide appellate review.[11] But if an appeal is afforded, the State must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.[12]

**Jurisdiction**

***Generally.***—Jurisdiction may be defined as the power to create legal interests. In the famous case of *Pennoyer* v. *Neff*,[1] the Court

[2] In *Turner* v. *Dept. of Employment Security*, 423 U.S. 44 (1975), subsequent to *Salfi*, the Court voided under the doctrine a statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected birth until six weeks after childbirth. *But see Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1977) (provision granting benefits to miners "irrebutably presumed" to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption), *Califano* v. *Boles*, 443 U.S. 282, 284-285 (1979) (Congress must fix general categorization, case-by-case determination would be prohibitively costly).

[3] *Walker* v. *Sauvinet*, 92 U.S. 90 (1876); *New York Central R. Co.* v. *White*, 243 U.S. 188, 208 (1917).

[4] *Marvin* v. *Trout*, 199 U.S. 212, 226 (1905).

[5] *In re Delgado*, 140 U.S. 586, 588 (1891).

[6] *Wilson* v. *North Carolina*, 169 U.S. 586 (1898); *Foster* v. *Kansas*, 112 U.S. 201, 206 (1884).

[7] *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 694 (1897).

[8] *Montana Co.* v. *St. Louis M. & M. Co.*, 152 U.S. 160, 171 (1894).

[9] *See Jordan* v. *Massachusetts*, 225 U.S. 167, 176 (1912).

[10] *See Maxwell* v. *Dow*, 176 U.S. 581, 602 (1900).

[11] *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972) (citing cases).

[12] Id., 74-79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal invalid when no similar provision applied to other cases).

[1] 95 U.S. 714 (1878).

enunciated two principles of jurisdiction respecting the States in a federal system. First, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and, second, "no State can exercise direct jurisdiction and authority over persons or property without its territory." [2] Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists,[3] the constitutional basis for them was deemed to be in the due process clause of the Fourteenth Amendment.[4] From these beginnings, the Court developed a complex set of rules defining when jurisdiction, physical power, could be exerted over persons through *in personam* actions and over things, generally, through actions *in rem*.[5]

In proceedings *in personam* to determine liability of a defendant, no property having been subjected by such litigation to the control of the court, jurisdiction over the defendant's person is a condition prerequisite to the rendering of any effective decree.[6] That condition is fulfilled, that is, a State is deemed capable of exerting jurisdiction over an individual if he is physically present within the territory of the State, if he is domiciled in the State although temporarily absent therefrom, or if he has consented to the exercise of jurisdiction over him. In actions *in rem*, however, a State could validly proceed to settle controversies with regard to rights or claims against property within its borders, notwithstanding that control of the defendant was never obtained. Accordingly, by reason of its inherent authority over titles to land within its territorial confines, a State could proceed through its courts to judgment respecting the ownership of such property, even though it lacked a constitutional competence to reach claimants of title who resided beyond its borders.[7] By the same token, probate [8] and gar-

[2] Id., 722.

[3] Hazard, "A General Theory of State-Court Jurisdiction," 1965 Sup. Ct. Rev. 241, 252–262.

[4] *Pennoyer* v. *Neff*, 95 U.S. 714, 733–735 (1878). The due process clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled utilization of this constitutional foundation. *Pennoyer* denied full faith and credit to the judgment because the state lacked jurisdiction.

[5] *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878); *Scott* v. *McNeal*, 154 U.S. 34, 64 (1894).

[6] *National Exchange Bank* v. *Wiley*, 195 U.S. 257, 270 (1904); *Iron Cliffs Co.* v. *Negaunee Iron Co.*, 197 U.S. 463, 471 (1905).

[7] *Arndt* v. *Griggs*, 134 U.S. 316, 321 (1890); *Grannis* v. *Ordean*, 234 U.S. 385 (1914); *Pennington* v. *Fourth Natl. Bank*, 243 U.S. 269, 271 (1917).

[8] *Goodrich* v. *Ferris*, 214 U.S. 71, 80 (1909).

nishment of foreign attachment [9] proceedings, being in the nature of *in rem* actions for the disposition of property, or *quasi in rem*, might be prosecuted to conclusion without requiring the presence of all parties in interest.[10]

Over a long period of time, the mobility of American society and the increasing complexity of commerce led to attenuation of the second principle of *Pennoyer*,[11] and beginning with *International Shoe Co.* v. *Washington*,[12] with respect to *in personam* jurisdiction, the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations had with a State, the "minimum contacts" test, which would permit the courts of a State through process to obtain power over out-of-state defendants. In recent cases, the "minimum contacts" test has been held applicable to all assertions of jurisdiction, so that *in rem* and *quasi-in-rem* proceedings must now be evaluated in the context of the defendant's relationship to the State in which the suit is being brought.[13]

Basis for the territorial concept of jurisdiction promulgated in *Pennoyer* and modified over the years is a two-fold construction of due process: a concern for "fair play and substantial justice" involved in requiring defendants to litigate cases against them far from their "home" or place of business [14] and, more important, a concern for the preservation of federalism.[15] The Framers, the

[9] *Pennington* v. *Fourth Natl. Bank*, 243 U.S. 269, 271 (1917); *Harris* v. *Balk*, 198 U.S. 215 (1905).

[10] The jurisdictional requirements for rendering a valid divorce decree are considered under the full faith and credit clause. *Supra, pp.* 844–854.

[11] The first principle, that a State may assert jurisdiction over anyone or anything physically within its borders, no matter how briefly there—the so-called "transient" rule of jurisdiction—*McDonald* v. *Mabee*, 243 U.S. 90, 91 (1917), remains valid, although in *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977), the Court's dicta appeared to assume it is not.

[12] 326 U.S. 310 (1945). As the Court explained in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957), "[w]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *See World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980).

[13] *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); *Rush* v. *Savchuk*, 444 U.S. 320 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84 (1978).

[14] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 317 (1945); *Travelers Health Assn.* v. *Virginia ex rel. State Corp. Comm.*, 339 U.S. 643, 649 (1950); *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977).

[15] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945); *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958).

Court has asserted, while intending to tie the States together into a Nation, "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." [16] Thus, the federalism principle is preeminent. "[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.' . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." [17]

***In Personam Proceedings Against Individuals.***—As has been noted, presence within the State with service of process is sufficient to create personal jurisdiction over an individual.[18] In the case of a resident, absence alone will not defeat the processes of courts in the State of his domicile; domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, whether obtained by means of appropriate, substituted service or by actual personal service on the resident outside the State.[19] However, if the defendant, although technically domiciled therein, has left the State with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, inasmuch as it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.[20]

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in which he neither appeared nor was served or effectively made a

[16] *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980).
[17] Id., 294 (internal quotation from *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945)).
[18] *McDonald* v. *Mabee*, 243 U.S. 90, 91 (1917). *Cf. Michigan Trust Co.* v. *Ferry*, 228 U.S. 346 (1913). The rule has been strongly criticized but persists. Ehrenzweig, "The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens," 65 Yale L. J. 289 (1956).
[19] *Milliken* v. *Meyer*, 311 U.S. 457 (1940).
[20] *McDonald* v. *Mabee*, 243 U.S. 90 (1917).

party.[21] The early cases held that the process of a court of one State could not run into another and summon a party there domiciled to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment.[22] The attenuation of the rule proceeded in steps. Consent was, of course, sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum, and for example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power,[23] and even a special appearance may be treated as consensual submission to the court.[24] Constructive consent, therefore, was seized upon as a basis for obtaining jurisdiction, and, with the advent of the automobile, States were permitted, under the fiction of conditioning the use of their highways on receipt of consent to be sued in state courts for accidents or other transactions arising out of such use, to designate a state official as a proper person to receive service of process in such litigation, provided only that the official receiving notice is obligated to communicate it to the person sued.[25] Although the Court verbalized the result in consent terms, the basis was really the State's power to regulate local acts dangerous to life or property.[1] This extension was necessary in order to permit States to assume jurisdiction over individuals "doing business" within the State, inasmuch the State could not withhold from nonresident individuals the right of doing business subject to consent to be sued.[2] Thus, the Court soon recognized that "doing business" within a State was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation and service could be effectuated within the State on an agent appointed to carry out the business.[3]

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[21] *Rees* v. *Watertown*, 19 Wall. (86 U.S.) 107 (1874); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1915); *Griffin* v. *Griffin*, 327 U.S. 220 (1946).

[22] *Sugg* v. *Thornton*, 132 U.S. 524 (1889); *Riverside Mills* v. *Menefee*, 237 U.S. 189, 193 (1915); *Hess* v. *Pawloski*, 274 U.S. 352, 355 (1927). *See also Harkness* v. *Hyde*, 98 U.S. 476 (1879); *Wilson* v. *Seligman*, 144 U.S. 41 (1892).

[23] *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U.S. 230 (1900); *Western Loan & Savings Co.* v. *Butte & Boston Min. Co.*, 210 U.S. 368 (1908); *Houston* v. *Ormes*, 252 U.S. 469 (1920). *See also Adam* v. *Saenger*, 303 U.S. 59 (1938) (plaintiff suing defendants deemed to have consented to jurisdiction with respect to counterclaims asserted against him).

[24] *York* v. *Texas*, 137 U.S. 15 (1890); *Kauffman* v. *Wooters*, 138 U.S. 285 (1891); *Western Indemnity Co.* v. *Rupp*, 235 U.S. 261 (1914).

[25] *Hess* v. *Pawloski*, 274 U.S. 352 (1927); *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928); *Olberding* v. *Illinois Central R. Co.*, 346 U.S. 338, 341 (1953).

[1] *Hess* v. *Pawloski*, 274 U.S. 352, 356–357 (1927).

[2] Id., 355. *See Flexner* v. *Farson*, 248 U.S. 289, 293 (1919).

[3] *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623 (1935).

Culmination of the trend was, of course, the promulgation in *International Shoe Co.* v. *Washington,*[4] a corporations case, of the "minimum contacts" test of jurisdiction. In the context of *in personam* jurisdiction over individuals, the test is illustrated by *Kulko* v. *Superior Court,*[5] in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the State was to send his daughter to live with her mother in California.[6] "Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." [7] Without deciding that the standard was relevant, the Court noted that the "effects" test of contacts, that Kulko had "caused an effect" in the State by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York, was not applicable; it was deemed by the Court to involve wrongful activity outside a State which causes injury within the State or commercial activity affecting state residents, factors not present in this case. Any economic benefit to Kulko was derived in New York and not in California.[8] As with many such cases, the decision was narrowly limited to its facts and does little to clarify the standards applicable to state jurisdiction over nonresidents.

***Suability of Foreign Corporations.***—Because of the curious status of corporations in American law,[9] the basis of the assertion of jurisdiction of the courts of a State over a foreign corporation has been even more uncertain than that with respect to individuals, although the terms have been common. First, it was asserted that inasmuch as a corporation could not carry on business in a State without the State's permission, the State could condition its permission upon the corporation's consent to submit to the jurisdiction of the State's courts, either by appointment of someone to receive process or in the absence of such designation.[10] Second, the

[4] 326 U.S. 310, 316 (1945).

[5] 436 U.S. 84 (1978).

[6] Kulko had visited the State twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient or relevant to jurisdiction. Id., 92-93.

[7] Id., 92.

[8] Id., 96-98.

[9] *Cf. Bank of Augusta* v. *Earle,* 13 Pet. (38 U.S.) 519, 588 (1839) (corporation has no legal existence outside the boundaries of the State chartering it).

[10] *Lafayette Ins. Co.* v. *French,* 18 How. (59 U.S.) 404 (1855); *St. Clair* v. *Cox,* 196 U.S. 350 (1882); *Commercial Mutual Accident Co.* v. *Davis,* 213 U.S. 245 (1909) *Simon*

corporation by doing business in a State was deemed to be present there and thus subject to service of process and suit because it was present.[11] Presence conflicted with the prevailing idea of corporations as having no existence outside their State of incorporation, but the theory was nonetheless accepted that a corporation "doing business" in a State to a sufficient degree was "present" for service of process upon its agents in the State who carried out that business.[12] Generally, with rare exceptions, even continuous activity of some sort by a foreign corporation within a State did not suffice to render it amenable to suits therein unrelated to that activity. Without the protection of such a rule, it was maintained, foreign corporations would be exposed to the manifest hardship and inconvenience of defending in any State in which they happened to be carrying on business suits for torts wherever committed and claims on contracts wherever made.[13] And if the corporation stopped doing business in the forum State before suit against it was commenced, it might well escape jurisdiction altogether.[14] The issue of the degree of activity required, in particular the degree of solicitation necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings.[15] In the absence of enough activity to constitute doing business, the mere presence within its territorial limits of an agent, officer, or stockholder, upon whom service might readily be had, was not ef-

v. *Southern Ry.*, 236 U.S. 115 (1915); *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

[11] Presence was first independently used to sustain jurisdiction in *International Harvester Co.* v. *Kentucky*, 234 U.S. 579 (1914), although the possibility was suggested as early as *St. Clair* v. *Cox*, 106 U.S. 350 (1882). *See also Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U.S. 264, 265 (1917) (Justice Brandeis).

[12] E.g., *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *St. Louis S. W. Ry.* v. *Alexander*, 227 U.S. 218 (1913).

[13] E.g., *Old Wayne Life Assn.* v. *McDonough*, 204 U.S. 8 (1907); *Simon* v. *Southern Railway*, 236 U.S. 115, 129–130 (1915); *Green* v. *Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907); *Rosenberg Co.* v. *Curtis Brown Co.*, 260 U.S. 516 (1923); *Davis* v. *Farmers Co-operative Co.*, 262 U.S. 312 (1923). Continuous operations were sometimes sufficiently substantial and of a nature to warrant assertions of jurisdiction. *St. Louis S. W. Ry.* v. *Alexander*, 227 U.S. 218 (1913); *Missouri, K. & T. R. Co.* v. *Reynolds*, 255 U.S. 565 (1921).

[14] *Robert Mitchell Furn. Co.* v. *Selden Breck Contr. Co.*, 257 U.S. 213 (1921); *Chipman, Ltd.* v. *Thomas B. Jeffery Co.*, 251 U.S. 373, 379 (1920). On a consent theory, jurisdiction would continue. *Washington ex rel Bond & Goodwin & Tucker* v. *Superior Court*, 289 U.S. 361, 364 (1933).

[15] Solicitation of business alone was inadequate to constitute "doing business," *Green* v. *Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907), but when connected with other activities would suffice to confer jurisdiction. *International Harvester Co.* v. *Kentucky*, 234 U.S. 579 (1914). *See* the survey of cases by Judge Hand in *Hutchinson* v. *Chase and Gilbert*, 45 F.2d 139, 141–142 (C.A. 2, 1930).

fective to enable a State to acquire jurisdiction over the foreign corporation.[16]

The rationales and premises of these cases were swept away in *International Shoe Co.* v. *Washington*,[17] although, of course, the results in many of them would stand on the basis of the "minimum contacts" analysis there adopted. International Shoe, a foreign corporation, had not been issued a license to do business in the State, but it systematically and continuously employed a force of salesmen, residents thereof, to canvass for orders therein, and was held suable in Washington for unpaid unemployment compensation contributions in respect to such salesmen. Service of the notice of assessment personally upon one of its local sales solicitors plus the forwarding of a copy thereof by registered mail to the corporation's principal office in Missouri was deemed sufficient to apprise the corporation of the proceeding.

To reach this conclusion the Court not only overturned prior holdings to the effect that mere solicitation of patronage does not constitute doing of business in a state sufficient to subject a foreign corporation to the jurisdiction thereof,[18] but also rejected the "presence" test as begging "the question to be decided. . . . The terms 'present' or 'presence,'" according to Chief Justice Stone, "are used merely to symbolize those activities of the corporation's agent within the State which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system . . ., to require the corporation to defend the particular suit which is brought there; [and] . . . that the maintenance of the suit does not offend 'traditional notices of fair play and substantial justice'. . . . An 'estimate of the inconveniences' which would result in the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." [19] As to the scope of application to be accorded this "fair play and substantial justice" doctrine, the Court, at least verbally, concluded that ". . . so far as . . . [corporate] obligations arise out of or are connected with

[16] E.g. *Goldey* v. *Morning News*, 156 U.S. 518 (1895); *Conley* v. *Mathieson Alkali Works*, 190 U.S. 406 (1903); *Riverside Mills* v. *Menefee*, 237 U.S. 189, 195 (1915); *but see Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U.S. 602 (1899).

[17] 326 U.S. 310 (1945).

[18] This departure was recognized by Justice Rutledge subsequently in *Nippert* v. *City of Richmond*, 327 U.S. 416, 422 (1946). Inasmuch as International Shoe, in addition to having its agents solicit orders, also permitted them to rent quarters for the display of merchandise, the Court could have utilized *International Harvester Co.* v. *Kentucky*, 234 U.S. 579 (1914), to find it was "present" in the State.

[19] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316–317 (1945).

activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." [20] Read literally, these statements coupled with the terms of the new doctrine lead to a reversal of former decisions which: (1) nullified the exercise of jurisdiction by the forum State over actions arising outside the State and brought by a resident plaintiff against a foreign corporation doing business therein without having been legally admitted and without having consented to service of process of a resident agent; and (2) exempted a foreign corporation, which has been licensed by the forum State to do business therein and has consented to the appointment of a local agent to accept process, from suit on an action not arising in the forum State and not related to activities pursued therein.

By an extended application of the logic of the position, a majority of the Court, in *Travelers Health Assn.* v. *Virginia ex rel. State Corp. Comm.*[21] ruled that, notwithstanding that it solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever, a foreign mail order insurance company had through its policies developed such contacts and ties with Virginia residents that the State, by forwarding notice to the company by registered mail only, could institute enforcement proceedings under its Blue Sky Law leading to a decree ordering cessation of business pending compliance with that act. The due process clause was declared not to "forbid a State to protect its citizens from such injustice" of having to file suits on their claims at a far distant home office of such company, especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.[22] Like-

[20] Id., 319.

[21] 339 U.S. 643 (1950). The decision was 5-to-4 with one of the majority Justices also contributing a concurring opinion. Id., 651 (Justice Douglas). The possible significance of the concurrence is that it appears to disagree with the implication of the majority opinion, id., 647–648, that a State's legislative jurisdiction and its judicial jurisdiction are coextensive. Id., 652–653 (distinguishing between the use of the State's judicial power to enforce its legislative powers and the judicial jurisdiction when a private party is suing). See id., 659 (dissent).

[22] Id., 647–649. The holding in *Minnesota Commercial Men's Assn.* v. *Benn*, 261 U.S. 140 (1923), that a similar mail order insurance company could not be viewed as doing business in the forum State and that the circumstances under which its contracts with forum State citizens, executed and to be performed in its State of incorporation, were consummated could not support an implication that the foreign company had consented to be sued in the forum State, was distinguished rather than formally overruled. Id., 339 U.S. 647. In any event, *Benn*, although unmentioned in the opinion, could not survive *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957).

wise, under a California statute, subjecting foreign mail order insurance companies to suit in California on insurance contracts with residents thereof, petitioner was enabled to obtain a valid judgment in a California court against a Texas insurer served only by registered mail.[23] The contract between the company and the insured specified that Austin, Texas, was the place of "making" and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the State, no evidence had been presented that it had solicited anyone other than this insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. "The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." [24]

"Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." [25] However, during the same Term, the Court found *in personam* jurisdiction lacking for the first time since *International Shoe* and after a long period of declining to review the exercise of state court jurisdiction the Court has now pronounced firm due process limita-

[23] *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957).

[24] Id., 223. The Court also noticed the proposition that the insured could not bear the cost of litigation away from home as well as the insurer. *See also Perkins* v. *Benguet Consolidating Mining Co.*, 342 U.S. 437 (1952), a case too atypical on its facts to permit much generalization but which does appear to verify the implication of *International Shoe* that *in personam* jurisdiction may attach to a corporation even where the cause of action does not arise out of the business done by defendant in the forum State, as well as to state, in dictum, that the mere presence of a corporate official within the State on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and service were made on him within the State. Id., 444–445. The Court held that the State could, but was not required to, assert jurisdiction over a corporation owning gold and silver mines in the Philippines but temporarily (because of the Japanese occupation) carrying on a part of its general business in the forum State, including directors' meetings, business correspondence, banking, and the like, although it owned no mining properties in the State.

[25] *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 222 (1957). An exception exists with respect to *in personam* jurisdiction in domestic relations cases, at least in some instances. E.g., *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957) (holding that sufficient contacts afforded Nevada *in personam* jurisdiction over a New York resident wife for purposes of dissolving the marriage but Nevada did not have jurisdiction to terminate the wife's claims for support).

tions. Thus, in *Hanson* v. *Denckla*,[1] the issue was whether Florida courts obtained through use of ordinary mail and publication jurisdiction over corporate trustees of property the subject of a contest over a will entered into and, upon death of the testator, probated in Florida, the trustees being resident in Delaware and being indispensable parties with claimants who were resident in Florida and who had been personally served. Noting the trend in enlarging the ability of the States to obtain *in personam* jurisdiction over absent defendants, the Court denied that the States could exercise nationwide *in personam* jurisdiction and said that "it would be a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." [2] The Court recognized that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the due process clause. The due process restrictions did more than guarantee immunity from inconvenient or distant litigation. "They are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him." The only contacts the corporate defendants had had in Florida consisted of a relationship with the individual defendants. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case." [3]

[1] 357 U.S. 235 (1958). The decision was 5-to-4. *See* id., 256 (Justice Black dissenting), 262 (Justice Douglas dissenting).

[2] Id., 251. In dissent, Justice Black observed that "of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here." Id., 260.

[3] Id., 251, 253–254. Justice Black argued that the relationship of the nonresident defendants, of the subject of the litigation to the forum State, upon an analogy of choice of law and *forum non conveniens*, made Florida the natural and constitutional basis for asserting jurisdiction. Id., 258–259. The Court has numerous times asserted that contacts sufficient for the purpose of designating a particular State's law as appropriate may be insufficent for the purpose of asserting jurisdiction. See *Shafer* v. *Heitner*, 433 U.S. 186, 215 (1977); *Kulko* v. *Superior Court*, 436 U.S. 84, 98

In *World-Wide Volkswagen Corp.* v. *Woodson*,[4] the Court applied its "minimum contacts" test to preclude the assertion of jurisdiction over two foreign corporations with respect to an accident that had occurred in the forum State. Plaintiffs sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile, which they had purchased the previous year in New York, while they were New York residents, and which they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defendants. They (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the State's laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the State, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. The unilateral action of the purchasers in driving the car to Oklahoma was insufficient to create the kinds of requisite contacts. While it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability is relevant only insofar as "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." [5] Further, "whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them." [6] Thus, defendant must, as the Court said in *Denckla*, "purposefully [avail] itself of the privilege of conducting activities within the forum State," [7] if not by carrying on business there within the constitutional sense, at least by delivering "its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." [8]

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(1978); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294–295 (1980). On the due process limits on choice of law decisions, *see Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981).

[4] 444 U.S. 286 (1980).

[5] Id., 297.

[6] Id., 299.

[7] *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1985), quoted in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

[8] Id., 298. Of the three dissenters, Justice Brennan argued that the "minimum contacts" test was obsolete and that jurisdiction should be predicated upon the balancing of the interests of the forum State and plaintiffs against the actual burden imposed on defendant, id., 299, while Justices Marshall and Blackmun applied the test and found jurisdiction because of the foreseeability of defendants that a defec-

***Actions in Rem: Proceedings Against Land.***—The basis of *in rem* jurisdiction is the power of a State to determine title to all property, whether tangible or intangible, located within its borders.[9] Unlike jurisdiction *in personam*, a judgment entered by a court with *in rem* jurisdiction does not bind the defendant personally but determines the title to or status of only the property in question.[10] Proceedings brought to register title to land,[11] to condemn[12] or confiscate[13] real or personal property, or to administer a decedent's estate[14] are typical *in rem* actions. Due process is satisfied by seizure of the *res* and notice to all who have or may have interests therein.[15] It was formally the case that in *in rem* actions a court could acquire jurisdiction over nonresidents by mere constructive service of process,[16] under the theory that property was always in possession of its owners and that seizure would afford them notice, inasmuch as they would keep themselves apprised of the state of their property. That this was a fiction not satisfying the requirements of due process has been established and, whatever the nature of the proceeding, notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.[17]

Although the Court's holding in *Shaffer* v. *Heitner*[18] "that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in *International Shoe*"[19] requires an assessment of all decided cases based upon now disavowed tests, it does not appear that as to *in rem* jurisdiction over property the results will appreciably change. "[T]he presence of property in a State may bear on the existence of jurisdic-

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tive product of theirs might cause injury in a distant State and because the defendants had entered into an interstate economic network. Id., 313.

[9] *Arndt* v. *Griggs*, 134 U.S. 316, 320–321, 323 (1890); *Pennoyer* v. *Neff*, 95 U.S. 714 (1878).

[10] *Boswell's Lessee* v. *Otis*, 9 How. (50 U.S.) 336, 348 (1850).

[11] *American Land Co.* v. *Zeiss*, 219 U.S. 47 (1911); *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Chief Justice Holmes), *app. dismd.*, 179 U.S. 405 (1900).

[12] *Huling* v. *Kaw Valley Ry. & Improvement Co.*, 130 U.S. 559 (1889).

[13] *The Confiscation Cases*, 20 Wall. (87 U.S.) 92 (1874).

[14] *Clarke* v. *Clarke*, 178 U.S. 186 (1900); *Riley* v. *New York Trust Co.*, 315 U.S. 343 (1942).

[15] *Pennoyer* v. *Neff*, 95 U.S. 714 (1878).

[16] *Arndt* v. *Griggs*, 134 U.S. 316 (1890); *Ballard* v. *Hunter*, 204 U.S. 241 (1907); *Security Savings Bank* v. *California*, 263 U.S. 282 (1923).

[17] *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956); *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972).

[18] 433 U.S. 186 (1977).

[19] Id., 212.

tion by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State." [20] Thus, for "true" *in rem* actions, the old results likely still prevail.

***Actions in Rem: Attachment Proceedings.***—Although the practice goes back to colonial times, *Pennoyer* v. *Neff* [21] was also the most relevant case for a long time respecting the power of a State to protect its citizens by exercising its jurisdiction over real and personal property situated within its borders belonging to a nonresident and permitting an appropriation of the same in attachment proceedings to satisfy a debt owed by the nonresident to one of its citizens or to settle a claim for damages founded upon a wrong inflicted on the citizen by the nonresident. Being neither present within the State nor domiciled therein, the nonresident defendant could not be served personally and any judgment in money obtained against him would be unenforceable. The solution was a form of *in rem* proceeding, sometimes called "*quasi in rem*," involving a levy of a writ of attachment on the local property of the defendant, of which proceeding the non-resident need be notified merely by publication,[22] and satisfaction of the judgment from the property attached; if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum State, as where

[20] Id., 207–208 (footnote citations omitted). The Court also suggested that the State would usually have jurisdiction in cases such as those arising from injuries suffered on the property of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that controversy. Ibid.

[21] 95 U.S. 714 (1878). *Cf. Pennington* v. *Fourth Natl. Bank*, 243 U.S. 269, 271 (1917); *Corn Exch. Bank* v. *Comr.*, 280 U.S. 218, 222 (1930); *Endicott Co.* v. *Encyclopedia Press*, 266 U.S. 285, 288 (1924).

[22] This theory of notice was disavowed sooner than the theory of jurisdiction. *Supra*, *p.* 1616.

the property was related to the matter sued over.[23] In others, the question was more disputed, as in the famous case which the property subject to attachment was the obligation of the defendant's insurance company to defend and pay the judgment.[24] But the extension of the principle in *Harris* v. *Balk* [25] squarely raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. Apparently adventitiously, Harris, also a North Carolina resident and owing Balk an amount of money, was found passing through Maryland by the Maryland resident and his debt to Balk was attached to satisfy the debt owed to the Marylander. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris defended that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense, ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid.[1]

*Harris* v. *Balk* was overruled in *Shaffer* v. *Heitner*,[2] in which the Court held that the "minimum contacts" test of *International Shoe* applied to all *in rem* and *quasi in rem* actions. The case arose under a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their "property" within Delaware, the property consisting of shares of corporate stock and options to stock in the defendant corporation, the stock being considered to be in Delaware because of the incorporation in Delaware, although none of the certificates representing the seized stocks was physically present in Delaware. The reason for applying the same test as is applied in *in personam* cases, the Court said, "is simple and straightforward. It is premised on recognition that '[t]he phrase "judicial jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.' " [3] Thus, "[t]he recog-

[23] *Atkinson* v. *Superior Court*, 49 Cal. 2d 338, 316 P. 2d 960 (1957), *ap. dismd*, 357 U.S. 569 (1958) (debt seized in California was owed to a New Yorker, but it had arisen out of transactions in California involving the New Yorker and the California plaintiff).

[24] *Seider* v. *Roth*, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966).

[25] 198 U.S. 215 (1905).

[1] *Compare New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916) (action purportedly against property within State, proceeds of an insurance policy, was really an *in personam* action against claimant and claimant not having been served the judgment is void). *But see Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

[2] 433 U.S. 186 (1977).

[3] Id., 207 (internal quotation from Restatement (Second) of Conflict of Laws 56, Introductory Note (1971)).

nition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' " [4]

A further tightening of jurisdictional standards occurred in *Rush* v. *Savchuk*.[5] The plaintiff was injured in a one-automobile accident in Indiana while a passenger in an automobile driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the forum.[6] *Rush* thus resulted in the demise of the controversial *Seider* v. *Roth* doctrine, which lower courts had struggled to save after *Shaffer* v. *Heitner*.[7]

***Actions in Rem: Estates, Trusts, Corporations.***—Probate administration, being in the nature of a proceeding *in rem*, is one to which all the world is charged with notice.[8] Generally, probate will be opened in the proper court of the decedent's domicile, and as to the assets in that State the probate judgment is *in rem* and determinative as to all; insofar as it affects property, land or personalty, beyond the State, the judgment is *in personam* and can bind only parties thereto or their privies.[9] That is, the full faith and credit

[4] Ibid. The characterization of actions *in rem* as being not actions against a *res* but against persons with interests merely reflects Justice Holmes insight in *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71, 76-77, 55 N.E., 812, 814, *app. dismd.*, 179 U.S. 405 (1900).

[5] 444 U.S. 320 (1980).

[6] Id. 328-330. In dissent, Justices Brennan and Stevens argued that what the state courts had done was the functional equivalent of direct-action statutes. Id., 333 (Justice Stevens); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 299 (1980) (Justice Brennan). The Court, however, refused so to view the Minnesota garnishment action, saying that "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee." Id., 330-331. Presumably, the comment is not meant to undermine the validity of such direct-action statutes, which was upheld in *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), a choice-of-law case rather than a jurisdiction case.

[7] *Supra*, p. 1618 n. 24. *See O'Conner* v. *Lee-Hy Paving Corp.*, 579 F.2d 194 (C.A.2), *cert. den.*, 439 U.S. 1034 (1978).

[8] *Goodrich* v. *Ferris*, 214 U.S. 71, 80 (1909); *McCaughey* v. *Lyall*, 224 U.S. 558 (1912).

[9] *Baker* v. *Baker, Eccles & Co.*, 242 U.S. 394 (1917); *Riley* v. *New York Trust Co.*, 315 U.S. 343 (1942).

clause and statute would not prevent an attack in the forum of the situs of the property on the first court's finding of domicile as a predicate to deciding the disposition of the property.[10] The difficulty of characterization of the existence of the *res* in a particular jurisdiction is illustrated by the *in rem* aspects of *Hanson* v. *Denckla*.[11] There, the decedent, while a resident of Pennsylvania, created a trust with a Delaware corporation as trustee. She reserved the power to appoint the remainder, after her reserved life estate, either by testamentary disposition or by *inter vivos* instrument. After she moved to Florida, she executed a new will and a new power of appointment under the trust, which did not satisfy the requirements for testamentary disposition under Florida law. Upon her death, dispute arose as to whether the property passed pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will. While the Florida courts had *in personam* jurisdiction over individual defendants, they attempted to assert *in rem* jurisdiction over the Delaware corporation. Asserting the old theory that a court's *in rem* jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States,"[12] i.e., whether the court has jurisdiction over the thing, the Court thought it clear that the trust assets that were the subject of the suit were located in Delaware and thus the Florida courts had no *in rem* jurisdiction. The Court did not expressly consider whether the *International Shoe* test should apply to such *in rem* jurisdiction, as it has now held it generally must, but it did briefly consider whether Florida's interests arising from its authority to probate and construe its domiciliary's will, under which the foreign assets might pass were a sufficient basis of *in rem* jurisdiction and decided they were not.[13] The effort of *International Shoe* in this area is still to be discerned.

The old *Pennoyer* rule, that seizure of property was sufficient to give notice to nonresident or absent defendants, was likewise applied in statutory proceedings for the forfeiture of abandoned property. Judgments in proceedings to determine succession to property in escheat were held binding on all when personal service of summons was made on all known claimants and constructive notice by

[10] Id., 353.

[11] 357 U.S. 235 (1957). The *in personam* aspect of this decision is considered *supra, p.* 1614.

[12] Id., 246.

[13] Id., 247–250. The four dissenters, Justices Black, Burton, Brennan, and Douglas, believed that the transfer in Florida of $400,000 made by a domiciliary and affecting beneficiaries, almost all of whom lived in that State, gave rise to a sufficient connection with Florida to support an adjudication by its courts of the effectiveness of the transfer. Id., 256, 262.

publication to all claimants who were unknown or nonresident.[14] But in *Mullane* v. *Central Hanover Bank & Trust Co.*,[15] the Court held that the characterization of an action as *in rem* or *in personam* did not determine what process was due in a statutory procedure whereby a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could obtain a judicial settlement of accounts which was conclusive on all, with the only notice being publication in a local paper. Such notice by publication was necessarily sufficient as to beneficiaries whose interests or addresses were unknown to the bank, the Court held, but as to those, resident and nonresident alike, whose whereabouts were known, it was feasible to make serious efforts to notify them at least by mail to their addresses on record with the bank. The rule has been applied in the escheat situation, and the Court finding that a "contacts" test would not be workable in this field has held that, inasmuch as due process would prevent more than one State from escheating a given item of property, because of ease of administration rather than logic and jurisdiction, the State of residence shown by the last known address on a company's books would have the authority to take by escheat the uncollected claims against a corporation located in a particular State.[16]

***Notice: Service of Process.***—It is not enough, however, that a State be potentially capable of exercising control over persons and property. Before a State legitimately can exercise such power to alter private interests, its jurisdiction must be perfected by the employment of an appropriate mode of serving process deemed effective to acquaint all parties of the institution of proceedings calculated to affect their rights. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [17] Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person and has traditionally been deemed necessary in actions styled *in personam*.[18] But less

[14] *Hamilton* v. *Brown*, 161 U.S. 256 (1896); *Security Savings Bank* v. *California*, 263 U.S. 282 (1923). *See also Voeller* v. *Neilston Co.*, 311 U.S. 531 (1941).

[15] 339 U.S. 306 (1950).

[16] *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961); *Texas* v. *New Jersey*, 379 U.S. 674 (1965).

[17] *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[18] *McDonald* v. *Mabee*, 243 U.S. 90, 92 (1971).

rigorous notice procedures have been accepted, in light of history and of the practical obstacles to providing personal service in every instance, and these procedures do not carry with them the same certainty of actual notice that inheres in personal service.[19] But, whether the action be *in rem* or *in personam,* there is a constitutional minimum and if it be shown that the notice used was not reasonably calculated to provide the necessary information, its age and history will not sustain it.[20]

The function of mail, indeed, as conveying sufficient notice, has become quite established,[21] and the development of the ability of States, quite contrary to the *Pennoyer* theory, to assert *in personam* jurisdiction extraterritorially upon individuals and corporations having "minimum contacts" with the forum State, resulted in the passage of "long-arm" jurisdictional statutes under which notice was practically always by mail.[22] Other service devices, and substitutions, have been pursued and show some promise of further loosening of the concept of territoriality even while complying with minimum due process standards of notice.[23]

**The Procedure Which Is Due Process**

***The Interests Protected: Entitlements and Positivist Recognition.***—"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due

[19] *Greene* v. *Lindsey,* 456 U.S. 444, 449 (1982).

[20] In *Greene* v. *Lindsey,* 456 U.S. 444 (1982), the Court held that in light of substantial evidence that notices posted on the doors of apartments in a housing project in an eviction proceeding were often torn down by children and others before tenants ever saw them, service by posting did not comport with due process. Without requiring it, the Court observed that the mails provided an efficient and inexpensive means of communication upon which prudent men could rely and that notice by mail would provide a reasonable assurance of notice. Id., 455.

[21] E.g., *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957); *Travelers Health Assn. ex rel. State Corp. Comm.,* 339 U.S. 643 (1950).

[22] *See,* e.g., *G.D. Searle & Co.* v. *Cohn,* 455 U.S. 404, 409–412 (1982) (discussing New Jersey's "long-arm" rule, under which a plaintiff must make every effort to serve process upon someone within the State and then only if "after diligent inquiry and effort personal service cannot be made" within the State, then "service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."). *Cf. Velmohos* v. *Maren Engineering Corp.,* 83 N.J. 282, 416 A.2d 372 (1980), *vacated and remanded,* 455 U.S. 985 (1982).

[23] E.g., *Watson* v. *Employers Liability Assurance Corp.,* 348 U.S. 66 (1954) (authorizing direct action against insurance carrier rather than against the insured).

process is not infinite." [1] Whether any procedureal protections are due depends upon an analysis which is directed to determining "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." [2] Traditionally, the Court has accorded due process recognition to one's "life, liberty, or property" as determined by reference to common understanding, as embodied in the development of the common law. One's right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law for offenses against law deemed by a legislative body to be particularly heinous. One's liberty, one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.

Expansion of the understanding embodied in the "liberty and property" aspects of the clause began in the 1960s and followed an inconsistent path of acceleration and reining-in to the present. It has previously been noted that the Court's construction of "liberty" has long been much broader than would be encompassed within freedom from bodily restraint; while liberty of contract met its demise, the rise of rights of privacy, which included marital and intimate relationships, interests in one's dignity and reputational concerns, and the like, continues to lead to enlargement of the compass of the doctrine. A widening of the "property" concept in the 1960s occurred with respect to according protection to such public benefits as welfare assistance and other benefits and privileges that government conferred and that it could withdraw altogether for everyone but as to which individual recipients and claimants had to be accorded proper procedures before they could lose their entitlement. Similarly, other kinds of conditional property rights, such as the interest of an installment buyer of goods in retaining control until it could be shown he was in default, were accorded greater protection.

The key to this expansion may be found in the intertwined doctrinal strands of jurisprudential theory under which the "right-privilege" distinction was abandoned and a positivist conception of

[1] *Board of Regents* v. *Roth*, 408 U.S. 564, 569–570 (1972). Development under the Fifth Amendment's due process clause have been interchangeable. *Cf. Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

[2] *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1982).

entitlements arose. The former principle, discussed previously in the First Amendment context,[3] was pithily summarized by Justice Holmes years ago in dismissing a suit protesting the dismissal from his job of a policeman. "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [4] Most often, the assertion that one had no "vested property interest" in something was made to justify the taking of that interest or the disregarding of that interest without substantive restraints being relevant, but it was also true that it was said that if something was "only" a privilege, such as government employment [5] or some form of public assistance,[6] procedural due process guarantees were also inapplicable.[7] In other words, if government need not provide something, it could provide it with any attached conditions it might choose. This line of thought was always opposed by the "unconstitutional conditions" doctrine, under which it was said that "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." [8] Nonetheless, the two doctrines coexisted in an unstable relationship, until, in the 1960s and thereafter, the right-privilege distinction was largely shelved.[9]

Concurrently with the virtual demise of the "right-privilege" distinction, there arose the "entitlement" doctrine, under which the Court erected a barrier of procedural protections—but not substantive protections [10]—against erroneous governmental depriva-

[3] *Supra*, *pp.* 1062–1066.

[4] *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 2d 517, 522(1982).

[5] *Bailey* v. *Richardson*, 182 F.2d 46 (C.A.D.C. 1950), *aff'd. by an equally divided Court*, 314 U.S. 918 (1951); *Adler* v. *Education*, 342 U.S. 485 (1952).

[6] *Flemming* v. *Nestor*, 363 U.S. 603 (1960).

[7] *Barsky* v. *Board of Regents*, 347 U.S. 442 (1954).

[8] *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972). *See Speiser* v. *Randall*, 357 U.S. 513 (1958).

[9] *See* Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv. L. Rev. 1439 (1968). Much of the old fight had to do with imposition of conditions on admitting corporations into a State. *Cf. Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 656–668 (1981) (reviewing the cases). That the right-privilege distinction is not totally moribund is evident. *See Buckley* v. *Valeo*, 424 U.S. 1, 108–109 (1976) (sustaining qualifications for public financing of campaign to agree to abide by expenditure limitations otherwise unconstitutional); *Wyman* v. *James*, 400 U.S. 309 (1971).

[10] That is, Congress or a state legislature could simply take away part or all of the benefit. *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 174 (1980); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432–433 (1982).

tion of something it might have within its discretion bestowed. Thus, the Court found protected interests created by positive state enactments or practices; that is, the source of a right to something was ascertained not from tradition or the common law or "natural rights," but rather a property or liberty interest was discerned in the governmental statute or practice that gave rise to it. Indeed, for a time it appeared that this positivist conception of rights was going to displace the previous traditional sources.

That advent of the new doctrine may be placed in *Goldberg* v. *Kelly*.[11] The Court held that, inasmuch as termination of welfare assistance pending resolution of a controversy over eligibility may deprive an eligible receipient of the means by which to live while he waits, government must provide a pre-termination evidentiary hearing in which an initial determination of the validity of the dispensing agency's grounds for discontinuance of payment could be made. It was observed that the state agency did "not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them."[12] Provisions for loss of some benefit or privilege upon the establishing of some ground for taking it away was perceived as giving the holder a property interest entitling him to proper procedure before temination or revocation.

Therefore, a wage garnishment statute which failed to provide for notice to the garnishee and an opportunity for the making of some form of determination that the garnisher is likely to prevail before the garnishee is deprived of the use of his money for a period was held not to accord due process,[13] and neither did a repleven statute which authorized the authorities to seize goods from one simply upon the filing of an *ex parte* application and the posting of bond and the allegation that the possessor of the property was in arrears on payment on the goods and that they reverted to the seller.[14] A state motor vehicle financial responsibility law which provided that the registration and license of an uninsured motorist involved in an accident was to be suspended unless he posted security for the amount of damages claimed by an aggrieved party without affording the driver any opportunity to raise the issue of liability prior to suspension violated the due process clause.[15]

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[11] 397 U.S. 254 (1970).

[12] Id., 261–262. *See also Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (Social Security benefits).

[13] *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

[14] *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

[15] *Bell* v. *Burson*, 402 U.S. 535 (1971). *Compare Dixon* v. *Love*, 431 U.S. 105 (1977) and *Mackey* v. *Montrym*, 443 U.S. 1 (1979).

The Court's emphasis in these cases upon the importance to the claimant of retention of the rights led some lower courts to determine the application of the due process clause by assessing the weights of the interests involved and the harm done to one who lost what he was claiming. This approach, the Court held, was inappropriate. "[W]e must look not to the 'weight' but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." [16] To have a property interest in the constitutional sense, the Court held, it was not enough that one have an abstract need or desire for a benefit, that one have only a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." [17] Thus, in *Roth*, the Court held that the refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was nothing in the public university's contract, regulations,or policies that "created any legitimate claim" to reemployment.[18] On the other hand, in *Perry* v. *Sindermann*,[19] while there was no contract with a tenure provision nor any statutory assurance of it, the "existing rules or understandings" were deemed to provide a legitimate expectation independent of any contract provision, so that a professor employed for several years at a public college, in which the actual practice had the characteristics of tenure, had a protected interest. A statutory assurance was found in *Arnett* v. *Kennedy*,[20] in which the civil service laws and regulations made the continued employment subject to defeasance "only for such cause as would promote the efficiency of the service." Contrarily, in *Bishop* v. *Wood*,[21] a policeman

[16] *Board of Regents* v. *Roth*, 408 U.S. 564, 569–571 (1972) (emphasis by Court).

[17] Id., 577.

[18] Id., 576–578. The Court also held that no liberty interested was implicated, because in declining to rehire Roth the State had not made any charges against him or taken any actions that would damage his reputation or stigmatize him. Id., 572–575. For an instance of protection accorded a claimant on the basis of such an action, *see Codd* v. *Vegler*, 429 U.S. 624 (1977). *See also Bishop* v. *Wood*, 426 U.S. 341, 347–350 (1976); *Vitek* v. *Jones*, 445 U.S. 480, 491–494 (1980); *Bd. of Curators* v. *Horowitz*, 435 U.S. 78, 82–84 (1978).

[19] 408 U.S. 593 (1972). *See Leis* v. *Flynt*, 439 U.S. 438 (1979) (finding no practice or mutually explicit understanding creating interest).

[20] 416 U.S. 134 (1974).

[21] 426 U.S. 341 (1976). "On its face," the Court noted, "the ordinance on which [claimant relied] may fairly be read as conferring" a "property interest in employ-

who was a "permanent employee" under an ordinance which appeared to afford him a continuing position subject to conditions subsequent was held not to be protected by the due process clause because the federal district court had interpreted the ordinance as providing only employment at the will and pleasure of the city and the Supreme Court chose not to disturb that interpretation.

Beyond employment the Court found "legitimate entitlements" in a variety of situations. Thus, because Ohio included within its statutes a provision for free education to all residents between five and 21 years of age and a compulsory-attendance at school requirement, the State was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days.[22] "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." [23]

The most striking application of such due process analysis, to date, is *Logan* v. *Zimmerman Brush Co.*,[24] in which a state antidiscrimination law required the enforcing agency to convene a factfinding conference within 120 days of the filing of the complaint. Inadvertently, the Commission scheduled the hearing after the expiration of the 120 days and the state courts held the requirement to be jurisdictional, necessitating dismissal of the complaint. The Court held that Logan had been denied due process. His cause of action was a property interest; older cases had clearly established causes of action as property and, in any event, Logan's claim was an entitlement grounded in state law and it could be removed only "for cause." That property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.[25]

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ment . . . [and] an enforceable expectation of continued public employment." Id., 344–345. The district court's decision had been affirmed by an equally divided appeals court and the Supreme Court deferred to the presumed greater expertise of the lower court judges in reading the ordinance. Id., 345.

[22] *Goss* v. *Lopez*, 419 U.S. 565 (1975). *Cf. Carey* v. *Piphus*, 435 U.S. 247 (1978) (measure of damages for violation of procedural due process in school suspension context). *And see Bd. of Curators* v. *Horowitz*, 435 U.S. 78 (1978) (whether liberty or property interest implicated in academic dismissals and discipline, as contrasted to disciplinary actions).

[23] *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975). *See also Barry* v. *Barchi*, 443 U.S.) 55 (1979) (horse trainer's license); *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980) (Statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care.)

[24] 455 U.S. 422 (1982). A different majority of the Court also found an equal protection denial. Id., 438, 443.

[25] Id., 428–433.

Beyond statutory entitlements, the Court has looked to state decisional law to find that private utilities may not terminate service at will but only for cause, for nonpayment of charges, so that when there was a dispute about payment or the accuracy of charges, due process required the utility to follow procedures to resolve the dispute prior to terminating service.[1]

With respect to liberty, the Court has followed a somewhat more meandering path, but it has arrived at the same place. In *Wisconsin* v. *Constantineau,*[2] without discussing the source of the entitlement, it held invalid a statutory scheme by which one could be labeled an "excessive drinker" and barred from places where alcohol was served without any opportunity for a hearing and rebuttal, because of its impact upon one's reputation, honor, or integrity. But, in *Paul* v. *Davis,*[3] the Court looked exclusively to positive statutory enactments to determine whether a liberty interest was entitled to protection. Davis involved official defamation of someone—the police included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants—but the Court held that damage to reputation alone did not constitute a deprivation of any interest that the due process clause protected.[4] "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions." [5]

A number of liberty interest cases involve prisoner rights and are dealt with in the section on criminal due process. But in terms of the emphasis upon positive entitlements, it is useful to treat them briefly here. In *Meachum* v. *Fano,*[6] the Court held that a

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[1] *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1 (1978).

[2] 400 U.S. 433 (1971).

[3] 424 U.S. 693 (1976).

[4] The Court, id., 701–710, distinguished *Constantineau* as being a "reputation-plus" case. That is, it involved not only the stigmatizing of one posted but it also "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." Id., 708. How the state law positively did this the Court did not explain. But, of course, the reputation-plus concept is now well-settled. *Supra, p.* 1626 n. 18. *And see Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972).

[5] *Paul* v. *Davis* 424 U.S. 693, 711–712 (1976). In a subsequent case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected property interest. *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 9–12 (1978).

[6] 427 U.S. 215 (1976). *See also Montanye* v. *Haymes,* 427 U.S. 236 (1976).

state prisoner was not entitled to a factfinding hearing when he is transferred to a different prison in which the conditions were substantially less favorably to him, because (1) the due process clause liberty interest by itself is satisfied by the initial valid conviction which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. Under state law, he could be transferred for any reason or for no reason, and the due process clause did not mandate a different result. The decision of prison officials was not dependent upon any state of facts that would be found upon a hearing. But in *Vitek* v. *Jones*,[7] a protected entitlement interest was found. The state statute at issue permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in that facility." Because the transfer was conditioned upon a "cause" the establishment of the facts necessary to show the cause had to be done through fair procedures.

However, the *Vitek* Court also held that, independent of the statutory entitlement, the prisoner had a "residuum of liberty" in being free from the different confinement and from the stigma of involuntary commitment for mental disease that the due process clause protected. Thus, the Court has recognized, in this case and in the cases involving revocation of parole or probation,[8] a liberty interest that is separate from a positivist entitlement and which it requires proper procedures to take away. But with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures.[9]

In *Ingraham* v. *Wright*,[10] the Court, unanimously, agreed that freedom from wrongfully or excessively administered corporal punishment was a liberty interest of school children protected by the due process clause irrespective of positive state protection. "The liberty preserved from deprivation without due process included

[7] 445 U.S. 480 (1980).

[8] *Morrisey* v. *Brewer*, 408 U.S. 471 (1972); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

[9] *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979); *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458 (1981); *Jago* v. *Van Curen*, 454 U.S. 14 (1981). *See also Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (due process applies to forfeiture of good-time credits and other positivist granted privileges of prisoners).

[10] 430 U.S. 651 (1977).

the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." [11]

In *Arnett* v. *Kennedy*,[12] three Justices sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction in a new formulation. Dealing with a federal law conferring upon employees the right not to be discharged except for cause, the Justices acknowledged the prior formulation that recognized that due process rights could be created through statutory grants of entitlements, but they went on to observe that the same law withheld the procedural provisions now contended for; in other words, "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." [13] Congress (and state legislatures) could qualify the conferral of an interest the due process clause might otherwise require.

But the other six Justices, while disagreeing among themselves in other respects, rejected this attempt so to formulate the issue. "This view misconceives the origin of the right to procedural due process," Justice Powell wrote. "That right is conferred not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." [14] Yet, in *Bishop* v. *Wood*,[15] the Court appeared to come

[11] Id., 673. The family-related liberties discussed under substantive due process, as well as the associational and privacy ones, no doubt provide a fertile source of liberty interests for procedural protection. *See Armstrong* v. *Manzo*, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (unwed father could not simply be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). *See also Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977); *Little* v. *Streater*, 452 U.S. 1 (1981); *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18 (1981); *Santosky* v. *Kramer*, 455 U.S. 745 (1982).

[12] 416 U.S. 134 (1974).

[13] Id., 155 (Justices Rehnquist and Stewart and Chief Justice Burger).

[14] Id., 167 (Justices Powell and Blackmun concurring). *See* id., 177 (Justice White concurring and dissenting), 203 (Justice Douglas dissenting), 206 (Justices Marshall, Douglas, and Brennan dissenting).

[15] 426 U.S. 341 (1976). A five-to-four decision, the opinion was written by Justice Stevens, replacing Justice Douglas, and was joined by Justice Powell, who had disagreed with the theory in *Arnett*. *See* id., 350, 353 n. 4, 355 (dissenting opinions). The language is ambiguous and appears at different points to adopt both positions. *But see* id., 345, 347.

close to adopting the three-Justice *Arnett* position, the dissenters accusing the majority of having repudiated the majority position in *Arnett*, and in *Goss* v. *Lopez*,[16] while the opinion of the Court stated the expressed formulation of Justice Powell in *Arnett*, the Justice himself dissented, using language quite similar to the Rehnquist *Arnett* language. Most recently, however, first in a liberty interest case and then in a property interest case, the Court has squarely held that because " 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse action.' . . . Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest." [17] Substantive entitlements, therefore, may owe their existence to positive enactment, but the procedural protections are found in the judiciary's reading of the due process clause.

***Proceedings in Which Procedural Due Process Must Be Observed.***—While due notice and a reasonable opportunity to be heard to present one's claim or defense have been declared to be two fundamental conditions almost universally prescribed in all systems of law established by civilized countries,[18] there are certain proceedings appropriate for the determination of various rights in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. Thus, persons adversely affected by a specific law cannot challenge its validity on the ground that the legislative body or one of its committees gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." [19] Similarly,

[16] 419 U.S. 565, 573–574 (1975). *See* id., 584, 586–587 (Justice Powell dissenting).

[17] *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (quoting *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980).

[18] *Twining* v. *New Jersey*, 211 U.S. 78, 110 (1908); *Jacob* v. *Roberts*, 223 U.S. 261, 265 (1912).

[19] *Bi-Metallic Investment Co.* v. *State Bd. of Equalization*, 239 U.S. 441, 445–446 (1915). *See also Bragg* v. *Weaver*, 251 U.S. 57, 58 (1919). *And cf. Logan* v. *Zimmerman Brush Co.*, 445 U.S. 422, 432–433 (1982).

when an administrative agency engages in a legislative function, as, for example, when in pursuance of statutory authorization it drafts regulations of general application affecting an unknown number of persons, it need not, any more than does a legislative assembly, afford a hearing prior to promulgation.[20] On the other hand, if a regulation, sometimes denominated an "order," is of limited application, that is, affects the property or interests of specific named or namable individuals or an identifiable class of persons, the question whether notice and hearing is prerequisite and, if so, whether it must precede such action becomes a matter of greater urgency and must be determined by evaluation of the factors discussed herein.[21]

"It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process."[22] In one of the initial decisions construing the due process clause (this of the Fifth Amendment), the Court upheld the actions of the Secretary of the Treasury, acting pursuant to statute, to obtain from a collector of customs a substantial amount of money on which it was claimed he was in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and remitting him to suit, the statute waiving the immunity of the United States, for recovery of his property upon proof that he had not withheld funds from the Treasury. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usuage in the United States and was thus sustainable.[23] In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issued notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each

[20] *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973).

[21] Id., 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). *See Londoner* v. *City of Denver*, 210 U.S. 373 (1908).

[22] *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 426–247 (1944).

[23] *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272 (1856).

stockholder, by affidavit of illegality, to contest his liability for such an assessment. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.[24]

Consistent with the due process clause, a State may not enforce a judgment against a party named in the proceeding without having given him an opportunity to be heard sometime before final judgment is entered.[25] With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment. The person may be remitted to other actions initiated by him[1] or an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.[2] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.[3]

***When Is Process Due.***—"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[4]

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[24] *Coffin Brothers & Co.* v. *Bennett*, 277 U.S. 29 (1928).

[25] *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 476 (1918); *Baker* v. *Baker, Eccles & Co.*, 242 U.S. 294, 403 (1917); *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U.S. 230, 236 (1900).

[1] *Lindsey* v. *Normet*, 405 U.S. 56, 65–69 (1972). However, if one would suffer too severe an injury between the doing and the undoing, he may avoid the alternative means. *Stanley* v. *Illinois*, 405 U.S. 645, 647 (1972).

[2] *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932). *Compare Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429–430, 432–433 (1982).

[3] *Saunders* v. *Shaw*, 244 U.S. 317 (1917).

[4] *Goldberg* v. *Kelly*, 397 U.S. 254, 262–263 (1970), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring).

"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." [5] Due process application, as has been noted, depends upon the nature of the interest; the form of the due process to be applied is determined by the weight of that interest balanced against the opposing interests. The currently prevailing standard is that formulated in *Mathews* v. *Eldridge*.[6] "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

Whereas, in *Goldberg* v. *Kelly*,[7] the effect of termination of welfare benefits could be "devastating," a matter of loss of food and shelter, thus mandating a pre-deprivation hearing, the termination of Social Security benefits would be considerably different, inasmuch as they are not based on financial need and a terminated recipient would be able to apply for welfare if need be; moreover, the determination of ineligibility more often with respect to Social Security benefits turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, which in *Goldberg* was found significant. Finally, the administrative burden and other societal costs involved in giving everyone a pre-termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.[8]

Application of the standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. For example, the previous cases had focused upon the interests of the holders of the property is not being unjustly deprived of the goods and funds in their possession, in requiring pre-deprivation hearings. The newer cases looked to the interests of creditors as well. "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the

[5] *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 894-895 (1961).

[6] 424 U.S. 319, 335 (1976).

[7] 397 U.S. 254, 264 (1970).

[8] *Mathews* v. *Eldridge*, 424 U.S. 319, 339-349 (1976).

due process question must take account not only of the interests of the buyer of the property but those of the seller as well." [9]

Thus, *Sniadach*, mandating a pre-deprivation hearing before wages may be garnished, is apparently to be limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.[10] *Fuentes*, which extended the *Sniadach* principle to all "significant property interests" and thus mandated pre-deprivation hearings, has been limited, so that when goverment provides certain procedural protections in structuring the *ex parte* judicial determinations that seizure should take place and provides for a prompt and adequate post-deprivation (but pre-judgment) hearing, the due process clause is satisfied.[11] To be valid, a law must require, as a precondition to invoking state aid to sequester, garnish, or otherwise seize property of an alleged defaulting debtor that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, and not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity for an adversary hearing must be assured promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.[12] There the matter for the

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[9] *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 604 (1975). *See also* id., 623 (Justice Powell concurring), 629 (Justices Stewart, Douglas, and Marshall dissenting). Justice White, who wrote *Mitchell* and included the balancing language in his dissent in *Fuentes* v. *Shevin*, 407 U.S. 67, 99–100 (1972), did not repeat it in *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975), but it presumably underlies the reconciliation of *Fuentes* and *Mitchell* in the latter case and the application of *Di-Chem*.

[10] *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601, 611 n. 2 (1975) (Justice Powell concurring). The majority opinion draws no such express distinction, see id., 605–606, rather emphasizing that *Sniadach-Fuentes* do require observance of *some* due process procedural guarantees, *but see Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 614 (1974) (opinion of the Court by Justice White emphasizing the wages aspect of the earlier case).

[11] *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975). *Fuentes* was a decision of uncertain viability from the beginning, inasmuch as it was four-to-three; argument had been heard prior to the date Justices Powell and Rehnquist joined the Court and it was issued after they began sitting, the two of them not participating. *See Di-Chem*, *supra*, 616–619 (Justice Blackmun dissenting); *Mitchell*, *supra*, 635–636 (Justice Stewart dissenting).

[12] *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 615–618 (1974), and id., 623 (Justice Powell concurring). *And see Arnett* v. *Kennedy*, 416 U.S. 134, 188 (1974) (Justice White concurring in part and dissenting in part). It should be noted that the standards reflect a parsing of the positions of three different sets of Justices. Justices Brennan, Stewart, and Marshall believed preseizure hearings are mandated; Chief Justice Burger and Justices Blackmun and Rehnquist do not believe the due process clause is applicable to determine when and whether a hearing takes place; Justices White and Powell believed, with some differences of emphasis between them, that prompt postseizure hearings satisfy due process. On Justice Stevens, *see Ingraham* v.

moment at least rests. More recent efforts to litigate challenges to seizures prior to hearings have been aborted by findings of "no state action" and the only case in which state action was found resulted in a remand to try the case.[13]

Similarly, applying the tripartite test of *Mathews* v. *Eldridge*, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination require the provision of some minimum pretermination notice and opportunity to respond, although there need not be a formal adversary hearing, followed by a full post-termination hearing complete with all the procedures normally accorded and back pay if the employee is successful.[14] In other cases, hearings of even minimum procedures have been dispensed with when what is to be established is so pro forma or routine that the likelihood of error is very small.[15] In the case dealing with the negligent state failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing prior to dismissal of his action with the agency to pass upon the merits of his claim.[16]

In another respect, the balancing standard has resulted in an alternation of previously existing law, requiring neither a pre- nor post-termination hearing in some instances when the State affords the claimant an alternative remedy, such as a judicial action for damages. Thus, passing on the infliction of corporal punishment in the public schools, a practice which implicated protected liberty interests, it was held that the existence of common-law tort remedies

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*Wright*, 430 U.S. 651, 700 (1977) (dissenting). The matter is further complicated by the existence of some older cases permitting attachment of certain properties, which seemed at first to be disapproved but which now appear to be accepted. *Ownbey* v. *Morgan*, 265 U.S. 94 (1921), *and McKay* v. *McInnes*, 279 U.S. 820 (1929), *discussed and approved in Mitchell, supra*, 613–615, *and Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981).

[13] *Compare Flagg Brothers* v. *Brooks*, 436 U.S. 149 (1978), *with Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982).

[14] *Arnett* v. *Kennedy*, 416 U.S. 134, 170–171 (1974) (Justice Powell concurring), and id., 195–196 (Justice White concurring in part and dissenting in part). In *Barry* v. *Barchi*, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured.

[15] E.g., *Dixon* v. *Love*, 431 U.S. 105 (1977) (when suspension of drivers' license is automatic upon conviction of a certain number of offenses, no hearing is required because there can no dispute about facts).

[16] *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982).

for wrongful or excessive administration of punishment, plus the context in which it was administered, that is, the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visability of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment, made reasonably assured the improbability that a child would be punished without cause or excessively. The Court did not inquire about the availability of judicial remedies for such violation in the State in which the case arose.[17]

More expressly adopting the tort remedy theory, the Court in *Parratt* v. *Taylor*[18] held that the loss of a prisoner's mail ordered goods through the negligence of prison officials constituted a deprivation of property but the State's post-deprivation tort-claims procedure afforded adequate due process. The due process clause does not protect against all loss, the Court thought, only against loss without due process of law. When a state officer or employee acts negligently, there is no way that the State can provide a pre-termination hearing; the real question, therefore, is what kind of post-deprivation hearing is sufficient. When the action complained of is the result of the unauthorized failure of agents to follow established procedure and there is no contention that the procedures themselves are inadequate, the due process clause is satisfied by the provision of a judicial remedy to provide redress, which the claimant must initiate.[19] When, in *Logan* v. *Zimmerman Brush Co.*,[20] it was contended that the failure of the state agency to observe a jurisdictional time limit was the sort of negligence for which there was provided a state tort remedy, the Court replied that the earlier case had concerned only the random and unauthorized act of an employee, whereas here "it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference—whether the Commission's action is taken through negli-

[17] *Ingraham* v. *Wright*, 430 U.S. 651, 680–682 (1977). In *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 19–22 (1987), the Court rejected the argument that common-law remedies were sufficient to obviate the hearing requirement, on the basis that they could not remedy the particular deprivation and on their inadequacy in any event.

[18] 451 U.S. 527 (1981).

[19] Id., 541, 543–544.

[20] 455 U.S. 422, 435–436 (1982). The Court also emphasized that a post-deprivation hearing in the context of this case would be inadequate. "That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole." Id., 436–437.

gence, maliciousness, or otherwise." Apparently, post deprivation procedures, such as tort remedies, will satisfy due process when the loss of property [21] is attributable to individual misconduct, and perhaps only individual negligence, and they will not satisfy due process if the loss is the result of established state procedures. Inasmuch as state tort remedies are generally available for much if not all of the wrongs that the procedures mandated by the due process clause are designed to avoid,[22] extensive recurrence of the *Parratt* v. *Taylor* analysis could severely limit the application of the clause to insure reasonable hearings.

In "rare and extraordinary situations," [23] where harm to the public is immediately threatened which only summary action can prevent and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a full later hearing. An example would be the seizure prior to a hearing of contaminated foods or drugs or other such commodities to protect the consumer.[24] There are no doubt other situations, such as the collection of governmental revenues [25] and the seizure of enemy property in wartime.[1] The Government in a national security context was permitted to exclude a short-order cook employed by a concessionaire from a Naval Gun Factory without notice and an opportunity to be heard, but the basis of the five-to-four decision is unclear.[2] The Court expressly disavowed a right-privilege distinction, but twice it seems to revert to it; [3] on the other hand, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the concessionaire's other premises—with the Government's interest in conducting a high-security program.[4]

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[21] *Parratt* was a property loss case and while *Ingraham* was a liberty case the holding there was not that, standing alone, a tort remedy was an adequate process. It is not clear, therefore, that a tort remedy could ever be an adequate substitute for some kind of hearing in a liberty loss situation.

[22] Although many States retain sovereign immunity in their own courts, others have done away with it. Employees and officers may be accorded a wide range of immunities for their official actions, which is within the State's power and does not deny due process. *Martinez* v. *California*, 444 U.S. 277, 280–283 (1980).

[23] *Board of Regents* v. *Roth*, 408 U.S. 564, 570 n. 7 (1972); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971). *See Parratt* v. *Taylor*, 451 U.S. 527, 538–540 (1981).

[24] *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908); *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594 (1950). *See also Fahey* v. *Mallonee*, 332 U.S. 245 (1948). *Cf. Mackey* v. *Montrym*, 443 U.S. 1, 17–18 (1979).

[25] *Phillips* v. *Commissioner*, 283 U.S. 589, 597 (1931).

[1] *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 566 (1921). *See also Bowles* v. *Willingham*, 321 U.S. 503 (1944).

[2] *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961).

[3] Id., 894, 895, 896.

[4] Id., 896–898. *See Goldberg* v. *Kelly*, 397 U.S. 254, 263 n. 10 (1970); *Board of Regents* v. *Roth*, 408 U.S. 564, 575 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134, 152 (1974)

Finally, one may waive his due process rights, though as with other constitutional rights the waiver must be knowing and voluntary.[5]

***The Requirements of Due Process.***—Bearing in mind that due process tolerates variances in form "appropriate to the nature of the case," [6] it is nonetheless possible to indicate generally the basic requirements. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." [7] "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified depreviation of life, liberty, or property." [8] The rules "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.[9] Thus, after the determination of the existence of a protected interest at issue, it must still be determined what procedure is adequate.

(1) *Notice.* "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [10] The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.[11] Ordinarily, service of the notice must be reasonably structured to see that the person to whom it is directed receives it.[12]

(2) *Hearing.* "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest." [13]

(plurality opinion), and id., 181–183 (Justice White concurring in part and dissenting in part).

[5] *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972). *See also Fuentes* v. *Shevin*, 407 U.S. 67, 94–96 (1972).

[6] *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

[7] *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976).

[8] *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978).

[9] *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. *Carey* v. *Piphus*, 435 U.S. 247, 266–267 (1978); *Marshall* v. *Jerrico*, 446 U.S. 238, 242 (1980).

[10] *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

[11] *Goldberg* v. *Kelly*, 397 U.S. 254, 267–268 (1970).

[12] *Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965); *Robinson* v. *Hanrahan*, 409 U.S. 38 (1974); *Greene* v. *Lindsey*, 456 U.S. 444 (1982).

[13] *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976).

"Parties whose rights are to be affected are entitled to be heard." [14] The notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [15] "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment. . . ." [16] The Court has in recent years developed a complex calculus to determine whether a hearing should precede the deprivation or whether a prompt post-deprivation hearing would be adequate. Generally, where the loss, even temporarily, would be severe or catastrophic, the hearing must come first; [17] where a temporary deprivation would be less severe and the opposing interest is important, the hearing may come later,[18] so long as it is promptly assured.[19] Too, the nature of what must be shown will be taken into account. Where the showing to be established is largely formal or subject to substantial documentary evidence, a post-termination hearing may suffice,[20] while in cases in which the evidence is largely subjective and dependent upon the personal appearance of the claimant the hearing must ordinarily precede the loss and the circumstance may require a more highly structured proceeding.[21] Sometimes, because of the nature of the opposing interest and the circumstances of the determination, the hearing need involve only minimal formality.[22] The hearing requirement does not depend upon an advance showing that the claimant will prevail at such a hearing.[23] While written presentations may be acceptable in some

[14] *Baldwin* v. *Hale*, 1 Wall. (68 U.S.) 223, 233 (1863).

[15] *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

[16] *Fuentes* v. *Shevin*, 407 U.S. 67, 80–81 (1972). *See Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170–171 (1951) (Justice Frankfurter concurring).

[17] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

[18] *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Barry* v. *Barchi*, 443 U.S. 55 (1979).

[19] Id., 66.

[20] *Mathews* v. *Eldridge*, 424 U.S. 319, 343–345 (1976); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *Mackey* v. *Montrym*, 443 U.S. 1, 13–17 (1979); *Barry* v. *Barchi*, 443 U.S. 55, 65–66 (1979).

[21] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[22] *Goss* v. *Lopez*, 419 U.S. 565 (1975) (temporary suspension of student from school). *See also Bd. of Curators* v. *Horowitz*, 435 U.S. 78 (1978).

[23] *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

situations, in others the issue of veracity may be present which will necessitate oral presentation or oral examination of witnesses, or the petitioner may not have the ability to present his case in writing.[24]

(3) *Impartial Tribunal.* Just as in criminal and quasi-criminal cases,[25] one is entitled to "an impartial decision maker," an "essential" right.[1] "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." [2] Thus, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction.[3] But there is a "presumption of honesty and integrity in those serving as adjudicators," [4] so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. It is not, without more, a violation of due process to combine investigating and adjudicating functions in the same agency,[5] although the question of combination of functions is a substantial one in administrative law.[6] A showing of bias or of strong implications of bias was deemed made in a case in which the state optometry board, which was made up only of private practioners, was proceeding against other licensed optometrists for unprofessional conduct, because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.[7] However, the Court held that school

[24] *Goldberg* v. *Kelly*, 397 U.S. 254, 266–267 (1970); *Mathews* v. *Eldridge*, 424 U.S. 319, 343–345 (1976). *See also FCC* v. *WJR*, 337 U.S. 265, 275–277 (1949).

[25] *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955).

[1] *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970).

[2] *Marshall* v. *Jerrico*, 446 U.S. 238, 242 (1980); *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982).

[3] *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950).

[4] *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982); *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975); *United States* v. *Morgan*, 313 U.S. 409, 421 (1941).

[5] *Withrow* v. *Larkin*, 421 U.S. 35 (1975).

[6] Id., 51.

[7] *Gibson* v. *Berryhill*, 411 U.S. 564 (1973).

board members did not have such an official or personal stake in the decision as to disqualify them from making the decision whether to fire teachers who had engaged in a strike against the school system in violation of state law.[8] A lesser standard of impartiality applies to an administrative officer who acts in a prosecutorial role.[9]

(4) *Confrontation and Cross-Examination.* "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." [10] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny." [11]

(5) *Discovery.* The Court has never directly confronted this issue, but in one case it did observe in dictum. "[W]here governmental action seriously injuries an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." [12] Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so.[13] There appear to be no cases, howev-

[8] *Hortonville Joint School Dist.* v. *Hortonville Educ. Assn.*, 426 U.S. 482 (1976). *Compare Arnett* v. *Kennedy*, 416 U.S. 134, 170 n. 5 (1974) (Justice Powell), *with* id., 196–199 (Justice White), *and* 216 (Justice Marshall).

[9] *Marshall* v. *Jerrico*, 446 U.S. 238, 248–250 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Id., 249.

[10] *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). *See also ICC* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93–94 (1913); *Willner* v. *Committee on Character*, 373 U.S. 96, 103–104 (1963). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

[11] *Greene* v. *McElroy*, 360 U.S. 474, 496–497 (1959). *But see Richardson* v. *Perales*, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). *Cf. Mathews* v. *Eldridge*, 424 U.S. 319, 343–345 (1976).

[12] *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959), quoted with approval in *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970).

[13] *Recommendations and Reports of the Administrative Conference of the United States* (Washington: 1968–1970), 571.

er, holding they must, and there is some authority that they cannot absent congressional authorization.[14]

(6) *Decision on the Record.* [T]he decisionmaker's conclusion as to a recipients' eligibility must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." [15]

(7) *Counsel.* In *Goldberg* v. *Kelly*,[16] the Court held that an agency must permit the recipient to be represented by and assisted by counsel. It did not, however, decide that the agency must provide counsel for one unable to afford his own and did not decide that the agency need not do so. In the years since, the right of civil litigants in court and persons before agencies who could not afford retained counsel has excited much controversy, and while quite recently the Court has applied its balancing standard to require a case-by-case determination with respect to the right to appointed counsel the matter seems far from settled. In a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized as "an extremely important one" the parent's interest, but observed that the State's interest in protecting the welfare of children was likewise very important. The interest in correct factfinding was strong on both sides, but, the Court thought, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witness were present, and no "specially troublesome" substantive or procedural issues had been raised.[17] But what tipped the scale in the Court's decision not to require counsel in this case was the "pre-eminent generalization it drew from its precedents that an indigent has an obsolute right to appointed counsel only where he may lose his physical liberty if he loses the

[14] *FMC* v. *Anglo-Canadian Shipping Co.*, 335 F.2d 255 (C.A. 9, 1964); *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (C.A. 9), *cert. den.*, 400 U.S. 943 (1970).

[15] *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970). The exclusiveness of the record is fundamental in administrative law. *See* § 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e). However, one must show not only that the agency used *ex parte* evidence but that he was prejudiced thereby. *Market Street Ry.* v. *Railroad Comm.*, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding *ex parte* evidence).

[16] 397 U.S. 254, 270-271 (1970).

[17] *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18 (1981). The decision was a five-to-four one, Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id., 35, 59.

litigation.[18] Thus, in all other situations when liberty or property interests are present, the right of an indigent to appointed counsel is to be determined on a case-by-case basis, initially by the trial judge, subject to appellate review.[19] In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights,[20] and it is to be supposed that the counsel issue will recur.

## PROCEDURAL DUE PROCESS—CRIMINAL

### Generally

The Supreme Court's guardianship of state criminal justice systems under the due process clause has ever been one not subject to precise statement of metes and bounds. Rather, the Court in each case must ask whether the challenged practice or policy violates "a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government." [1] The question is whether a claimed right is "implicit in the concept of ordered liberty," whether it partakes "of the very essence of a scheme of ordered liberty." [2] Inevitably, judgment expresses a determination that certain practices do or do not "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." [3] More recently, the Court has eschewed as too abstract an inquiry with regard to whether some procedural safeguard was necessary before a system could be imagined which would be regarded as civilized without that safeguard. Rather, "[t]he recent cases. . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing

[18] Id., 25–27. The Court purported to draw the distinction from *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (no *per se* right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of *Mathews* v. *Eldridge*, upon which the Court (and dissent) relied relates to the importance of the interest to the person claiming the right, thus, at least in this context, reducing the value of the first *Eldridge* factor.

[19] Id., 452 U.S., 31–32. The *Mathews* v. *Eldridge* standards were expressly drafted in the context of the generality of cases and were not intended for case-by-case application *Cf.* 424 U.S. 319, 344 (1976).

[20] E.g., *Little* v. *Streater*, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the State required to be instituted); *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

[1] *Twining* v. *New Jersey*, 211 U.S. 78, 106 (1908).

[2] *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937).

[3] *Rochin* v. *California*, 342 U.S. 165, 169 (1952).

virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . [Therefore the limitations imposed by the Court on the States are] not necessarily fundamental to fairness in every criminal system that might be imagined but [are] fundamental in the context of the criminal processes maintained by the American States." [4]

Applying this analysis the Court in recent years has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—contain limitations which are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law.[5] However, the due process clause of the Fourteenth Amendment is not limited, despite Justice Black's dissenting views,[6] to those specific guarantees spelled out in the Bill of Rights but rather contains protection against practices and policies which may fall short of fundamental fairness without running afoul of a specific provision.[7]

**The Elements of Due Process**

***Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine.***—"Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." [1] Acts which are made criminal "must be defined with

[4] *Duncan* v. *Louisiana*, 391 U.S. 145, 149n. (1968).

[5] *Supra*, pp. 950–957.

[6] E.g., *In re Winship*, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan's response, see id., 372 n. 5 (concurring).

[7] Thus, *In re Winship*, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is a due process requirement. For other recurrences to due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, *see*, e.g., *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Wardius* v. *Oregon*, 412 U.S. 470 (1973); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Henderson* v. *Kibbe*, 431 U.S. 145 (1977); *Patterson* v. *New York*, 432 U.S. 197 (1977); *Taylor* v. *Kentucky*, 436 U.S. 478 (1978); *Kentucky* v. *Whorton*, 441 U.S. 786 (1979); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).

[1] *Musser* v. *Utah*, 333 U.S. 95, 97 (1948). "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and

appropriate definiteness." [2] "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." [3] Statutes which lack the requisite definiteness or specificity are commonly held "void for vagueness." Such a statute may be pronounced unconstitutional wholly, "on its face," as it were,[4] or if the statute could be applied to both prohibitable and to protected conduct and its valuable effects outweigh its potential general harm it could be held unconstitutional as applied.[5] Generally, a vague statute which regulates in the area of First Amendment guarantees will always be pronounced wholly void,[6] while one which does not reach such protected conduct will be upheld because it is applied to clearly proscribable conduct or voided as applied when the conduct is marginal and the proscription is unclear.[7]

Defective because of vagueness was a statute providing that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who had been convicted at least three times of being a disorderly person, or who had been convicted of any crime in that or any other State, is to be considered a gangster and subject to fine or imprisonment. The Court observed that neither at the common law nor by statute are the words "gang" and "gangster" given definite meaning, the enforcing agencies and the courts were free to construe broadly or narrowly the terms, and the phrase "known to be a member" was ambiguous. The statute was held void on its face, and the Court refused to allow specification of details in the particular indictment

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discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–109 (1972), quoted in *Village of Hoffman Estates* v. *The Flipside*, 455 U.S. 489, 498 (1982).

[2] *Cantwell* v. *Connecticut*, 310 U.S. 296, 308 (1940).

[3] *Winters* v. *New York*, 333 U.S. 507, 515–516 (1948). *Cf. Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972).

[4] *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Smith* v. *Goguen*, 415 U.S. 566 (1974).

[5] *Palmer* v. *City of Euclid*, 402 U.S. 544 (1971); *Village of Hoffman Estates* v. *The Flipside*, 455 U.S. 489, 494–495 (1982).

[6] *Winters* v. *New York*, 333 U.S. 507, 509–510 (1948); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

[7] E.g., *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963).

to save it, inasmuch as it is the statute, not the accusation, that prescribes the rule to govern conduct.[8]

Possibly concluding a controversy of long standing with regard to the validity of vagrancy laws as generally written,[9] a unanimous Court in *Papachristou* v. *City of Jacksonville* [10] struck down for vagueness an ordinance which punished "dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by frequenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children. . . ." The ordinance was invalid, said Justice Douglas for the Court, because it did not give fair notice, did not require specific intent to commit an unlawful act, permitted and encouraged arbitrary and erratic arrests and convictions, committed too much discretion to policemen, and made criminal activities which by modern standards are normally innocent. Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was impermissibly vague and because it encroached on the freedom of assembly was void on its face.[11] But an ordinance punishing "suspicious persons" was void only as applied to a person engaging in ambiguous conduct which it was possible to fit within the ordinance's definition.[12] A statute authorizing conviction for disorderly conduct of any person who refuses to move on upon police request and who is intent on causing inconvenience, annoyance, or alarm is not vague on its face or as applied to one interfering with police ticketing of a car for valid reasons.[13]

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[8] *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Edelman* v. *California*, 344 U.S. 357 (1953).

[9] E.g., *Winters* v. *New York*, 333 U.S. 507, 540 (1948) (Justice Frankfurter dissenting); *Edelman* v. *California*, 344 U.S. 357, 362 (1953) (Justice Black dissenting); *Hicks* v. *District of Columbia*, 383 U.S. 252 (1966) (Justice Douglas dissenting).

[10] 405 U.S. 156 (1972).

[11] *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971). Justices White and Blackmun and Chief Justice Burger dissented. Id., 617. *See also Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965). *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), voided conviction on trespass charges arising out of a sit-in at a drugstore lunch counter since the trespass statute did not give fair notice that it was a crime to refuse to leave private premises after being requested to do so.

[12] *Palmer* v. *City of Euclid*, 402 U.S. 544 (1971).

[13] *Colten* v. *Kentucky*, 407 U.S. 104 (1972).

A state statute imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed" was held to be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [14] Similarly, a statute which allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge's instruction to the jury that the defendant should only have to pay the costs if it thought him guilty of "some misconduct" though innocent of the crime with which he was charged, was found to fall short of the requirements of due process.[15] But the Court sustained as neither too vague nor indefinite a state law which provided for commitment of a psychopathic personality by probate action akin to a lunacy proceeding and which had been construed by the state court as applying to those persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.[16]

***Other Aspects of Statutory Notice.***—Conceptually related to the problem of definiteness in criminal statutes is the problem of the requisite notice a person must have that a statute commands something not be done or alternatively that unless something is done criminal liability will result. Ordinarily, it can be said that ignorance of the law affords no excuse, that everyone is presumed to know that certain things may not be done. Moreover, in other instances, the subject matter or conduct may be sufficient to alert one that there are regulatory laws which must be observed.[17] In still other instances, the requirement of "*scienter*" may take care of the problem in that there may be a statutory requirement of intent expressed through some form of the word "willful," [18] but the

[14] *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

[15] *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966).

[16] *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940).

[17] E.g., *United States* v. *Freed*, 401 U.S. 601 (1971).

[18] E.g., *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (1952); *Colautti* v. *Franklin*, 439 U.S. 379, 395 (1979). *Cf. Screws* v. *United States*, 325 U.S. 91, 101–103 (1945) (plurality opinion).

Court has so far failed in dealing with those cases involving strict liability to develop the implications of the *mens rea* requirement.[19] There remains the case of *Lambert* v. *California* [20] in which a municipal code made it a crime to remain in the city for more than five days without registering if one had ever been convicted of a felony. Emphasizing that the act of being in the city was not itself blameworthy, the Court held that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed" and voided the conviction. "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."

***Entrapment.***—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems. Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, and in other respects informers may be utilized, which may implicate several constitutional provisions. Sometimes, however, police agents may "encourage" persons to engage in criminal behavior, by seeking to buy from them or to sell to them narcotics or contraband or by seeking to determine if public employees or officers are corrupt by offering them bribes. The Court has dealt with this issue in terms of the "entrapment" defense, though it is unclear whether the basis of the defense is one of statutory construction—the legislature would not have intended to punish conduct induced by police agents—,one of supervisory authority of the federal courts to deter wrongful police conduct, or one of due process command.[21] While it has recognized the defense,

[19] E.g., *Morissette* v. *United States*, 342 U.S. 246 (1952).

[20] 355 U.S. 225, 228, 229–230 (1957).

[21] For a thorough evaluation of the basis for and the nature of the entrapment defense, see Seidman, "The Supreme Court, Entrapment, and Our Criminal Justice Dilemma," 1981 Sup. Ct. Rev. 111. The statutory basis was said to be the ground in the Court's first discussion of the issue, *Sorrells* v. *United States*, 287 U.S. 435, 446–449 (1932), and that basis remains the choice of some Justices. *Hampton* v. *United States*, 425 U.S. 484, 488–489 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). The supervisory power basis was argued by Justice Frankfurter in *Sherman* v. *United States*, 356 U.S. 369, 380 (1958) (concurring). Utilization of that power was rejected in *United States* v. *Russell*, 411 U.S. 423, 490 (1973), and by the plurality in *Hampton*, *supra*, 490. As to due process, the *Hampton* plurality, ibid, thought the due process clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some

under whatever rationale, the Court has been divided within itself with respect to the test to use to evaluate the defense. The majority approach, the so-called "subjective approach," follows a two-pronged analysis. First, the question is asked whether the offense was induced by a government agent. Second, if that is answered affirmatively, the question is asked whether the defendant was predisposed to commit the type of offense charged. If the defendant can be shown to have been ready and willing to commit the crime with which he is charged, whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement.[22] The "objective approach" disregards the defendant's predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense is available.[23] Though rejected by the Supreme Court, the objective approach has been recommended for codification by Congress and the state legislatures.[24] Typically, the cases have risen in the narcotics area,[25] but more recently, as in the "Abscam" controversy, the focus has been on public corruption and the offering of bribes to public officials.[1]

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protected right of *defendant* and inducement and encouragement could never do that; Justice Powell and Blackmun, id., 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. Id., 495 (Justices Brennan, Stewart, and Marshall); *Russell, supra*, 439 (Justices Stewart, Brennan, and Marshall).

[22] *Sorrells* v. *United States*, 287 U.S. 435, 451-452 (1932); *Sherman* v. *United States*, 356 U.S. 369, 376-378 (1958); *Masciale* v. *United States*, 356 U.S. 386, 388 (1958); *United States* v. *Russell*, 411 U.S. 423, 432-436 (1973); *Hampton* v. *United States*, 425 U.S. 484, 488-489 (1976) (plurality opinion), and id., 491 (Justices Powell and Blackmun concurring).

[23] *Sorrells* v. *United States*, 287 U.S. 435, 458-459 (1932) (separate opinion of Justice Roberts); *Sherman* v. *United States*, 356 U.S. 369, 383 (1958) (Justice Frankfurter concurring); *United States* v. *Russell*, 411 U.S. 423, 441 (1973) (Justice Stewart dissenting); *Hampton* v. *United States*, 425 U.S. 484, 496-497 (1976) (Justice Brennan dissenting).

[24] *See* American Law Institute, *Model Penal Code* (Official Draft, 1962), 2.13; National Commission on Reform of Federal Criminal Laws, *A Proposed New Federal Criminal Code* (Final Draft, 1971), 702(2).

[25] Thus, in *Sorrells* and *Sherman* government agents solicited defendants, in *Russell* the agents supplied an ingredient, which was commonly available, and in *Hampton* the agents supplied an essential and difficult to obtain ingredient.

[1] The defense was rejected as to all the "Abscam" defendants. E.g., *United States* v. *Kelly*, 707 F.2d 1460 (C.A.D.C. 1983); *United States* v. *Williams*, 705 F.2d 603 (C.A. 2, 1983); *United States* v. *Jannotti*, 673 F.2d 578 (C.A. 3), *cert. den.*, 457 U.S. 1106 (1982).

***Criminal Identification Process.***—The conduct by police of identification processes seeking to identify the perpetrators of crimes—by lineups, showups, photographic displays, and the like—can raise due process problems. For postindictment lineups and showups conducted before June 12, 1967,[2] for preindictment lineups and showups,[3] and for identification processes at which the defendant is not present,[4] the question with regard to the admissibility of an in-court identification or of testimony with regard to an out-of-court identification is whether there is "a very substantial likelihood of misidentification" and that question must be determined "on the totality of the circumstances." [5]

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." [6] But, balancing the factors that it thought furnished the guidance for decision, the Court declined to lay down a *per se* rule of exclusion of an identification because it was obtained under conditions of unnecessary suggestiveness alone, feeling that the fairness standard of due process does not require an evidentiary rule of such severity.[7]

***Initiation of the Prosecution.***—Indictment by a grand jury is not a requirement of due process and a State may proceed by information instead.[8] Due process does require that whatever the proce-

[2] *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[3] *Kirby* v. *Illinois*, 406 U.S. 682 (1972).

[4] *United States* v. *Ash*, 413 U.S. 300 (1973).

[5] *Neil* v. *Biggers*, 409 U.S. 188, 196–201 (1972); *Manson* v. *Brathwaite*, 432 U.S. 98, 114–117 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also Stovall* v. *Denno*, 388 U.S. 293 (1967); *Simmons* v. *United States*, 390 U.S. 377 (1968); *Foster* v. *California*, 394 U.S. 440 (1969); *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

[6] *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972).

[7] *Manson* v. *Brathwaite*, 432 U.S. 98, 107–114 (1977). The evaluative factors were what the *per se* rule and the less strict rule contributed to excluding unreliable eyewitness testimony from jury consideration, to deterrence of suggestive procedures, and to the administration of justice. The possibility of a *per se* rule in post-*Stovall* cases had been left open in *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972). Due process does not require that the in-court hearing to determine whether to exclude a witness' identification as arrived at improperly be out of the presence of the jury. *Watkins* v. *Sowders*, 449 U.S. 341 (1981).

[8] *Hurtado* v. *California*, 110 U.S. 516 (1884).

dure a defendant must be given adequate notice of the offense charged against him and for which he is to be tried,[9] even aside from the requirements of the Sixth Amendment. Where, of course, a grand jury is utilized, it must be fairly constituted and free from prejudicial influences.[10]

***Fair Trial.***—The provisions of the Bill of Rights now applicable to the States contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others." [11] Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." [12] Bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey* v. *Ohio* [13] it was held to violate due process to vest trial of offenders before a judge who in addition to his salary received the costs imposed on the defendant in case of conviction and because the judge was also mayor of the municipality which received part of the money collected in fines. The influence of contemptuous misbehavior in court upon the impartiality of the presiding judge who may cite for contempt and sentence contemnors has divided the Court.[14]

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[9] *Smith* v. *O'Grady*, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of "burglary with explosives" carrying a much lengthier sentence is void). *See also Cole* v. *Arkansas*, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); *In re Ruffalo*, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); *Rabe* v. *Washington*, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of context in which movie was shown which was not a provision of statute nor in the charge invalid).

[10] *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939). *See infra*, pp. 1745–1747. On prejudicial publicity, *see Beck* v. *Washington*, 369 U.S. 541 (1962).

[11] *Snyder* v. *Massachusetts*, 291 U.S. 97, 116, 117 (1934). *See also Buchalter* v. *New York*, 319 U.S. 427, 429 (1943).

[12] *Lisenba* v. *California*, 314 U.S. 219, 236 (1941).

[13] 273 U.S. 510 (1927). *See also Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). *But see Dugan* v. *Ohio*, 277 U.S. 61 (1928).

[14] E.g., *Fisher* v. *Pace*, 336 U.S. 155 (1949); *Ungar* v. *Sarafite*, 376 U.S. 575 (1964); *Holt* v. *Virginia*, 381 U.S. 131 (1965); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971);

Mob domination of a trial so as to rob the jury of its judgment on the evidence presented, is, of course, a classic due process violation.[15] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[16] A state rule permitting the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure.[17] Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom inherently has an adverse effect on the process in all circumstances, the Court has held that due process does not preclude the introduction into state criminal trials of television broadcasting facilities.[18]

It is permissible for the State to require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, but due process requires reciprocal discovery in this respect if the State so requires, necessitating that the State give defendant pretrial notice of its rebuttal evidence on the alibi issue.[19] Due process is violated when

*Johnson* v. *Mississippi*, 403 U.S. 212 (1971); *Taylor* v. *Hayes*, 418 U.S. 488 (1974). *See* generally *Illinois* v. *Allen*, 397 U.S. 337 (1970). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

[15] *Frank* v. *Mangum*, 237 U.S. 309 (1915); *Moore* v. *Dempsey*, 261 U.S. 86 (1923).

[16] *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *But see Stroble* v. *California*, 343 U.S. 181 (1952); *Murphy* v. *Florida*, 421 U.S. 794 (1975).

[17] *Estes* v. *Texas*, 381 U.S. 532 (1965).

[18] *Chandler* v. *Florida*, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that *Estes* had established a per se constitutional rule which had to be overruled, id., 583, 586, contrary to the Court's position. Id., 570–574.

[19] *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes because of the possible impairment of the presumption of innocence in the minds of the jurors.[20] Ordinary evidentiary rules of criminal trials may in some instances deny a defendant due process. Thus, the combination in a trial of two rules (1) that denied defendant the right to cross-examine his own witness, whom he had called because the prosecution would not, in order to elicit evidence exculpatory to defendant and (2) that denied defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, under all the circumstances, denied defendant his constitutional right to present his own defense in a meaningful way.[21] Even though the burden on defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction, under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence.[22] It does not deny a defendant due process to subject him initially to trial before a nonlawyer police court judge when there is a later trial *de novo* available under the State's court system.[23]

Due process would be violated by the participation of a biased or otherwise partial juror, but there is no presumption that jurors who are potentially compromised are in fact prejudiced and the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual

[20] *Estelle* v. *Williams*, 425 U.S. 501 (1976). The convicted defendant was denied *habeas* relief, however, because of failure to object at trial.

[21] *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). *See also Davis* v. *Alaska*, 415 U.S. 786 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid).

[22] *Taylor* v. *Kentucky*, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case, *Kentucky* v. *Whorton*, 441 U.S. 786 (1979), the Court reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process. The circumstances emphasized in *Taylor* included the skeletal instruction on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting jury to consider defendant's prior record and his indictment in present case as indicating guilt. *See also Sandstrom* v. *Montana*, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event State would not have carried its burden of proving guilt). *And see Cupp* v. *Naughten*, 414 U.S. 141 (1973); *Henderson* v. *Kibbe*, 431 U.S. 145, 154-155 (1973).

[23] *North* v. *Russell*, 427 U.S. 328 (1976).

bias.[24] It is not a denial of due process for the prosecution to call the jury's attention to the defendant's prior criminal record when the object is to enable the jury, which has the sentencing function as well as the guilt-determination function, once it has determined guilt or innocence and if the former, to increase the sentence which would otherwise be given under a recidivist statute.[25]

***Guilty Pleas.***—A defendant may instead of insisting that the prosecution prove him guilty plead guilty, because of the overwhelming evidence against him, perhaps because, while the evidence leaves the outcome in doubt, should he go to trial and be convicted his sentence will be more severe than if he pleads guilty, perhaps to secure some other advantage. Perhaps the defendant and his attorney engage in "plea bargaining" with the prosecution so that he is guaranteed a light sentence or he is allowed to plead to a lesser offense. While the government may not structure its system so as to coerce a guilty plea,[1] one which is entered voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.[2] The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,[3] and it is not impermissible for a prosecutor during such plea bargains to put a defendant to a hard choice, requiring him to forego his right to go to trial in return for escaping what is likely to be a much more severe penalty if he does elect to go to trial.[4]

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[24] *Smith* v. *Phillips*, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial). *See also Remmer* v. *United States*, 347 U.S. 227 (1954) (bribe offer to sitting juror); *Dennis* v. *United States*, 339 U.S. 162, 167–172 (1950) (government employees on jury).

[25] *Spencer* v. *Texas*, 385 U.S. 554 (1967).

[1] *United States* v. *Jackson*, 390 U.S. 570 (1968).

[2] *North Carolina* v. *Alford*, 400 U.S. 25 (1971); *Parker* v. *North Carolina*, 397 U.S. 790 (1970). *See also Brady* v. *United States*, 397 U.S. 742 (1970). A guilty plea will ordinarily waive challenges to alleged unconstitutional police practices occurring prior to the plea, unless defendant can show the plea resulted from incompetent counsel. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Davis* v. *United States*, 411 U.S. 233 (1973). *But see Blackledge* v. *Perry*, 417 U.S. 21 (1974). The State can permit pleas of guilty in which defendant reserves the right to raise constitutional questions on appeal and federal *habeas* courts will honor that arrangement. *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975).

[3] *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977).

[4] *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes would receive a mandatory life sentence if convicted because of two prior felony convictions. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id., 365, 368, contending that the Court had watered down *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). *See also United States* v. *Goodwin*, 457 U.S. 368 (1982).

The court is obligated to make inquiry to make sure the defendant is pleading voluntarily, knowingly, and understandingly,[5] and "the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." [6]

***Prosecutorial Misconduct.***—When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, due process is violated. The clause "cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." [7] The quoted language was dictum in the case in which it was uttered [8] but the principle enunciated has been utilized to require state officials to controvert allegations of convicted persons that knowingly false testimony had been used to convict [9] and to upset convictions found to have been

[5] *Boykin* v. *Alabama*, 395 U.S. 238 (1969). In *Henderson* v. *Morgan*, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree and therefore no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id., 645 n. 13. *See also Blackledge* v. *Allison*, 431 U.S. 63 (1977).

[6] *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). Defendant and a prosecutor reached agreement based on a guilty plea in return for no sentence recommendation by the prosecutor. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence which was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise, and remanded for a determination whether there should be compliance with the bargain or whether defendant should be permitted to withdraw his plea.

[7] *Mooney* v. *Holahan*, 294 U.S. 103, 112 (1935).

[8] The Court dismissed the petitioner's suit on the ground that adequate process existed in the state courts to correct any wrong and that petitioner had not availed himself of it. A state court subsequently appraised the evidence and ruled that the allegations had not been proved in *Ex parte Mooney*, 10 Cal. 2d 1, 73 P.2d 554 (1937), *cert. den.* 305 U.S. 598 (1938).

[9] *Pyle* v. *Kansas*, 317 U.S. 213 (1942); *White* v. *Ragen*, 324 U.S. 760 (1945). *See also New York ex rel. Whitman* v. *Wilson*, 318 U.S. 688 (1943); *Ex parte Hawk*, 321

so procured.[10] Extending the principle, the Court in *Miller* v. *Pate* [11] upset a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to defendant and that they were stained with blood, when defendant in a *habeas corpus* proceeding showed that no evidence connected him with the shorts and furthermore that the shorts were not in fact blood stained and this was known to the prosecution at the time.

Furthermore, in *Brady* v. *Maryland*,[12] the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In that case, the Court held error the suppression by the prosecution of an extrajudicial confession of defendant's accomplice that he had actually committed the murder, which had it been known to the jury could have influenced its decision with regard to the sentence although not with regard to the judgment of guilt. But this beginning toward the development of criminal discovery was not carried forward [13] and the Court has

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U.S. 114 (1914); *but see Hysler* v. *Florida*, 315 U.S. 411 (1942); *Lisenba* v. *California*, 314 U.S. 219 (1941).

[10] *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Alcorta* v. *Texas*, 355 U.S. 28 (1957). In the former case, the principal prosecution witness was defendant's accomplice and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but he did nothing to correct the false testimony. *See also Giglio* v. *United States*, 405 U.S. 150 (1972) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the *habeas corpus* hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. What if the prosecution should become aware of the perjury of a prosecution witness following the trial? *Cf. Durley* v. *Mayo*, 351 U.S. 277 (1956). *But see Smith* v. *Phillips*, 455 U.S. 209, 218–221 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).

[11] 386 U.S. 1 (1967).

[12] 373 U.S. 83, 87 (1963). In *Jencks* v. *United States*, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. *Cf. Scales* v. *United States*, 367 U.S. 203, 257–258 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. *Palermo* v. *United States*, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

[13] *See* the division of opinion in *Giles* v. *Maryland*, 386 U.S. 66 (1967).

waivered in its application of *Brady*. In *Moore* v. *Illinois*,[14] the convicted defendant claimed that the prosecution suppressed several statements of witnesses and other items of documentary evidence that would have tended to impeach the trial testimony of these and other witnesses; defendant's counsel had requested prior to trial discovery of all statements given to the prosecution or the police by any witness possessing information relevant to the case but the request was denied upon representation of the prosecution that he would make his files available to the defense. The prosecution did so but some of the items the defense now deemed critical were not in the files but were known to police officers who assisted the prosecution at trial.

The Court held that no denial of due process had occurred. "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." [15] The first factor, the Court held, was not favorable to the defense because in addition to his general request he asked each witness but one if he had made a statement to the prosecution which he then specifically requested and received and he did not make the request of the witness whose statement he now deemed critical; of greater importance, the Court thought, was that the evidence allegedly suppressed was not material to the issue of the identification of the defendant as the killer but related only to a confusion in other situations of defendant with someone else.

In *United States* v. *Agurs*,[16] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. The obligation is expressed in a tripartite test of materiality of the exculpatory evidence in the context of the trial record. First, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[17] Second, if the defense specifically requested cer-

[14] 408 U.S. 786 (1972). Joining Justice Blackmun's opinion were Justices Brennan, White, Rehnquist, and Chief Justice Burger. Dissenting were Justices Douglas, Stewart, Marshall, and Powell. Id., 800.

[15] Id., 794–795.

[16] 427 U.S. 97 (1976).

[17] Id., 103–104. This situation is the *Mooney* v. *Holohan* type of case.

tain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[18] Third, and the new law created in *Agurs*, if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence and if he does not reveal it, reversal of a conviction may be required but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[19]

A prosecutor does not violate the due process clause when, in negotiating with a defendant to obtain a guilty plea or some other action that will lessen the trial burden, such as trial before a judge rather than jury, he threatens and carries out the threat to seek a more severe sentence, either by charging a greater offense or recommending a longer sentence.[20] But the prosecutor does deny due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[21] The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to.

***Proof, Burden of Proof, and Presumptions.***—The due process clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." [22] "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of

[18] Id., 104–106. This the *Brady* situation.

[19] Id., 106–114. This was the *Agurs* fact situation.

[20] *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *United States* v. *Goodwin*, 457 U.S. 368 (1982). In the former case, during plea negotiations, the prosecutor told defendant that if he did not plead guilty to the charges he would bring additional charges, and he did so upon defendant's continued refusal. In the latter case, defendant was charged with a misdemeanor and could have been tried before a magistrate; he refused to plead guilty and sought a jury trial in district court. The Government obtained a four-count felony indictment based upon the same conduct and acquired a conviction.

[21] *Blackledge* v. *Perry*, 417 U.S. 21 (1974). Defendant was convicted in an inferior court of a misdemeanor. He had a right to a *de novo* trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court draws between this case and *Bordenkircher* and *Goodwin* is that of pretrial conduct, in which vindictiveness is not likely, and posttrial conduct, in which vindictiveness is more likely and is not permitted.

[22] *In re Winship*, 397 U.S. 358, 364 (1970).

our criminal law,' " [23] In many past cases, this standard was assumed to be the required one,[24] but because it was so widely accepted only recently has the Court had the opportunity to pronounce it guaranteed by due process.[25] The presumption of innocence is valuable in assuring defendants a fair trial,[1] and it operates to ensure that the jury considers the case solely on the evidence.[2]

The Court has long held it would set aside under the due process clause convictions that are supported by no evidence at all,[3] but *Winship* necessitated a reconsideration whether it should in reviewing state cases weigh the sufficiency of the evidence. Thus, in *Jackson* v. *Virginia,*[4] it held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether *it* believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

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[23] Id., 363 (quoting *Coffin* v. *United States,* 156 U.S. 432, 453 (1895)). Justice Harlan's *Winship* concurrence, id., 368, proceeded on the basis that inasmuch as there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard.

[24] *Miles* v. *United States,* 103 U.S. 304, 312 (1881); *Davis* v. *United States,* 160 U.S. 469, 488 (1895); *Holt* v. *United States,* 218 U.S. 245, 253 (1910); *Speiser* v. *Randall,* 357 U.S. 513, 525–526 (1958).

[25] *In re Winship,* 397 U.S. 358 (1970), arose in the context of a juvenile delinquency adjudication. Justice Black dissented, doubting that the Constitution imposed any standard of proof. Id., 377. *Accord: Estelle* v. *Williams,* 425 U.S. 501 (1976); *Henderson* v. *Kibbe,* 431 U.S. 145, 153 (1977); *Ulster County Court* v. *Allen,* 442 U.S. 140, 156 (1979); *Sandstorm* v. *Montana,* 442 U.S. 510, 520–524 (1979). On the interrelated concepts of the burden of the prosecution to prove guilt beyond a reasonable doubt and defendant's entitlement to a presumption of innocence, *see Taylor* v. *Kentucky,* 436 U.S. 478, 483–486 (1978), *and compare Kentucky* v. *Whorton,* 441 U.S. 786 (1979).

[1] E.g., *Deutch* v. *United States,* 367 U.S. 456, 471 (1961).

[2] *Holt* v. *United States,* 218 U.S. 245 (1910); *Agnew* v. *United States,* 165 U.S. 36 (1897). These cases overturned *Coffin* v. *United States,* 156 U.S. 432, 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt.

[3] *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Garner* v. *Louisiana,* 368 U.S. 157 (1961); *Taylor* v. *Louisiana,* 370 U.S. 154 (1962); *Barr* v. *City of Columbia,* 378 U.S. 146 (1964); *Johnson* v. *Florida,* 391 U.S. 596 (1968). *See also Chessman* v. *Teets,* 354 U.S. 156 (1957).

[4] 443 U.S. 307 (1979).

[5] Id., 316, 318–319.

Inasmuch as due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, it was a denial of this constitutional guarantee to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter.[6] The Court indicated that a balancing of interests test was to be employed to determine when the due process clause required the prosecution to carry the burden and when some part of the burden might be shifted to defendant, but the decision called into question the practice in many States under which some burdens of persuasion were borne by the defense and raised the prospect that the prosecution must bear all burdens of persuasion, a significant and weighty task given the large numbers of affirmative defenses. But the Court soon summarily rejected the argument that the decision meant the prosecution had to negate the insanity defense [7] and in full-scale consideration upheld a state statute that provided that an intentional killing is murder but permitted the defendant to assert "extreme emotional disturbance" as an affirmative defense which, if proved by the defense by a preponderance of the evidence, would reduce the murder offense to manslaughter.[8] According to the Court, the constitutional deficiency in the earlier case was that the statute made malice an element of the offense but permitted malice to be presumed upon proof of the other elements and required the defendant to prove the absence of malice; in the present case, the statute provided that the death, the intent to kill, and the causation are the elements of the offense and the State is obligated to prove each of the elements beyond a reasonable doubt. But the statute permits the defendant to present an affirmative defense of acting under an extreme emotional disturbance as to which he bears the burden of persuasion by a preponderance and which would reduce the degree of the offense. Thus, the statute in the present case requires the prosecution to prove each of the elements defined to make up the offense whereas the law in the former case did not so require the prosecution to prove each

[6] *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). *See also Sandstrom* v. *Montana*, 442 U.S. 510, 520–524 (1979).

[7] Justice Rehnquist and Chief Justice Burger had argued in *Mullaney* v. *Wilbur*, 421 U.S. 684, 704, 705 (1975) (concurring), that the case did not require any reconsideration of the holding in *Leland* v. *Oregon*, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt. In *Rivera* v. *Delaware*, 429 U.S. 877 (1976), the Court dismissed as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a State from placing on the defendant the burden of proving insanity by a preponderance of the evidence. *See Patterson* v. *New York*, 432 U.S. 197, 202–205 (1977) (explaining the import of *Rivera*).

[8] *Patterson* v. *New York*, 432 U.S. 197 (1977).

element. So defined, the distinction and the constitutional mandate are formalistic and the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.[9]

Quite closely related is the issue of statutory presumptions; that is, these generally provide for the proof of one fact that is an element of a crime, the presumed fact, by the establishment of another fact, the basic fact.[10] In *Tot* v. *United States,*[11] the Court held that a statutory presumption was valid under the due process clause if it met a "rational connection" test. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience." In *Leary* v. *United States,*[12] however, the due process test was stiffened to require that for such a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Thus, a provision which permitted a jury to infer from defendant's possession of marijuana his knowledge of its illegal importation was voided. A lengthy canvass of factual materials established to the Court's satisfaction that while the greater part of marijuana consumed here is of foreign origin there was still a good amount produced domestically and there was thus no way to assure that the majority of those possessing marijuana have any reason to know their marijuana is imported.[13] The Court left open the question whether a presumption

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[9] Dissenting, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts which historically have made a substantial difference in the punishment and stigma flowing from a criminal act the State always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. Id., 216.

[10] *Cf. Yee Hem* v. *United States,* 268 U.S. 178 (1925) (statute proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession). *See Manley* v. *Georgia,* 279 U.S. 1 (1929).

[11] 319 U.S. 463, 467 (1943) (voiding presumption of transportation of firearm in interstate commerce from possession). *Compare United States* v. *Gainey,* 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with United States* v. *Romano,* 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

[12] 395 U.S. 6, 36 (1969).

[13] Id., 37–54.

which survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." [14] In its most recent case, a closely divided Court drew a distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." But, with respect to permissive presumptions, "the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted." [15] Thus, because the jury was told it had to believe in defendants' guilt beyond a reasonable doubt and that it could consider the inference, due process was not violated by the application of the statutory presumption that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle, under the circumstances of the case.[16]

The division of the Court in these cases and in the *Mullaney* v. *Wilbur* line of cases clearly shows the unsettled doctrinal nature of the issues.

***Sentencing.***—In *Townsend* v. *Burke* [17] the Court overturned a sentence imposed on an uncounseled defendant by a judge who in

[14] Id., 36 n. 64. The matter was also left open in *Turner* v. *United States*, 396 U.S. 398 (1970) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in *Barnes* v. *United States*, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).

[15] *Ulster County Court* v. *Allen*, 442 U.S. 140, 166–167 (1979).

[16] The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. Id., 168 (Justices Powell, Brennan, Stewart, and Marshall).

[17] 334 U.S. 736, 740–741 (1948). In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), the jury had been charged in accordance with an habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years. Subsequently, in another case, the provision of the habitual offender statute under which Hicks had been sentenced was declared unconstitutional but his conviction was affirmed on the basis that his sentence was within the

reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." But in the absence of revelations of errors by the sentencing judge, the content of procedural due process at sentencing is vague. *Williams* v. *New York* [18] upheld the imposition of the death penalty although the jury in convicting had recommended mercy, the judge indicating that he was disregarding the recommendation because of information in the presentence report prepared by a probation officer and not shown to the defendant or his counsel. The Court viewed as highly undesirable the restriction of judicial discretion in sentencing by requiring adherence to rules of evidence which would exclude highly relevant and informative material; similarly, disclosure of such information to the defense could well dry up sources which feared retribution or embarrassment. Thus, hearsay and rumors would be considered and there would be no opportunity of rebuttal. Still in the context of capital cases, the Court has now, although by no consistent rationale, limited *Williams*. In *Gardner* v. *Florida*,[19] the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge, on the basis of a confidential presentence report which he did not characterize nor make available to defense or prosecution as well as on the basis of evidence adduced at trial, sentenced defendant to death. Three Justices found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when *Williams* was decided, the report must at least be made part of the record for review so that the factors motivating imposition of the death penalty may be known and ordinarily must be made available to the defense. All but one of the other Justices joined the result on various other

permissible range open to the jury in any event. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might have still given the stiffer sentence was only conjectural and he was entitled to sentencing by a body under proper constitutional instruction. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see Chewing* v. *Cunningham*, 368 U.S. 433 (1962); *Oyler* v. *Boles*, 368 U.S. 448 (1962); *Spencer* v. *Texas*, 385 U.S. 554 (1967). On Eighth Amendment relevance, *see supra, pp.* 1408–1409.

[18] 337 U.S. 241 (1949). *See also Williams* v. *Oklahoma*, 358 U.S. 576 (1959).

[19] 430 U.S. 349 (1977).

bases.[20] On the other hand, in *United States* v. *Grayson*,[21] a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his *belief* that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed. Under the current scheme of individualized indeterminate sentencing, the Court declared, the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation, and defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[22]

In *Specht* v. *Patterson*,[23] the Court specifically reaffirmed *Williams* but declined to apply it in that case, which it viewed as significantly different. Specht had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offenders statue to an indefinite term of one day to life. The sex offenders law, the Court observed, did not make the commission of the particular offense the basis for sentencing but the conviction triggered a new hearing at which it must be determined whether the convicted person was a public threat, an habitual offender, or mentally ill. The new finding was an essential ingredient of the offense charged and it must be accompanied by procedural safeguards. *Mempa* v. *Rhay*[24] held that when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the convicted defendant is returned for sentencing, he must then be represented by counsel, inasmuch as it is a point in the process where substantial rights of the defendant may be affected. Moreover, in *Kent* v. *United States*[25] the Court required that before a juvenile court decided to waive jurisdiction of a juvenile and to transfer his case to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report which formed the basis for the court's decision.

[20] Only Justices Stevens, Stewart, and Powell took the position described in the text. Id., 357–361. Justice Brennan without elaboration thought the result compelled by due process, id., 364, Justices White and Blackmun thought the result necessitated by the Eighth Amendment, id., 362, 364, as did Justice Marshall in a different manner. Id., 365. Chief Justice Burger concurred only in the result, id., 362, and Justice Rehnquist dissented. Id., 371.

[21] 438 U.S. 41 (1978).

[22] *See also United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 (1973). *Cf.* 18 U.S.C. § 3577.

[23] 386 U.S. 605 (1967).

[24] 389 U.S. 128 (1967).

[25] 383 U.S. 541, 554, 561, 563 (1966). *Kent* was ambiguous whether it was based on statutory interpretation or constitutional analysis; *In re Gault*, 387 U.S. 1 (1967), appears to have constitutionalized the language.

It is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others. If the judge does impose a longer sentence the second time, he must justify it on the record by showing, for example, the existence of information meriting a longer sentence of which he was unaware at the first sentencing.[1]

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury which sentences, *Pearce's* requirement that a judge resentencing on a subsequent trial must justify a more severe sentence is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence. The Court concluded the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials.[2]

Due process does not impose any limitation upon the sentence that a legislature may affix to any offense; that function is in the Eighth Amendment.[3]

***The Problem of the Incompetent or Insane Defendant or Convict.***—When it becomes evident during the trial that a defendant is or has become insane, or perhaps incompetent to stand trial, the court on its own initiative must conduct a hearing on the issue.[4]

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[1] *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). *Pearce* was held to be nonretroactive in *Michigan* v. *Payne*, 412 U.S. 47 (1973). But when a State provides a two-tier court system in which one may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial *de novo* in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in *Pearce*, inasmuch as the potential for vindictiveness and inclination to deter is not present. *Colten* v. *Kentucky*, 407 U.S. 104 (1972). *But see Blackledge* v. *Perry*, 417 U.S. 21 (1974), discussed *supra*, *p.* 1659.

[2] *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973). Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id., 35, 38. Justice Douglas dissented on other grounds. Id., 35.

[3] *Williams* v. *Oklahoma*, 358, U.S. 576, 586–587 (1959). *See also Collins* v. *Johnston*, 237 U.S. 502 (1915). On recidivist statutes, *see Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912); *Ughbanks* v. *Armstrong*, 208 U.S. 481, 488 (1908), and, under the Eighth Amendment, *Rummell* v. *Estelle*, 445 U.S. 263 (1980).

[4] *Pate* v. *Robinson*, 383 U.S. 375 (1966). For treatment of the circumstances when a trial court should inquire into the mental competency of the defendant, *see Drope* v. *Missouri*, 420 U.S. 162 (1975). It would violate due process to try as a criminal a person who is insane or incompetent to stand trial. *Bishop* v. *United States*, 350 U.S. 961 (1956). *But see United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953). It does not deny due process, however, to require one who pleads insanity to establish the defense, although the standard of proof may be in doubt. *Leland* v. *Oregon*,

When a State determines that a person charged with a criminal offense is incompetent to stand trial he cannot be committed indefinitely for that reason. The court's power is to commit him to no longer a period than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that this is not the case, then the State must institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant.[5] It is generally assumed that it would violate due process to execute a prisoner who has become insane or incompetent following conviction,[6] but the Court has held that due process is not violated when the governor is allowed to make the determination whether a prisoner sentenced to death is insane at the time of the scheduled execution.[7]

***Corrective Process: Appeals and Other Remedies.***—"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review." [8] This holding has been recently reaffirmed [9] although the Court has also held that when a State does provide appellate process it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[10] But it is not the case that a State is free to have no corrective process at all in which state convicts may pursue remedies for federal constitutional violations. In *Frank* v. *Mangum,*[11] the Court

343 U.S. 790 (1952); *Rivera* v. *Delaware,* 429 U.S. 877 (1976), elaborated in *Patterson* v. *New York,* 432 U.S. 197, 202–205 (1977).

[5] *Jackson* v. *Indiana,* 406 U.S. 715 (1972).

[6] *Cartiativo* v. *California,* 357 U.S. 549, 550 (1958) (Justice Harlan concurring).

[7] *Solesbee* v. *Balkcom,* 339 U.S. 9 (1950). Nor is vesting the decision in the prison warden a denial of due process. *Caritativo* v. *California,* 357 U.S. 549 (1958).

[8] *McKane* v. *Durston,* 153 U.S. 684, 687 (1894). *See also Andrews* v. *Swartz,* 156 U.S. 272, 275 (1895); *Murphy* v. *Massachusetts,* 177 U.S. 155, 158 (1900); *Reetz* v. *Michigan,* 188 U.S. 505, 508 (1903).

[9] *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956); id., 21 (Justice Frankfurter concurring), 27 (dissenting opinion); *Ross* v. *Moffit,* 417 U.S. 600 (1974).

[10] The line of cases begins with *Griffin* v. *Illinois,* 351 U.S. 12 (1956), in which it was deemed to violate both the due process and the equal protection clauses for a State to deny to defendants alleging poverty free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions. *See infra, pp.* 1801–1804.

[11] 237 U.S. 309, 335 (1915).

asserted that a conviction obtained in a mob-dominated trial was contrary to due process, and it continued: "And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." Consequently, it has been stated numerous times that the absence of corrective process in some form when the convicted defendant alleges a federal constitutional violation contravenes the Fourteenth Amendment,[12] and it has been held that to burden this process, such as limiting the right to petition for *habeas corpus,* is to deny the convicted defendant his constitutional rights.[13]

The mode by which federal constitutional rights are to be vindicated after conviction is for the government concerned to determine. "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them . . . States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis.* It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at a place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated." [14] If a State provides a mode of redress, a defendant must first exhaust it and if unsuccessful he may seek relief in federal court; if there is no adquate remedy in state court, he may petition a federal court for relief through a writ of *habeas corpus.*[15]

When appellate or other corrective process is made available, inasmuch as it is no less a part of the process of law under which a defendant is held in custody, it becomes subject to scrutiny on the

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[12] *Moore* v. *Dempsey,* 261, U.S. 86, 90, 91 (1923); *Mooney* v. *Holohan,* 294 U.S. 103, 113 (1935); *New York ex rel. Whitman* v. *Wilson,* 318, U.S. 688, 690 (1943); *Young* v. *Ragan,* 337 U.S. 235, 238–239 (1949).

[13] *Ex parte Hull,* 312 U.S. 546 (1941); *White* v. *Ragen,* 324 U.S. 760 (1945).

[14] *Carter* v. *Illinois,* 329 U.S. 173, 175–176 (1946).

[15] *Supra, pp.* 820–821. Note that in *Case* v. *Nebraska,* 381 U.S. 336 (1965), the Court had taken for review a case which raised the issue whether a State could simply omit any corrective process for hearing and determining claims of federal constitutional violations, but it dismissed the case when the State in the interim enacted provisions for such process.

occasion of any determination of an alleged unconstitutional deprivation of life or liberty. At first, the Court seemed content to assume that when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the conclusion by the appellate court that the trial court's sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law.[16] But in *Moore* v. *Dempsey,*[17] while insisting that its earlier decision was consistent with its present decision, the Court directed a federal district court in which petitioners had sought a writ of *habeas corpus* to make an independent investigation of the facts alleged by the petitioners—mob domination of their trial—notwithstanding that the state appellate court had ruled against the legal sufficiency of these same allegations. Indubitably, *Moore* marked the abandonment of the Supreme Court's deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair, an abandonment soon made even clearer in *Brown* v. *Mississippi*[18] and now taken for granted.

***Rights of Prisoners.***—Until recently the view prevailed that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."[19] While possibly never wholly correct,[20] this view is not now the law, but a correct statement of the law is impossible because of the flux now taking place. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," the Court said in 1948, "a retraction justified by the considerations underlying our penal system."[21] "Many," however, indicates less than "all" and it is clear that the due process and equal protection clauses to some extent do apply to prisoners.[22] "Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are

[16] *Frank* v. *Mangum,* 237 U.S. 309 (1915).
[17] 261 U.S. 86 (1923).
[18] 297 U.S. 278 (1936).
[19] *Ruffin* v. *Commonwealth,* 62 Va. 790, 796 (1871).
[20] *Cf. In re Bonner,* 151 U.S. 242 (1894).
[21] *Price* v. *Johnston,* 334 U.S. 266, 285 (1948).
[22] "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell,* 418 U.S. 539, 555–556 (1974).

subject to appropriate rules and regulations." [23] "[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all these reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of these facts reflect no more than a healthy sense of realism. Moreover, when state penal institutions, are involved, federal courts have a further reason for deference to the appropriate prison authorities." [24] Thus, the Court has affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, but at the same time concerns of federalism and of judicial restraint have caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems.[25]

Save for challenges to conditions of confinement of pretrial detainees,[1] the Court has generally treated challenges to prison conditions as a whole under the cruel and unusual punishments clause of the Eighth Amendment [2] and challenges to particular incidents and practices under the due process clause [3] as well as under more specific provisions, such as the First Amendment speech and religion clauses.[4] Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[5] They have the right to petition for redress of grievances,

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[23] *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972).

[24] *Procunier* v. *Martinez*, 416 U.S. 396, 404–405 (1974).

[25] *Bell* v. *Wolfish*, 441 U.S. 520, 545–548, 551, 555, 562 (1979) (federal prison); *Rhodes* v. *Chapman*, 452 U.S. 337, 347, 351–352 (1981).

[1] *Bell* v. *Wolfish*, 441 U.S. 520 (1979). Persons not yet convicted of a crime may be detained by government upon the appropriate determination of probable cause and the detention may be effectuated through subjection of the prisoner to the restrictions and conditions of the detention facility. But a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Therefore, unconvicted detainees may not be subjected to conditions and restrictions that amount to punishment. However, the Court limited its concept of punishment to practices intentionally inflicted by prison authorities and to practices which were arbitrary or purposeless and unrelated to legitimate institutional objectives.

[2] *Supra*, *pp.* 1409–1410.

[3] E.g., *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976); *Vitek* v. *Jones*, 445 U.S. 480 (1980).

[4] E.g., *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); on religious practices and ceremonies, *see Cooper* v. *Pate*, 378 U.S. 546 (1964); *Cruz* v. *Beto*, 405 U.S. 319 (1972).

[5] *Lee* v. *Washington*, 390 U.S. 333 (1967).

which includes access to the courts for purposes of presenting their complaints,[6] and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators.[7] And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration.

In *Wolff* v. *McDonnell*,[8] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. "Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, . . . . But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." [9] Due process applies, but since prison disciplinary proceedings are not part of a criminal prosecution the full panoply of rights of a defendant is not available. Rather, the analysis must proceed on a basis of identifying the interest in "liberty" which the clause protects.

Where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to those minimum procedures appropriate under the circumstances.[10] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions. Therefore, the prison must afford the subject of a disciplinary proceeding advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken; the inmate should be allowed to call witnesses and present documentary evidence in defense when permitting him to do so will not hazard the institution's interests. Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt hazard valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Limitations imposed on the discre-

[6] *Ex parte Hull*, 312 U.S. 546 (1941); *White* v. *Ragen*, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. *Younger* v. *Gilmore*, 404 U.S. 15 (1971); *Bounds* v. *Smith*, 430 U.S. 817 (1978).

[7] *Haines* v. *Kerner*, 404 U.S. 519 (1972); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

[8] 418 U.S. 539 (1974).

[9] Id., 555.

[10] Id., 557. This analysis, of course tracks the interest analysis discussed *supra*, *pp.* 1622–1631.

tion of the body conducting the proceedings met the impartial tribunal requirements.[11]

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer of one from a prison to another prison in which the conditions were substantially less favorable to him than the one he is in. Since the State had not conferred any right to remain in the facility to which he is first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.[12] On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing it if the inmate suffers from a "mental disease or defect" must be preceded by a hearing for two alternate reasons: first, the statute gave the inmate a liberty interest since it presumed he would not be moved absent a finding he was suffering from a mental disease or defect, and, second, unlike transfers from one prison to another, a transfer to a mental institution was not within the range of confinement that a sentence subjected a convicted person to and the stigmatizing consequence of a transfer to a mental hospital was a deprivation of a liberty interest to which due process imposed procedural guarantees.[13]

***Probation and Parole.***—A convicted defendant may not be sentenced to jail but instead be placed on probation subject to incarceration upon violation of the conditions which are imposed; the person may be jailed and subsequently qualify for release on parole before his sentence is completed, subject to reincarceration upon violation of imposed conditions. Because both of these dispositions are statutory privileges granted by the governmental authority,[14]

[11] Id., 418 U.S., 561–572. The Court continues to adhere to its refusal to require appointment of counsel. *Vitek* v. *Jones*, 445 U.S. 480, 496–497 (1980), and id., 497–500 (Justice Powell concurring); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

[12] *Meacham* v. *Fano*, 427 U.S. 215 (1976); *Montanye* v. *Haymes*, 427 U.S. 236 (1976).

[13] *Vitek* v. *Jones*, 445 U.S. 480 (1980).

[14] *Ughbanks* v. *Armstrong*, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In *Escoe* v. *Zerbst*, 295 U.S. 490 (1935), the Court's premise was that as a matter of grace the parolee was being granted a privilege and that he should neither expect nor seek due process. Then Judge Burger in *Hyser* v. *Reed*, 318 F. 2d 225 (C.A.D.C.) *cert. den.*, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversity between the board and the parolee.

it was long assumed that the administrators of the systems did not have to accord procedural due process either in the granting stage or in the revocation stage. Now, both granting and revocation are subject to due process analysis, although the results tend to be disparate. Thus, in *Mempa* v. *Rhay*,[15] the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed which indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he had been entitled to counsel at the deferred sentencing hearing.

In *Morrissey* v. *Brewer*[16] a unanimous Court held that parole revocations must be accompanied by the usual due process hearing and notice requirements. "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal."[17] What process is due, then, turned upon the State's interests. Its principal interest was that having once convicted a defendant, imprisoned him, and released him for rehabilitation purposes at some risk, it should "be able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." But the State has no interest in revoking parole without some informal procedural guarantees, inasmuch as this will not interfere with its reasonable interest.[18]

Minimal due process required, held the Court, that at both stages of the revocation process—the arrest of the parolee and the formal revocation—the parolee was entitled to certain rights. After the arrest of the parolee, there should be a hearing to determine that reasonable ground existed for revocation of parole; it should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, it should be conduct-

[15] 389 U.S. 128 (1967).
[16] 408 U.S. 471 (1972).
[17] Id., 480, 482.
[18] Id., 483–484.

ed by someone not directly involved in the case, though he need not be a judicial officer, the parolee should be given adequate notice that the hearing will take place and what violations are alleged, he should be able to appear and speak in his behalf and produce other evidence as well as to examine those who have given adverse evidence against him unless it is determined that the identity of such informant should not be revealed, the hearing officer should prepare a digest of the hearing and base his decision upon the evidence adduced at the hearing.[19]

Prior to the final decision on revocation, there should be a more formal hearing at which there would be a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody and he must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the States to develop but the Court specified minimum requirements of due process. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole." [20]

The Court has applied a flexible due process standard in regard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The State should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.[21]

[19] Id., 484–487.
[20] Id., 487–489.
[21] *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

With respect to the granting of parole, the Court's analysis of the due process clause's meaning in *Greenholtz* v. *Nebraska Penal Inmates* [22] is much more problematical. Rejected was the theory that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize in the particular statute before it the creation of some expectancy of release that was entitled to some measure of constitutional protection, while cautioning that only by a case-by-case analysis could it be said whether other parole statutes similarly created such expectancy. In any event, the Court turned to the nature of the decisions that parole authorities must make to hold that the full panoply of due process guarantees is not required; procedures designed to elicit specific facts are inappropriate under the circumstances. Rather, the minimizing of the risk of error is the prime consideration and that goal was achieved by the board's largely informal methods, thus allowing discarding of the lower court's imposition of requirements of formal hearings, notice, and specification of particular evidence in the record as justifying the decision to deny release. The inmate was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due.

Where, however, government by its statutes and regulations creates no obligation of the pardoning authority and thus creates no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expectancy. The mere existence of the authority and the frequent exercise of it creates no entitlement.[23]

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[22] 442 U.S. 1 (1979). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id., 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court's analysis of the liberty interest was faulty and that due process required more than the board provided. Id., 22.

[23] *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458 (1981); *Jago* v. *Van Curen*, 454 U.S. 14 (1981). The former case involved not parole but commutation of a life sentence which was necessary before one was eligible for parole. The statute gave the Board total discretion to commute, but in at least 75% of the cases prisoner received a favorable action and virtually all of the prisoners who had their sentences commuted were promptly paroled. In *Van Curen*, the Court made express what had been implicit in *Dumschat*; the "mutually explicit understandings" concept under which some property interests are found protected did not apply to liberty interests. *Van Curen* is also interesting because there the parole board had grant-

***The Problem of the Juvenile Offender.***—In all the States of the Union and the District of Columbia there is provision made for treating with persons under a certain age who have allegedly committed an offense which if committed by an adult would be criminal or who have become delinquent in a sense not recognizable under laws dealing with adults, such as statutory provisions relating to habitual truancy, deportment endangering the morals or health of the juvenile or others, or consistent with disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of this century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment and offering the theory that the state was acting as *parens patriae* for the juvenile offender and was in no sense his adversary.[24] Disillusionment with the results of juvenile reforms coupled with judicial emphasis of constitutional protection of the accused led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence.

After tracing in much detail this history of juvenile courts, the Court held in *In re Gault* [25] that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than on punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the process—but that the consequences of the absence of due process standards made their application necessary. "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistically the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the

ed his petition for parole but within days revoked it before the prisoner was released, upon being told that he had lied at the hearing before the board.

[24] *In re Gault*, 387 U.S. 1, 12–29 (1967).

[25] 387 U.S. 1 (1967).

child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

"In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." [1] Thus, the Court required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which he could be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination.[2] It did not pass upon the right of appeal or the failure to make transcripts of hearings. Earlier, the Court had held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently constitutionalized in *Gault*.[3] Subsequently, it was held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult,[4] but still later the Court held that jury trials were not constitutionally required in juvenile trials.[5] Still to be considered by the Court are such questions

[1] Id., 27–28.

[2] Id., 31–35. Justice Harlan concurred in part and dissented in part, id., 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id., 78.

[3] *Kent* v. *United States*, 383 U.S. 541 (1966), noted on this point in *In re Gault*, 387 U.S. 1, 30–31 (1967).

[4] *In re Winship*, 397 U.S. 358 (1970). Chief Justice Burger and Justice Stewart dissented, following essentially the Stewart reasoning in *Gault*. "The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitation. . . . What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court." Id., 375, 376. Justice Black dissented because he did not think the reasonable doubt standard a constitutional requirement at all. Id., 377.

[5] *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971). No opinion was concurred in by a majority of the Justices. Justice Blackmun's opinion of the Court, which was joined by Chief Justice Burger and Justices Stewart and White, reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth

as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is not essentially criminal-like conduct but misbehavior or uncontrollability requiring application of legal sanctions and whether the panoply of adult rights existing in the investigative stages of crime is to be accorded juveniles under investigation.

***The Problem of Civil Commitment.***—As is the case with juvenile offenders, several classes of persons are subject to confinement by processes and in courts deemed civil rather than criminal. Within this category of "protective commitment" are involuntary commitments for treatment of insanity and other degrees of mental incompetence, retardation, alcoholism, narcotics addiction, sexual psychopathy, and the like. Inasmuch as the deprivation of liberty is as severe as that experienced by juveniles adjudged delinquent, and in addition is accompanied with the harm to reputation and standing that accompanies such action, it is merely surprising that the Court has only recently dealt with the issue.[6]

In *O'Connor* v. *Donaldson,*[7] bypassing "the difficult issues of constitutional law" raised by the lower courts' resolution of the case,[8] the Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." [9] It having been found by

Amendment, so that jury trials were not automatically required; instead, the prior cases had proceeded on a "fundamental fairness" approach and in that regard a jury was not a necessary component of fair factfinding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. Id., 551. Justice Brennan concurred in one case and dissented in another because in his view open proceedings would operate to protect juveniles from oppression in much the same way as a jury would. Id., 553. Justice Harlan concurred because he did not believe jury trials were constitutionally mandated in state courts. Id., 557. Justices Douglas, Black, and Marshall dissented. Id., 557.

[6] Only in *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940), did the Court earlier approach consideration of the problem. Other cases reflected the Court's concern with the rights of convicted criminal defendants and generally required due process procedures or that the commitment of convicted criminal defendants follow the procedures required for civil commitments. *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Lynch* v. *Overholser*, 369 U.S. 705 (1962); *Humphrey* v. *Cady*, 405 U.S. 504 (1972); *Jackson* v. *Indiana*, 406 U.S. 715 (1972); *McNeil* v. *Director*, 407 U.S. 245 (1972). *Cf. Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355 (1972).

[7] 422 U.S. 563 (1975).

[8] That is, the right to treatment of the involuntarily committed. *Supra*, *pp.* 1590–1592.

[9] Id., 576.

the jury at trial that Donaldson was neither dangerous to himself nor to others, the Court found that he had been unconstitutionally confined and sent the case back to trial to determine if he should recover personally from his doctors and others for his confinement under the standards previously laid down judicially.[10] Left to resolution another day were such questions as "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness" [11] and the right, if any, to receive treatment for the confined person's illness.

Procedurally, it is clear that an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings; on the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state's aim is not punitive and because some or even much of the consequences of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of "clear and convincing" evidence.[12]

Difficult questions of what due process may require in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the State when such children are wards of the State were confronted in *Parham* v. *J.R.*[13] Under the laws under challenge, there were no formal preadmission hearings but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential

[10] Id., 576–577. The then-prevailing standards were those formulated under 42 U.S.C. § 1983. *See Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

[11] *O'Connor* v. *Donaldson*, 422 U.S. 563, 573 (1975).

[12] *Addington* v. *Texas*, 441 U.S. 418 (1979). *See also Vitek* v. *Jones*, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[13] 442 U.S. 584 (1979). *See also Secretary of Public Welfare* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979).

for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually acted in behalf of their children's welfare, the independent role of medical professionals in deciding to accept for admission the children, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children.[14] Similarly, the same concerns, reflected in the statutory obligation of the State to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the Government.[15] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[16]

## EQUAL PROTECTION OF THE LAWS

### Scope and Application

***State Action.***—"[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." [1] The Amendment by its express terms provides that "[n]o State . . ." and "nor shall any State . . ." engage in the proscribed conduct. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the

[14] Id., 442 U.S. 598–617. The dissenters agreed on this point. Id., 626–637.

[15] Id., 617–620. The dissenters would have required a preconfinement hearing. Id., 637–638.

[16] Id., 617. The dissent would have mandated a formal postadmission hearing. Id., 625–626.

[1] *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948). It is, of course, the case that the due process clause of the Fifth Amendment, with its equal protection component, limits only federal governmental action and not that of private parties, as is true of each of the provisions of the Bill of Rights. The scope and reach of the "state action" doctrine is thus the same whether a State or the National Government is concerned. *See Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973).

equal protection of the laws." [2] While then the state action doctrine is equally applicable to denials of privileges or immunities, due process, and equal protection, it is actually only with the last great right of the Fourteenth Amendment with which the doctrine is invariably associated.[3]

"The vital requirement is State responsibility," Justice Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights.[4] Certainly, when a State through its legislature commands a discriminatory result, that is state action condemned by the first section of the Fourteenth Amendment and the statute is void.[5] But the difficulty of the Court has begun when the conduct complained of is not so clearly the action of a State but is, perhaps, the action of a minor state official not authorized so to act and perhaps forbidden to act in such a manner by state law, or is, perhaps on the other hand, the action of a private party who is nonetheless in some relationship with governmental authority.

The continuum of state action ranges from obvious legislated denial of equal protection to the point at which private action is no longer so significantly related to or brigaded with state action that the Amendment does not apply. The prohibitions of the Amendment "have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitu-

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[2] *Civil Rights Cases*, 109 U.S. 3, 11 (1883). With regard to the principal issue in this decision, the limitation of the state action requirement on Congress' enforcement powers, *see infra, pp.* 1813–1817.

[3] Recently, however, because of broadening due process conceptions and the resulting litigation, issues of state action have been raised with respect to the due process clause. E.g., *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Flagg Bros.* v. *Brooks*, 436 U.S. 149 (1978); *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982); *Blum* v. *Yaretsky*, 457 U.S. 991 (1982).

[4] *Terry* v. *Adams*, 345 U.S. 461, 473 (1953) (concurring). The Justice was speaking of the state action requirement of the Fifteenth Amendment. The Nineteenth and Twenty-sixth Amendments are worded the same way, unlike the Thirteenth Amendment which applies to any subjugation into slavery or to private visitations of the badges of servitude upon persons because of their race.

[5] *United States* v. *Raines*, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). *And see Peterson* v. *City of Greenville*, 373 U.S. 244 (1963), holding that trespass convictions of Negroes "sitting-in" at a lunch counter over the objection of the manager cannot stand because of a local ordinance commanding such separation, irrespective of the manager's probable attitude if no such ordinance existed.

tional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." [6]

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." [7] That the doctrine serves certain values and disserves others is not a criticism of it but a recognition that in formulating and applying the several tests by which the presence of "state action" is discerned,[8] the Court has considerable discretion and the weights of the opposing values and interests will lead to substantially different applications of the tests. Thus, following the Civil War, when the Court sought to reassert federalism values, it imposed a rather rigid state action standard. During the civil rights movement of the 1950s and 1960s, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in nonracial cases.

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[6] *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880).

[7] *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982). "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." *Peterson* v. *City of Greenville*, 373 U.S. 244, 250 (1963) (Justice Harlan concurring).

[8] "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

Critical to findings whether school systems were segregated unconstitutionally by race was the operation of the state action doctrine. The original *Brown* cases and subsequent ones arose in the context of statutory mandated separation of the races and occasioned therefore no controversy in finding state action.[9] The aftermath in the South involved not so much state action as the determination of the remedies necessary to achieve a unitary system.[10] But if racial segregation is not the result of state action in some aspect, then its existence is not subject to constitutional remedy.[11] Distinguishing between two such systems, however, has occasioned much controversy.

Confronting in a case arising from Denver, Colorado, the issue of a school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that racial segregation caused by "intentionally segregative school board actions" is *de jure* and not *de facto*, just as if it had been mandated by statute. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[12] Where it is proved that a meaningful portion of a school system is segregated as a result of official action, the official agency must bear the burden of proving that other school segregation within the system is adventitious and not the result of official action. It is not the responsibility of complainants to show that each school in a system is *de jure* segregated to be entitled to a system-wide desegregation plan.[13] Moreover, the Court has also apparently adopted a rule to the effect that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can be said to have devolved upon the agency at that earlier point so that its subsequent actions can be held to a standard of having promoted desegregation or of not having promoted it, so that facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.[14]

[9] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[10] *Infra*, *pp.* 1734–1738.

[11] *Compare Washington* v. *Seattle School Dist.*, 458 U.S. 457 (1982), *with Crawford* v. *Los Angeles Board of Educ.*, 458 U.S. 527 (1982).

[12] *Keyes* v. *Denver School District*, 413 U.S. 189, 208 (1973) (emphasis by Court). *See also Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 457 n. 5 (1979).

[13] Id., 208–213. The continuing validity of the *Keyes* shifting-of-the-burden principle, after *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977), was asserted in *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 455–458 & n. 7, 467–468 (1979), and *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 540–542 (1979).

[14] *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 458–461 (1979); *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 534–540 (1979).

Different results, however, follow when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-district segregation." [15] The *de jure-de facto* distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment.

It has long been established that the actions of its officers and agents are attributable to the State. Thus, a state judge who pursuant to statute selected prospective jurors for his court but excluded all Negroes was held accountable under an act of Congress adopted under the Fourteenth Amendment which forbade racial discrimination in jury selection.[16] The fact that the state statute did not authorize such discrimination was deemed irrelevant, a point made clearer in *Yick Wo* v. *Hopkins* [17] in which the Court found unconstitutional state action in the discriminatory administration of an ordinance fair on its face. Neither is the fact that the actions of the agents of the State may be illegal under state law sufficient to make the action nonattributable to the State for purposes of the Fourteenth Amendment.[18] "Misuse of power, possessed by virtue of

[15] *Milliken* v. *Bradley*, 418 U.S. 717, 744-745 (1974).

[16] *Ex parte Virginia*, 100 U.S. 339 (1880). Similarly, the acts of a state governor are state actions, *Cooper* v. *Aaron*, 358 U.S. 1, 16-17 (1958); *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932), as are the acts of prosecuting attorneys, *Mooney* v. *Holohan*, 294 U.S. 103, 112, 113 (1935), state and local election officials, *United States* v. *Classic*, 313 U.S. 299 (1941), and law enforcement officials. *Griffin* v. *Maryland*, 378 U.S. 130 (1964); *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Screws* v. *United States*, 325 U.S. 91 (1945). One need not be an employee of the State to act "under color of" state law; he may merely participate in an act with state officers. *United States* v. *Price*, 383 U.S. 787 (1966).

[17] 118 U.S. 356 (1886).

[18] *Screws* v. *United States*, 325 U.S. 91 (1945); *Williams* v. *United States*, 341 U.S. 97 (1951); *United States* v. *Price*, 383 U.S. 787 (1966). *See also United States* v. *Raines*, 362 U.S. 17, 25 (1960). As Justice Brandeis noted in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 246 (1931), "acts done 'by virtue of public position under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that for purposes of being amenable to suit in federal court, however, the immunity of the States does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. *Ex parte Young*, 209 U.S. 123 (1908), *supra*, *pp.* 1441-1447. *Cf. Screws* v. *United States*, *supra*, 147-148.

state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." [19] When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accomplished through police enforcement of "custom" [20] or through hortatory admonitions by public officials to private parties to act in a discriminatory manner,[21] the action is state action. When a State clothes a private party with official authority, he may not engage in conduct forbidden the State.[22]

Beyond this point we enter the area in which the discriminatory intent is that of a private individual and the question is whether a State has encouraged the effort or has impermissibly aided it.[23] Of notable importance and a subject of controversy since it was decided is *Shelley* v. *Kraemer*.[24] There, third parties brought suit to enjoin the execution of an agreement of purchase between black buyers and white sellers of residential property subject to racially restrictive covenants. Standing alone, Chief Justice Vinson said, the covenants violated no rights protected by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." However, that was not all. "These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." [25] Establishing that the precedents were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that

[19] *United States* v. *Classic*, 313 U.S. 299, 326 (1941).

[20] *Cf. Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970).

[21] *Lombard* v. *Louisiana*, 373 U.S. 267 (1963). No statute or ordinance mandated segregation at lunch counters but both mayor and chief of police had recently issued statements announcing their intention to maintain the existing policy of separation. Thus, the conviction of Negroes for trespass because they refused to leave a segregated lunch counter was voided.

[22] *Griffin* v. *Maryland*, 378 U.S. 130 (1964). Guard at private entertainment ground was also deputy sheriff; he could not execute the racially discriminatory policies of his private employer. *See also Williams* v. *United States*, 341 U.S. 97 (1951).

[23] Examples already alluded to include *Lombard* v. *Louisiana*, 373 U.S. 267 (1963), in which certain officials had advocated continued segregation, *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963), in which there were segregation-requiring ordinances and customs of separation, and *Robinson* v. *Florida*, 378 U.S. 153 (1964), in which health regulations required separate restroom facilities in any establishment serving both races.

[24] 334 U.S. 1 (1948).

[25] Id., 13–14.

petitioners were willing purchasers of properties upon which they desire to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . ."

"These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." [1]

Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the State, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the State in interfering with the willingness of two private parties to deal with each other? Disposition of several cases possibly governed by *Shelley* was made in a manner to leave in doubt the answer to the question whether the rationale was expansive or limited.[2] But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules.[3] It may be that it is the substantive rule that is being

[1] Id., 19. In *Hurd* v. *Hodge*, 334 U.S. 24 (1948), the Court outlawed judicial enforcement of restrictive covenants in the District of Columbia as violative of civil rights legislation and public policy. *Barrows* v. *Jackson*, 346 U.S. 249 (1953), held that damage actions for violations of racially restrictive covenants would not be judicially entertained.

[2] *Rice* v. *Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W. 2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), *rehearing granted, judgment vacated & certiorari dismissed*, 349 U.S. 70 (1955); *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956). The central issue in the "sit-in" cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare Bell* v. *Maryland*, 378 U.S. 226, 255–260 (1964) (opinion of Justice Douglas), *with* id., 326 (Justices Black, Harlan, and White dissenting).

[3] In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights and Court imposed varying limiting rules on such rules of law. *See* id., 265 (finding state action). Similarly, in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. Id., 916 n. 51.

enforced which is the dispositive issue, rather than the mere existence of state action. Thus, in *Evans* v. *Abney*,[4] a state court, after determining that property left by a devisee to a city to be used for a public park, which the will expressly stipulated should never be used by Negroes, could not be operated in a segregated fashion, ruled that instead of striking the segregation requirement from the will it should return the property to the decedent's heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator's intent with no racial motivation itself and distinguished *Shelley* on the basis that Negroes were not discriminated against by the reversion, because everyone was deprived of use of the park.[5]

Similar to *Shelley* in controversy and the indefiniteness of its rationale, the latter element of which appears to have undergone a modifying rationalization, is *Reitman* v. *Mulkey*,[6] in which, following enactment of an "open housing" law by the California legislature, an initiative and referendum measure was passed that repealed the law and amended the state constitution to prevent any agency of the State or of local government from henceforth forbidding racial discrimination in private housing. Upholding a state court invalidation of this amendment, the Court appeared to ground its decision on two lines of reasoning, either on the state court's premise that passage of the provision encouraged private racial discrimination impermissibly or on the basis that the provision made immune from the ordinary legislative process discriminatory racial practices, while not so limiting other processes, and thus impermissibly burdened minorities in the achievement of legitimate aims in a way other classes of persons were not burdened.[7] In a subsequent case, the latter rationale was utilized in a unanimous decision voiding an Akron ordinance, which suspended an "open housing" ordinance and provided that any future ordinance regulating transactions in real property "on the basis of race, color, religion, national origin or ancestry" must be submitted to a vote of the people before it could become effective, while any

[4] 396 U.S. 435 (1970). The matter had previously been before the Court in *Evans* v. *Newton*, 382 U.S. 296 (1966).

[5] Id., 445. Note the use of the same rationale in another context in *Palmer* v. *Thompson*, 403 U.S. 217 226 (1971). On a different result in the *"Girard College" will case, see infra, p.* 1689 n. 14.

[6] 387 U.S. 369 (1967). The decision was 5-to-4, Justices Harlan, Black, Clark, and Stewart dissenting. Id., 387.

[7] *See*, e.g., id., 377 (language suggesting both lines of reasoning).

other ordinance would become effective when passed, except that it could be petitioned to referendum.[8]

That *Mulkey* and *Hunter* stand for the proposition that imposing a barrier to racial amelioration legislation is the decisive and condemning factor is evident from two recent decisions with respect to state referendum decisions on busing for integration.[9] Both cases agree that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." [10] It is thus not impermissible to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play; that is, the private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." [11] There is no clear formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." [12] The "White Primary" was outlawed by the Court not because the party's discrimination was commanded by statute but because the party operated under the authority of the State and it in fact controlled the outcome of elections.[13] Although it was acting as trust-

[8] *Hunter* v. *Erickson*, 393 U.S. 385 (1969). In *Lee* v. *Nyquist*, 318 F. Supp. 710 (D.C.W.D.N.Y. 1970), *aff'd.*, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner's program to ameliorate *de facto* segregation. The federal court held the law void, holding in reliance on *Mulkey* that the statute encouraged racial discrimination *and* that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the *de facto* segregation problem.

[9] *Washington* v. *Seattle School Dist.*, 458 U.S. 457 (1982); *Crawford* v. *Los Angeles Board of Educ.*, 458 U.S. 527 (1982). A five-to-four majority in *Seattle* found the fault to be a racially-based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-to-1 majority in *Crawford* found that repeal of a measure to bus to undo *de facto* segregation, without imposing any barrier to other remedial devices, was permissible.

[10] *Crawford*, id., 458 U.S., 539, quoted in *Seattle*, id. 458 U.S., 483. *See also Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 414 (1977).

[11] *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

[12] Id., 722.

[13] *Smith* v. *Allwright*, 321 U.S. 649 (1944).

ee in administering and carrying out the will of one who had left money for a college, admission to which was stipulated to be for white boys only, Philadelphia was held to be engaged in forbidden state action in discriminating against Negroes in admission.[14] When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park left in trust for such use in a will and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.[15] In a significant case in which the Court explored a lengthy list of contacts between the State and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude Negroes from its restaurant. It was emphasized that the building was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee and had made stipulations but nothing related to racial discrimination, and that the financial success of the restaurant benefited the governmental agency; "the degree of state participation and involvement in discriminatory action" was sufficient to condemn it.[16]

The question arose, then, what degree of state participation was "significant?" Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The "sit-in" cases of the early 1960's presented all these questions and more but they were not there resolved.[17] The basics of an answer came in *Moose Lodge No. 107* v. *Irvis* [18] in which the Court

[14] *Pennsylvania* v. *Board of Trustees*, 353 U.S. 230 (1957). On remand, the state courts substituted private persons as trustees to carry out the will. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844, *cert. den.* 357 U.S. 570 (1958). This expedient was, however, ultimately held u nstitutional. *Brown* v. *Pennsylvania*, 392 F.2d 120 (C.A. 3), *cert. den.*, 391 U.S. 921 68).

[15] *Evans* v. *Newton*, 382 U.S. 296 (1966). Justices Black, Harlan, and Stewart dissented. Id., 312, 315. For the subsequent ruling in this case, *see Evans* v. *Abney*, 396 U.S. 435 (1970), considered *supra*, *p.* 1686.

[16] *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

[17] *See*, e.g., the various opinions in *Bell* v. *Maryland*, 378 U.S. 226 (1964).

[18] 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. Id., 177–179. It required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws.

held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not bar it from discriminating against Negroes. It denied that private discrimination became constitutionally impermissible "if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever," since any such rule would eviscerate the state action doctrine. Rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination.' " [19] Moreover, while the State had extensive powers to regulate in detail the liquor dealings of its licensees, "it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." [20] And there was nothing in the licensing relationship here that approached "the symbiotic relationship between lessor and lessee" which the Court had found in *Burton*.[21]

The Court subsequently made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of "state action." Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." [22] Or, to quote Judge Friendly, who first enunciated the test this way, the "essential point" is "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private, must be the subject of the complaint." [23] Therefore, the Court found no such nexus between the State and a public utility's action in terminating service to complainant in order to attribute the action to the State. Neither the fact that the business was subject to state regulation, nor that the State had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision included therein (but had not required the practice, had "not put its own weight on the side of

[19] Id., 173.
[20] Id., 176-177.
[21] Id., 174-175.
[22] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (under the due process clause).
[23] *Powe* v. *Miles*, 407 F.2d. 73, 81 (C.A. 2, 1968).

the proposed practice by ordering it") [24] operated to make the utility's action the State's action.[25] Significantly tightening the standard further against a finding of "state action," the Court asserted that plaintiffs must establish not only that a private party "acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ." [1] And the actions are to be attributable to the State apparently only if the State compelled the actions and not if also the State established the process through statute or regulation under which the private party acted. Thus, when a private party, having someone's goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statue to sell the goods and retain out of the proceeds his charges, his actions are not governmental action and need not follow the dictates of the due process clause.[2] In the context of regulated nursing home situations, in which the homes were closely regulated and state officials reduced or withdrew Medicaid benefits paid to patients when they were discharged or transferred to institutions providing a lower level of care, the Court found that the actions of the homes in discharging or transferring were not thereby rendered the actions of the government.[3]

The rules evolved by the Court are that (1) the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment," [4] and (2) "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State." [5]

[24] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). In dissent, Justice Marshall protested that the quoted language marked "a sharp departure" from precedent, "that state authorization and approval of 'private' conduct has been held to support a finding of state action." Id., 369. Note that in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.

[25] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351–358 (1974). On the due process limitations on the conduct of public utilities, see *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978).

[1] *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 156 (1978) (due process).

[2] Id., 164–166. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982).

[3] *Blum* v. *Yaretsky*, 457 U.S. 991 (1982).

[4] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). *Cf. Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

[5] *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982); *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 166 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).

Previously, the Court's decisions with respect to state "involvement" in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subjected to constitutional constraints. Many lower courts had held state action to exist in such circumstances.[6] However the question might have been answered under the older cases, it is evident that a negative answer flows from the premises of the more recent cases. In *Rendell-Baker* v. *Kohn*,[7] the private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90 and 99% of its operating budget from public funds. In *Blum* v. *Yaretsky*,[8] the nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds. In setting reimbursement rates, the State included a formula to assure the home a profit. Nevertheless, in both instances, the Court found that the entities remained private and required plaintiffs to show that as to the complained of actions the State was involved, either through coercion or encouragement. "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business." [9]

One must also note that judicial inquiry into the existence of "state action" may be directed toward the implementation of either of two remedies and this may well lead to some difference in the search. Thus, in the cases considered here suits were against the private actor to compel him to halt his discriminatory action, to enjoin him to admit blacks to a lunch counter for example. But one could just as readily bring suit against the government to compel it to cease aiding the private actor because of his discriminatory conduct. Recurrence to the latter remedy might well avoid constitu-

[6] On funding, *see Simkins* v. *Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (C.A. 4, 1963), *cert. den.*, 376 U.S. 938 (1964); *Kerr* v. *Enoch Pratt Free Library*, 149 F.2d 212 (C.A. 4), *cert. den.*, 326 U.S. 721 (1945); *Christhilf* v. *Annapolis Emergency Hosp. Assn.*, 496 F.2d 174 (C.A. 4, 1974). *But compare Greco* v. *Orange Mem. Hosp. Corp.*, 513 F.2d 873 (C.A. 5), *cert. den.*, 423 U.S. 1000 (1975). On tax benfits, *see Green* v. *Connally*, 330 F. Supp. 1150 (D.C.D.C.) (three-judge court), *aff'd. sub nom. Coit* v. *Green*, 404 U.S. 997 (1971); *McGlotten* v. *Connally*, 338 F. Supp. 448 (D.C.D.C. 1972); *Jackson* v. *Statler Foundation*, 496 F.2d 623 (C.A. 2, 1974). *But compare New York City Jaycees* v. *United States Jaycees*, 512 F.2d 856 (C.A. 2, 1976); *Greenya* v. *George Washington Univ.*, 512 F.2d 556 (C.A. D.C.), *cert. den.*, 423 U.S. 995 (1975).

[7] 457 U.S. 830 (1982).

[8] 457 U.S. 991 (1982).

[9] Id., 1011.

tional issues that an order directed to the private party would raise.[10] But in any event, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy; in a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints while in a suit against the government agency it must be determined whether the government's action "impermissibly fostered" the private conduct.

Thus, in *Norwood* v. *Harrison*,[11] the Court struck down the provision of free textbooks by the State to private schools set up as racially segregated institutions to avoid desegregated public schools, even though the program predated the establishment of these schools. "[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.' . . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discriminations."[12] And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools in order that the district court could determine whether such use "involve government so directly in the actions of those users as the warrant court intervention on constitutional grounds."[13] Unlike the situation in which private club discrimination is attacked directly, "the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities. . . ." Receipt of just any sort of benefit or service

[10] For example, rights of association protected by the First Amendment. *See Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178–180 (1972) (Justice Douglas dissenting); *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974); *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. *See Runyon* v. *McCrary*, 427 U.S. 160, 175–179 (1976).

[11] 413 U.S. 455 (1973).

[12] *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 568–569 (1974), quoting *Norwood* v. *Harrison*, 413 U.S. 455, 466, 467 (1973).

[13] *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 570 (1974).

at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court's order was too broad because not predicated upon a proper finding of state action. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.[14]

It should be noted, however, that the Court has interposed, without mentioning these cases, a potentially significant barrier to utilization of the principle set out in them. In a 1976 decision, which it has expanded since, it held that plaintiffs, seeking to have withdrawn governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must in order to bring the suit show that revocation of the benefit would cause the institutions to cease the complained of conduct.[15]

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a "public function." This rationale is one of those which emerges from the various opinions in *Terry* v. *Adams.*[16] In *Marsh* v. *Alabama,*[17] a Jehovah's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town and the Court reversed. It is not at all clear from the opinion of the Court what it was that made the privately-owned town one to which the Constitution applied. In essence, it appears to have been that the town "had all the characteristics of any other American town," that it was "like" a State. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." [18] Subsequent efforts to expand upon

[14] Id., 573–574. In *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), plaintiffs, objecting to decisions of the nursing home in discharging or transferring patients, sued public officials, but they objected to the discharges and transfers, not to the changes in Medicaid benefits made by the officials.

[15] *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). *See* id., 46, 63–64 (Justice Brennan concurring and dissenting).

[16] 345 U.S. 461 (1953).

[17] 326 U.S. 501 (1946).

[18] Id., 506.

*Marsh* were at first successful and then turned back and the "public function" theory in the context of privately-owned shopping centers sharply curtailed.[19]

Attempts to apply such a theory to other kinds of private conduct, such as to private utilities,[20] to private utilization of permissive state laws to secure property claimed to belong to creditors,[21] to the operation of schools for "problem" children referred by public institutions,[22] and to the operations of nursing homes the patients of which are practically all funded by public resources,[23] have proved unavailing. The "public function" doctrine is to be limited to a delegation of "a power 'traditionally exclusively reserved to the State.' " [24] Therefore, the question is not "whether a private group is serving a 'public function.' . . . That a private entity performs a function which serves the public does not make its acts state action." [25] It appears then that beyond the conduct of elections and the operation of a privately-owned town that has all the characteristics of a public municipality, the "public function" part of the state action doctrine is of extremely limited application.

***"Persons".***—In the case in which it was first called upon to interpret this clause, the Court doubted whether "any action of a State not directed by way of discrimination against the [N]egroes as a class, or on account of their race, will ever be held to come within the purview of this provision." [1] Nonetheless, in deciding the *Granger Cases* shortly thereafter, the Justices seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the clause.[2] Nine years later, Chief Justice Waite announced from the bench that the Court would not hear argument on the question whether the equal protection clause applied to corporations. "We are all of the opinion that it does." [3] The

[19] *See Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), *limited in Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), *and overruled in Hudgens* v. *NLRB*, 424 U.S. 507 (1976). The *Marsh* principle is good only when private property has taken on *all* the attributes of a municipality. Id., 516-517.

[20] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

[21] *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 157-159 (1978).

[22] *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982).

[23] *Blum* v. *Yaretsky*, 457 U.S. 991, 1011-1012 (1982).

[24] *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 157 (1978) (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)).

[25] *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982).

[1] *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 81 (1873). *Cf. Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 177 (1972) (Justice Rehnquist dissenting).

[2] *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U.S. 155 (1877); *Peik* v. *Chicago & Nw. Ry. Co.*, 94 U.S. 164 (1877); *Chicago, M. & S. P. R. Co.* v. *Ackley*, 94 U.S. 179 (1877); *Winona & St. Peter R. Co.* v. *Blake*, 94 U.S. 180 (1877).

[3] *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U.S. 394, 396 (1886). The background and developments from this utterance are treated in H. Graham, *Every*

word has been given the broadest possible meaning. "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; . . ." [4] The only qualification is that a municipal corporation cannot invoke the clause against its State.[5]

***"Within Its Jurisdiction."***—Persons "within its jurisdiction" are entitled to equal protection from a State. Largely because Article IV, § 2, has from the beginning guaranteed the privileges and immunities of citizens in the several States, the Court has rarely construed the phrase in relation to natural persons.[6] It was first held that a foreign corporation not doing business in a State under conditions that subjected it to process issuing from the courts of that State at the instance of suitors was not "within the jurisdiction" and could not complain of the preferences granted resident creditors in the distribution of assets of an insolvent corporation,[7] but this holding was subsequently qualified in a decision that a foreign corporation which sued in a court of a State in which it was not licensed to do business to recover possession of property wrongfully taken from it in another State was "within the jurisdiction" and could not be subjected to unequal burdens in the maintenance of the suit.[8] The test of amenability to service of process within the State was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual.[9] When a State has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws but not necessarily to identical treatment with domestic corporations.[10]

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*man's Constitution—Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism* (Madison: 1968), chaps. 9, 10, and *see pp.* 566–584. Justice Black, *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 85 (1938), and Justice Douglas, *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 576 (1949), have disagreed that corporations are persons for equal protection purposes.

[4] *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). For modern examples, *see Levy* v. *Louisiana*, 391 U.S. 68, 70 (1968); *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971).

[5] *City of Newark* v. *New Jersey*, 262 U.S. 192 (1923); *Williams* v. *Mayor*, 289 U.S. 36 (1933).

[6] *See Plyler* v. *Doe*, 457 U.S. 202, 210–216 (1982) (explicating meaning of the phrase in the context of holding that aliens illegally present in a State are "within its jurisdiction" and may thus raise equal protection claims).

[7] *Blake* v. *McClung*, 172 U.S. 239, 261 (1898); *Sully* v. *American National Bank*, 178 U.S. 289 (1900).

[8] *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923).

[9] *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946).

[10] *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949); *Hanover Ins. Co.* v. *Harding*, 272 U.S. 494 (1926). *See also Philadelphia Fire Assn.* v. *New York*, 119 U.S. 110 (1886).

**Equal Protection: Judging Classifications by Law**

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of § 1 of the Fourteenth Amendment.[1] Immediately pressing to its sponsors was the desire to provide a firm constitutional basis for already enacted civil rights legislation [2] and by amending the Constitution to place repeal beyond the accomplishment of a simple majority in a future Congress.[3] No doubt there were conflicting interpretations of the phrase "equal protection" among sponsors and supporters and the legislative history does little to clarify whether any sort of consensus was accomplished and if so what it was.[4] While the Court early recognized that Negroes were the primarily intended beneficiaries of the protections thus adopted,[5] the spare language was majestically unconfined to so limited a class or to so limited a purpose. Thus, as will be seen, the equal protection standard came to be applicable to all classifications by legislative and other official bodies, though not with much initial success,[6] until now the equal protection clause in the fields of civil rights and fundamental liberties looms large as a constitutional text affording the federal and state courts extensive powers of review with regard to differential treatment of persons and classes.

***The Traditional Standard: Restrained Review.***—The traditional standard of review of equal protection challenges of classifications developed largely though not entirely in the context of economic regulation.[7] It is still most validly applied there, although it ap-

[1] The story is recounted in J. James, *The Framing of the Fourteenth Amendment* (New York: 1956). *See also* B. Kendrick (ed.), *Journal of the Joint Committee of Fifteen on Reconstruction* (Washington: 1914). The floor debates are collected in 1 B. Schwartz (ed.), *Statutory History of the United States—Civil Rights* (New York: 1970), 181.

[2] Civil Rights Act of 1886, 14 Stat. 27, now in part 42 U.S.C. §§ 1981, 1982. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422–437 (1968).

[3] As in fact much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36; 35 Stat. 1088. *See* R. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: 1947), 45–46.

[4] TenBroek, *Equal Under Law* (New York: rev. ed. 1965); Frank & Munro, "The Original Understanding of 'Equal Protection of the Laws,'" 50 Colum. L. Rev. 131 (1950); Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1 (1955); and *see* the essays collected in H. Graham, *Everyman's Constitution—Historical Essays on the Fourteenth Amendment, the 'Conspiracy Theory,' and American Constitutionalism* (Madison: 1968). In calling for reargument in *Brown* v. *Board of Education*, 345 U.S. 972 (1952), the Court asked for and received extensive analysis of the legislative history of the Amendment with no conclusive results. Id., 347 U.S. 483, 489–490 (1954).

[5] *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 81 (1873).

[6] In *Buck* v. *Bell*, 274 U.S. 200, 208 (1927), Justice Holmes characterized the equal protection clause as "the last resort of constitutional arguments."

[7] *See Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

pears in many other contexts as well; recently, a more active review has appeared when classifications are based on a "suspect" indicium or affect a "fundamental" interest.

"The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." Justice Frankfurter once wrote. "They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[8] The mere fact of classification will not void legislation,[9] then, because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations.[10] "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."[11] Or, more succinctly, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."[12]

How then is the line between permissible and invidious classification to be determined? In *Lindsley* v. *Natural Carbonic Gas Co.*,[13] the Court summarized one version of the rules still prevailing. "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discre-

[8] *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940).

[9] *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U.S. 96, 106 (1899). *See also* from the same period, *Orient Ins. Co.* v. *Daggs*, 172 U.S. 557 (1869); *Bachtel* v. *Wilson*, 204 U.S. 36 (1907); *Watson* v. *Maryland*, 218 U.S. 173 (1910), and later cases. *Kotch* v. *Board of River Port Pilot Comrs.*, 330 U.S. 552 (1947); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Schilb* v. *Kuebel*, 404 U.S. 357 (1971); *Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).

[10] *Barrett* v. *Indiana*, 229 U.S. 26 (1913).

[11] *Barbier* v. *Connolly*, 113 U.S. 27, 32 (1885).

[12] *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

[13] 220 U.S. 61, 78–79 (1911), quoted in full in *Morey* v. *Doud*, 354 U.S. 457, 463–464 (1957). Classifications which are purposefully discriminatory fall before the equal protection clause without more. E.g., *Barbier* v. *Connolly*, 113 U.S. 27, 30 (1885); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–374 (1886). *Cf. New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 593 n. 40 (1979). Explicit in all the formulations is that a legislature must have had a permissible purpose, a requirement which is seldom failed, given the leniency of judicial review. *But see Zobel* v. *Williams*, 457 U.S. 55, 63–64 (1982), and id., 65 (Justice Brennan concurring).

tion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Especially because of the emphasis upon the necessity for total arbitrariness, utter irrationality, and the fact that the Court will strain to conceive of a set of facts that will justify the classification, the test is extremely lenient and, assuming the existence of a constitutionally permissible goal, no classification will ever be upset. But, contemporaneously with this test, the Court also pronounced another lenient standard which did leave to the courts a judgmental role. In this test, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[14] Between conceiving of any set of facts that would justify the classification which is challenged and evaluating whether the classification has a fair and substantial relation to the goal of the legislature, there is some room for the Court to set aside the choice of the lawmakers, and in fact use of the latter standard did result in some invalidations.[15]

But then, coincident with the demise of substantive due process in the area of economic regulation,[16] the Court reverted to the former standard, deferring to the legislative judgment on questions of economics and related matters; even when an impermissible purpose could have been attributed to the classifiers it was usually possible to conceive of a reason that would justify the classification.[17] Strengthening the deference was the recognition of discre-

[14] *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). *See also Brown-Forman Co.* v. *Kentucky*, 217 U.S. 563, 573 (1910).

[15] E.g., *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920); *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935); *Mayflower Farms* v. *Ten Eyck*, 297 U.S. 266 (1936).

[16] In *Nebbia* v. *New York*, 291 U.S. 502, 537 (1934), speaking of the limits of the due process clause, the Court observed that "in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare."

[17] E.g., *Tigner* v. *Texas*, 310 U.S. 141 (1940); *Kotch* v. *Board of River Port Pilot Comrs.*, 330 U.S. 552 (1947); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *Railway Express*

tion in the legislature not to try to deal with an evil or a class of evils all within the scope of one enactment but to approach the problem piecemeal, to learn from experience, and to ameliorate the harmful results of two evils differently, resulting in permissible over- and under-inclusive classifications.[18]

In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using and the results have reflected this. It has upheld economic classifications that suggested impermissible intention to discriminate, reciting at length the *Lindsley* standard, complete with conceiving-of-a-basis and the one-step-at-a-time rationale,[19] and it has applied to social welfare regulations this relaxed standard.[20] In other cases, it has utilized the *Royster Guano* standard and has looked to the actual goal articulated by the legislature in determining whether the classification had a reasonable relationship to that goal,[21] although it has usually ended up upholding the classification. Finally, purportedly applying the rational basis test, the Court has invalidated some classifications in the areas traditionally most subject to total deference.[22]

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*Agency* v. *City of New York*, 336 U.S. 106 (1949); *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

[18] *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *McDonald* v. *Board of Election Comrs.*, 394 U.S. 802, 809 (1969); *Schilb* v. *Kuebel*, 404 U.S. 357, 364-365 (1971); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

[19] *City of New Orleans* v. *Dukes*, 427 U.S. 297,303-304 (1976); *City of Pittsburg* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

[20] *Dandridge* v. *Williams*, 397 U.S. 471, 485-486 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535, 549 (1972). *See also New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587-594 (1979).

[21] E.g., *McGinnis* v. *Royster*, 410 U.S. 263, 270-277 (1973); *Johnson* v. *Robison*, 415 U.S. 361, 374-383 (1974); *City of Charlotte* v. *Intl. Assn. of Firefighters*, 426 U.S. 283, 286-289 (1976). It is significant that these opinions were written by Justices who subsequently dissented from more relaxed standard of review cases and urged adherence to at least a standard requiring articulation of the goals sought to be achieved and an evaluation of the "fit" of the relationship between goal and classification. *Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 182 (1980) (Justices Brennan and Marshall dissenting); *Schweiker* v. *Wilson*, 450 U.S. 221, 239 (1981) (Justices Powell, Brennan, Marshall, and Stevens dissenting). *See also New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 594 (1979) (Justice Powell concurring in part and dissenting in part), and id., 597, 602 (Justices White and Marshall dissenting).

[22] E.g., *Lindsey* v. *Normet*, 405 U.S. 56, 74-79 (1972); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *James* v. *Strange*, 407 U.S. 128 (1972); *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973). The Court in *Reed* v. *Reed*, 404 U.S. 71, 76 (1971), utilized the *Royster Guano* formulation and purported to strike down a sex classification on the rational basis standard, but, whether the standard was actually used or not, the case was the beginning of the decisions applying a higher standard to sex classifications.

Attempts to develop a consistent principle have been so far unsuccessful. In *Railroad Retirement Board* v. *Fritz*,[23] the Court acknowledged that "[t]he most arrogant legal scholar would not claim that all of these cases cited applied a uniform or consistent test under equal protection principles," but then went on to note the differences between *Lindsley* and *Royster Guano* and chose the former. But, shortly, in *Schweiker* v. *Wilson*,[24] written by another Justice than the one who wrote *Fritz*, the Court sustained another classification, using the *Royster Guano* standard, evaluating whether the classification bore a substantial relationship to the goal actually chosen and articulated by Congress. In between these decisions, the Court approved a state classification after satisfying itself that the legislature had had in mind a permissible goal, but setting aside the decision of the state court that the classification would not promote that goal the Court announced that it was irrelevant whether in fact it would, because the question was whether the legislature "could rationally have decided" that it would.[25]

In short, it is uncertain which formulation of the rational basis standard the Court will adhere to.[1] In the main, the result in recent years has not been sustaining versus voiding classification but the care with which the Court has reviewed the facts and the legislation with its legislative history to uphold the challenged classifications. The recent decisions voiding classifications have not clearly set out which standard they have been using.[2] Determina-

[23] 449 U.S. 166, 174–179 (1980). The quotation is id., 176–177 n. 10. The extent of deference is notable, inasmuch as the legislative history seemed clearly to establish that the purpose the Court purported to discern as the basis for the classification was not the congressional purpose at all. Id., 186–197 (Justice Brennan dissenting). The Court observed, however, that it was "constitutionally irrelevant" whether the plausible basis was in fact within Congress' reasoning, inasmuch as the Court has never required a legislature to articulate its reasons for enacting a statute. Id., 179. For a continuation of the debate with respect to actual purpose and subsequently conceived purposes, *see Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 680–685 (1981) (Justice Brennan concurring), and id., 702–706 (Justice Rehnquist dissenting). *Cf. Schweiker* v. *Wilson*, 450 U.S. 221, 243–245 (1981) (Justice Powell dissenting).

[24] 450 U.S. 221, 230–239 (1981). Nonetheless, the four dissenters thought that the purpose discerned by the Court was not the actual purpose, that it had had in fact no purpose in mind, and that the classification was not rational. Id., 239.

[25] *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461–470 (1981). The quoted phrase is id., 466.

[1] In *City of Mesquite* v. *Aladdin's Castle*, 455 U.S. 283, 294 (1982), the Court observed that it was not clear whether it would apply *Royster Guano* to the classification at issue, citing *Fritz* as well as *Craig* v. *Boren*, 429 U.S. 190 (1976), a sex intermediate standard case. Justice Powell denied that *Royster Guano* or *Reed* v. *Reed* had ever been rejected. Id., 301 n. 6 (dissenting). *See also* id., 296–297 (Justice White).

[2] The exception is *Reed* v. *Reed*, 404 U.S. 71 (1971), which, though it purported to apply *Royster Guano*, may have applied heightened scrutiny. *See Zobel* v. *Wil-*

tion in this area, then, must await presentation to the Court of a classification which it would sustain under the *Lindsley* standard and invalidate under *Royster Guano*.

***The New Standards: Active Review.***—When government legislates or acts either on the basis of a "suspect" classification or with regard to a "fundamental" interest, the traditional standard of equal protection review is abandoned, and the Court exercises a "strict scrutiny," government must demonstrate a high degree of need on its part, and usually little or no presumption favoring the classification is to be expected. After much initial controversy within the Court, it has now found several classifications to be worthy of a degree of "intermediate" scrutiny, requiring a showing of important governmental purposes and a close fit between the classification and the purposes.

Paradigmatic of "suspect" categories is classification by race. First in the line of cases dealing with this issue is *Korematu* v. *United States*,[3] concerning the wartime evacuation of Japanese-Americans from the West Coast, in which the Court said that because only a single ethnic-racial group was involved the measure was "immediately suspect" and subject to "rigid scrutiny." The school segregation cases [4] purported to enunciate no *per se* rule, however, although subsequent summary treatment of a host of segregation measures may have implicitly done so, until in striking down state laws prohibiting interracial marriage or cohabitation the Court declared that racial classifications "bear a far heavier burden of justification" than other classifications and were invalid because no "overriding statutory purpose" [5] was shown and they were not necessary to some "legitimate overriding purpose." [6] "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." [7] Remedial racial classifications, that is, the development of "affirmative action" or similar programs that classify on the basis of race for the purpose of ameliorating conditions resulting from past discrimination, are subject to more than traditional review scrutiny, but whether the highest or some intermediate

*liams*, 457 U.S. 55, 61–63 (1982), in which it found the classifications not rationally related to the goals without discussing which standard it was using.

[3] 323 U.S. 214, 216 (1944).

[4] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[5] *McLaughlin* v. *Florida*, 379 U.S. 184, 192, 194 (1964).

[6] *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). In *Lee* v. *Washington*, 390 U.S. 333 (1968), it was indicated that preservation of discipline and order in a jail might justify racial segregation there if shown to be necessary.

[7] *Mass. Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979), quoted in *Washington* v. *Seattle School Dist.*, 458 U.S. 457, 485 (1982).

standard is the applicable test is uncertain.[8] A measure which does not draw a distinction explicitly on race but which does draw a line between those who seek to use the law to do away with or modify racial discrimination and those who oppose such efforts does in fact create an explicit racial classification and is constitutionally suspect.[9]

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect,[10] to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review,[11] and to pass on statutory and administrative treatments of illegitimates inconsistently.[12] Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review.[13]

However, in a major evaluation of equal protection analysis early in this period, Justice Powell for the Court utilized solely the two-tier approach, determining that because the interests involved did not occasion strict scrutiny the Court would thus decide the case on minimum rationality standards.[14] Decisively rejected was

[8] *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 287–320 (1978) (Justice Powell announcing judgment of Court) (suspect), and id., 355–379 (Justices Brennan, White, Marshall, and Blackmun concurring in part and dissenting in part) (intermediate scrutiny); *Fullilove* v. *Klutznick*, 448 U.S. 448, 491–492 (1980) (Chief Justice Burger announcing judgment of Court) ("a most searching examination" but not choosing a particular analysis), and id., 495 (Justice Powell concurring), 523 (Justice Stewart dissenting) (suspect), 548 (Justice Stevens dissenting) (searching scrutiny).

[9] *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Washington* v. *Seattle School Dist.*, 458 U.S. 457 (1982).

[10] *Graham* v. *Richardson*, 403 U.S. 365, 371–372 (1971).

[11] *Reed* v. *Reed*, 404 U.S. 71 (1971); for the hint, *see Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n. 7 (1972).

[12] *See Levy* v. *Louisiana*, 391 U.S. 68 (1968) (strict review); *Labine* v. *Vincent*, 401 U.S. 532 (1971) (lenient review); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (modified strict review).

[13] *Cf. McDonald* v. *Board of Election Comrs.*, 394 U.S. 802, 807 (1969); *Bullock* v. *Carter*, 405 U.S. 134 (1972). *See Shapiro* v. *Thompson*, 394 U.S. 618, 658–659 (1969) (Justice Harlan dissenting). *But compare Lindsey* v. *Normet*, 405 U.S. 56 (1972); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

[14] *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 29–40 (1973). Justice Marshall argued that the Court had in fact applied, and must apply, a spectrum of standards, depending upon the constitutional and societal importance of the interests affected and the degree of invidiousness of the classification drawn. Id., 98–99 (dissenting). *See* his dissents in *Dandridge* v. *Williams*, 397 U.S. 471, 520–521 (1970); *Marshall* v. *United States*, 414 U.S. 417, 430, 432 (1974); *Mass. Board of Retirement* v. *Murgia*, 427 U.S. 307, 318–321 (1976).

the contention that a *de facto* wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis,[15] a holding that has several times been strongly reaffirmed by the Court.[16] But the Court's rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives."[17] And classifications that disadvantage illegitimates are subject to a similar though less exacting scrutiny of purpose and fit.[18] This

[15] Id., 411 U.S., 44-45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. Id., 20.

[16] E.g., *United States* v. *Kras*, 409 U.S. 434 (1973); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Harris* v. *McRae*, 448 U.S. 297 (1980).

[17] *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Justice Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when "fundamental" rights and "suspect classes" are absent, id., 210 (concurring), and added: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases." Ibid, n. *. Justice Stevens wrote that in his view the two-tiered analysis does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id., 211, 212. Chief Justice Burger and Justice Rehnquist would employ the rational basis test for gender classification. Id., 215, 217 (dissenting). Occasionally, because of the particular subject matter, the Court has appeared to apply a rational basis standard in fact if not in doctrine, E.g., *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (military); *Michael M.* v. *Superior Court*, 450 U.S. 464 (1981). Four Justices in *Frontiero* v. *Richardson*, 411 U.S. 677, 684-687 (1973), were prepared to find sex a suspect classification, and in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 n. 9 (1982), the Court appeared to leave open the possibility that at least some sex classifications may be deemed suspect.

[18] *Mills* v. *Habluetzel*, 456 U.S. 91, 99 (1982); *Parham* v. *Hughes*, 441 U.S. 347 (1979); *Lalli* v. *Lalli*, 439 U.S. 259 (1978); *Trimble* v. *Gordon*, 430 U.S. 762 (1977). In *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976), it was said that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." *Lucas* sustained a statutory scheme virtually identical to the one struck down in *Califano* v. *Goldfarb*, 430

period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.[19]

Expansion of the characteristics which when used as a basis for classification must be justified by a higher showing than ordinary economic classifications has so far been resisted.[20]

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, government classifications which adversely affect them must be justified by a showing of a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose. The effect of applying the test, as in the other branch of active review, is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.[21]

It is thought[22] that the "fundamental right" theory had its origins in *Skinner* v. *Oklahoma ex rel. Williamson*,[23] in which the Court subjected to "strict scrutiny" a state statute providing for compulsory sterilization of habitual criminals, such scrutiny being thought necessary because it affected "one of the basic civil rights." In the apportionment decisions, Chief Justice Warren observed that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[24] A stiffening of

U.S. 199 (1977), except that the latter involved sex while the former involved illegitimacy.

[19] Applying strict scrutiny, *see, e.g.*, *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977). Applying lenient scrutiny in cases involving restrictions on alien entry into the political community, *see Foley* v. *Connelie*, 435 U.S. 291 (1978); *Ambach* v. *Norwich*, 441 U.S. 68 (1979); *Cabell* v. *Chavez-Salido*, 454 U.S. 432 (1982). *See also Plyler* v. *Doe*, 457 U.S. 202 (1982).

[20] E.g., age classifications are not suspect or entitled to intermediate scrutiny, *Mass. Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Vance* v. *Bradley*, 440 U.S. 93 (1979).

[21] *Kramer* v. *Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969).

[22] Id., 660 (Justice Harlan dissenting).

[23] 316 U.S. 535, 541 (1942).

[24] *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility [25] and the phrase "compelling state interest" was used several times in Justice Brennan's opinion in *Shapiro* v. *Thompson*.[1] Thereafter, the phrase was used in several voting cases in which restrictions were voided and the doctrine asserted in other cases.[2]

While no opinion of the Court attempted to delineate the process by which certain "fundamental" rights were differentiated from others,[3] it was evident from the cases that the right to vote,[4] the right of interstate travel,[5] the right to be free of wealth distinctions in the criminal process,[6] and the right of procreation [7] were at least some of those interests that triggered active review when *de jure* or *de facto* official distinctions were made with respect to them. This branch of active review the Court also sought to rationalize and restrict in *Rodriguez*,[8] which involved both a claim of *de facto* wealth classifications being suspect and a claim that education was a fundamental interest so that affording less of it to people because they were poor activated the compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." [9] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance.

But just as *Rodriguez* was unable to prevent the Court's adoption of a "three-tier" or "sliding-tier" standard of review in the first phase of the active-review doctrine, so it did not by stressing

[25] *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

[1] 394 U.S. 618, 627, 634, 638 (1969).

[2] *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

[3] This indefiniteness has been a recurring theme in dissents. E.g., *Shapiro* v. *Thompson*, 394 U.S. 618, 655 (1969) (Justice Harlan); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 177 (1972) (Justice Rehnquist).

[4] E.g., *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

[5] E.g., *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

[6] E.g., *Tate* v. *Short*, 401 U.S. 395 (1971).

[7] *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

[8] *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973).

[9] Id., 30, 33–34. But see id., 62 (Justice Brennan dissenting), 70, 110–117 (Justices Marshall and Douglas dissenting).

the requirement that an interest be expressly or impliedly protected by the Constitution prevent the addition of other interests to the list of "fundamental" interests. The difficulty was that the Court decisions on the right to vote, the right to travel, the right to procreate, as well as others, premise the constitutional violation to be of the equal rights clause which does not itself guarantee the right but prevents the differential governmental treatment of those attempting to exercise the right.[10] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right which required a compelling justification.[11] While denials of public funding of abortions were held to implicate no fundamental interest—abortion being a fundamental interest—and no suspect classification—because only poor women needed public funding[12]—other denials of public assistance because of illegitimacy, alienage, or sex have been deemed governed by the same standard of review as affirmative harms imposed on those grounds.[13] And in *Plyler* v. *Doe*,[14] the denial of education completely to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.

Thus, the nature of active review in equal protection jurisprudence remains in flux, subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. But the cases, more fully reviewed hereafter, clearly indicate that a sliding scale of review is a fact of the Court's cases, however much its doctrinal explanation lags behind.

### Testing Facially Neutral Classifications Which Impact on Minorities

A classification expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or illegitimacy triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.[1] But when it is contended that a law, which is in

[10] *Zobel* v. *Williams*, 457 U.S. 55, 60 & n. 6 (1982), and id., 66–68 (Justice Brennan concurring), 78–80 (Justice O'Connor concurring) (travel).

[11] *Zablocki* v. *Redhail*, 434 U.S. 374 (1978).

[12] *Maher* v. *Roe*, 432 U.S. 464 (1977); *Harris* v. *McRae*, 448 U.S. 297 (1980).

[13] E.g., *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974) (illegitimacy); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977) (alienage); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (sex).

[14] 457 U.S. 202 (1982).

[1] *See* e.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Guinn* v. *United States*, 238 U.S. 347 (1915); *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Gomillion* v. *Lightfoot*, 364 U.S.

effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the equal protection clause, a much more difficult case is presented.

It is necessary that one claiming harm through the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate. "[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." [2] In reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation [3] and upon the Court's decisions reading congressional civil rights enactments as providing that when employment practices disqualifying disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices,[4] a number of lower federal

339 (1960). Government may make a racial classification that, for example, does not separate whites from blacks but that by focussing on an issue of racial import creates a classification that is suspect. *Washington* v. *Seattle School Dist.*, 458 U.S. 457, 467–474 (1982).

[2] *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. Id., 247–248; *Rogers* v. *Lodge*, 458 U.S. 613, 617 n. 5 (1982).

[3] The principal case was *Palmer* v. *Thompson*, 403 U.S. 217 (1971), in which a 5-to-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id., 224–226, but it also, and the *Davis* Court so read it as actually deciding, drew the conclusion that since the pools were closed for both whites and blacks there was no discrimination and that the city's avowed reason for closing the pools was to avoid violence and economic loss, which could not be impeached by allegations of a racial motive. *See also Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972).

[4] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. *Washington* v. *Davis*, 426 U.S. 229, 238–239, 246–248 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of *Griggs*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether *Griggs* applies to each section of the antidiscrimination provision of Title VII. *See Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Furnco Const. Co.* v. *Waters*, 438 U.S. 567 (1978). *But see General Building Contractors Assn.* v. *Pennsylvania*, 458 U.S. 375 (1982) (unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

courts had developed in constitutional litigation a "disproportionate impact" analysis under which a violation could be established upon a showing that a statute or practice adversely affected a class without regard to discriminatory purpose, absent some justification going substantially beyond what would be necessary to validate most other classifications.[5] These cases were disapproved in *Davis;* but the Court did note that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." [6]

Both elucidation and not a little confusion followed upon application of *Davis* in the following Terms. Looking to a challenged zoning decision of a local board which had a more harsh impact upon blacks and low-income persons than on others, the Court explained in some detail how inquiry into motivation would work.[7] First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; only "a discriminatory purpose" among permissible ones need be shown and the burden shifts to defendant to show that the same decision would have resulted absent the impermissible motive.[8] Second, determining whether a dis-

[5] *See Washington* v. *Davis*, 426 U.S. 229, 244 n. 12 (1976) (listing and disapproving cases). Cases not cited by the Court included the Fifth Circuit's wrestling with the *de facto-de jure* segregation distinction. In *Cisneros* v. *Corpus Christi Ind. School Dist.*, 467 F.2d 142, 148–150 (C.A. 5, 1972) (*en banc*), *cert. den.*, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the "*de facto* and *de jure* nomenclature" to be "meaningless." After the distinction was reiterated in *Keyes* v. *Denver School District*, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and thus that a school board decision, whatever its facial motivation, that results in segregation is intentional in the constitutional sense. *United States* v. *Texas Educ. Agency*, 532 F.2d 380 (C.A. 5), *vacated* and *remanded for reconsideration in light of Washington* v. *Davis*, 429 U.S. 990 (1976), *modified and adhered to*, 564 F.2d 162, *reh. den.*, 579 F.2d 910 (C.A. 5, 1977–78), *cert den.*, 443 U.S. 915 (1979). *See also United States* v. *Texas Educ. Agency*, 600 F.2d 518 (C.A. 5, 1979). This form of analysis was, however, substantially cabined in *Massachusetts Personnel Admr.* v. *Feeney*, 442 U.S. 256, 278–280 (1979), although foreseeability as one kind of proof was acknowledged by *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464–465 (1979).

[6] *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

[7] *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

[8] Id., 265–266, 270 n. 21. See also *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284–287 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive).

criminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," but this is a rare case.[9] In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision," especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decisionmakers may be examined and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." [10] In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all nonveterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender based; too many men are nonveterans to permit such a conclusion and there are women veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a par-

[9] *Arlington Heights, supra*, 266.
[10] Id., 267-268.

ticular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[11]

Moreover, in *City of Mobile* v. *Bolden*[12] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to evaluate standing on its own each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against blacks and Hispanics, without considering whether its ruling was premised on discriminatory purpose or adverse impact but listing and weighing a series of factors the totality of which caused the Court to find invidious discrimination.[13] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[14] Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent.[15] But, contemporaneously with Congress'

[11] *Massachusetts Personnel Admr.* v. *Feeney*, 442 U.S. 256, 279 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the equal protection clause. But *compare Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449 (1979), and *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the *Davis* standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

[12] 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the equal protection clause in the "fundamental interest" context, vote dilution, rather than just in the suspect classification context. While Justices Marshall and Brennan disagreed, id., 94, 103, the other Justices agreed and disagreed with the plurality on various other grounds.

[13] *White* v. *Regester*, 412 U.S. 755 (1972), was the prior case. *See also Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). Justice White, the author of *Register*, dissented in *Mobile, supra*, 446 U.S. 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White* v. *Register*." Justice Blackmun, id., 80, and Justices Brennan and Marshall, as alternate holdings, id., 94, 103, agreed with him. Thus, the Court was at least evenly divided on this issue, regardless of where Justice Stevens comes down.

[14] Id., 446 U.S., 65–74.

[15] Id., 73–74. The principal formulation of the test was in *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (C.A. 5, 1973), *aff'd. on other grounds sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976), and are thus frequently referred to as the *Zimmer* factors.

statutory rejection of the *Mobile* plurality standards,[16] the Court, in *Rogers* v. *Lodge*,[17] appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of "circumstantial evidence" [18] that is more reminiscent of pre-*Washington* v. *Davis* cases than of the more recent decisions.

*Rogers* v. *Lodge* was also a multimember electoral district case brought under the equal protection clause [19] and the Fifteenth Amendment. The fact that the system operated to cancel out or dilute black voting strength, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. "[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." [20] Turning to the lower court's enunciation of standards, the Court approved the *Zimmer* formulation. The fact that no black had ever been elected in the county, in which blacks were a majority of the population but a minority of registered voters, was "important evidence of purposeful exclusion." [21] Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of blacks from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the black community, indicated the presence of discriminatory motivation. The Court also looked to the "depressed socio-economic status" of the black population as being both a result of past discrimination and a barrier to black access to voting power.[22] As for the district court's applica-

[16] By the Voting Rights Act Amendments of 1982, P.L. 97-205, 96 Stat. 131, 42 U.S.C. § 1973 (as amended), see S. Rept. 97-417, 97th Congress, 2d sess. (1982), 27-28, Congress proscribed a variety of electoral practices "which results" in a denial or abridgment of the right to vote and spelled out in essence the *Zimmer* factors as elements of a "totality of the circumstances" test.

[17] 458 U.S. 613 (1982). The decision, handed down within days of final congressional passage of the Voting Rights Act Amendments, was written by Justice White and joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun, and O'Connor. Justices Powell and Rehnquist dissented, id., 628, as did Justice Stevens. Id., 631.

[18] Id., 618-622 (describing and disagreeing with the *Mobile* plurality, which had used the phrase at 446 U.S., 74). The *Lodge* Court approved the prior reference that motive analysis required an analysis of "such circumstantial and direct evidence" as was available. Id., 618 (quoting *Arlington Heights*, 429 U.S., 266).

[19] The Court confirmed the *Mobile* analysis that the "fundamental interest" side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. Id., 619 n. 6.

[20] Id., 618 (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)).

[21] Id., 623-624.

[22] Id., 624-627. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of blacks, including the

tion of the test, the Court reviewed it under the deferential "clearly erroneous" standard and affirmed it.

The Court in a jury discrimination case has also seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit.[23] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that plaintiff's showing that 79 percent of the county's population was Spanish-surnamed while jurors selected in recent years ranged from 39 to 50 percent Spanish-surnamed was sufficient to establish a *prima facie* case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are not random.[24] Second, the jury selection process was "highly subjective" and thus easily manipulated for discriminatory purposes, unlike the process in *Davis* and *Arlington Heights* which was regularized and open to inspection.[25] Thus, jury cases are likely to continue to be special cases and in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

## TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER

### Taxation

At the outset, the Court did not regard the equal protection clause as having any bearing on taxation.[1] It soon, however, took jurisdiction of cases assailing specific tax laws under this provision,[2] and in 1890 it cautiously conceded that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, *might* be obnoxious to the constitutional prohibi-

large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

[23] *Castaneda* v. *Partida*, 430 U.S. 482 (1977). The decision was 5-to-4, Justice Blackmun writing the opinion of the Court and Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissenting. Id., 504–507.

[24] Id., 493–494. This had been recognized in *Washington* v. *Davis*, 426 U.S. 229, 241 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 n 13 (1977).

[25] *Castaneda* v. *Partida*, 430 U.S. 482, 494, 497–499 (1977).

[1] *Davidson* v. *City of New Orleans*, 96 U.S. 97, 106 (1878).

[2] *Philadelphia Fire Assn.* v. *New York*, 119 U.S. 110 (1886); *Santa Clara County* v. *Southern Pacific Railroad*, 118 U.S. 394 (1886).

tion." [3] But it observed that the equal protection clause "was not intended to compel the States to adopt an iron rule of equal taxation" and propounded some conclusions valid today.[4] In succeeding years the clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) intentional discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases invalidating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

***Classification for Purpose of Taxation.***—The power of the State to classify for purposes of taxation is "of wide range and flexibility." [5] A State may adjust its taxing system in such a way

[3] *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890) (emphasis supplied).

[4] Ibid. The State "may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon various trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." *See Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). And see *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

[5] *Louisville Gas Co.* v. *Coleman*, 227 U.S. 32, 37 (1928).

Classifications for purpose of taxation has been held valid in the following situations:

*Banks:* a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. *First Nat. Bank* v. *Tax Comm.*, 289 U.S. 60 (1933).

*Bank deposits:* a tax of 50 cents per $100 on deposits in banks outside a State in contrast with a rate of 10 cents per $100 on deposits in the State. *Madden* v. *Kentucky*, 309 U.S. 83 (1940).

*Coal:* a tax of 2½ percent on anthracite but not on bituminous coal. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922).

*Gasoline:* a graduate severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. *Ohio Oil Co.* v. *Conway*, 281 U.S. 146 (1930).

*Chain stores:* a privilege tax graduated according to the number of stores maintained, *Tax Comrs.* v. *Jackson*, 283 U.S. 527 (1931); *Fox* v. *Standard Oil Co.*, 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the State, *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412 (1937), distinguishing *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517 (1933).

*Electricity:* municipal systems may be exempted, *Puget Sound Co.* v. *Seattle*, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932).

*Insurance companies:* license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are

as to favor certain industries or forms of industry [6] and may tax different types of taxpayers differently, despite the fact that they compete.[7] It does not follow that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed." [8] Classification may not be arbitrary. It

subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U.S. 132 (1918).

*Oleomargarine:* classified separately from butter. *Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934).

*Peddlers:* classified separately from other vendors. *Caskey Baking Co.* v. *Virginia*, 313 U.S. 117 (1941).

*Public utilities:* a gross receipts tax at a higher rate for railroads than for other public utilities, *Ohio Tax Cases*, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, *Nashville C. & St. Ry.* v. *Wallace*, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, *Illinois Cent. R. Co.* v. *Minnesota*, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, *New York Rapid Transit Corp.* v. *New York*, 303 U.S. 573 (1938).

*Wine:* exemption of wine from grapes grown in the State while in the hands of the producer, *Cox* v. *Texas*, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:

*Cigarette dealers:* taxing retailers and not wholesalers. *Cook* v. *Marshall County*, 196 U.S. 261 (1905).

*Commission merchants:* requirements that dealers in farm products on commission procure a license, *Payne* v. *Kansas*, 248 U.S. 112 (1918).

*Elevators and warehouses:* license limited to certain elevators and warehouses on right-of-way of railroad, *Cargill Co.* v. *Minnesota*, 180 U.S. 452 (1901); a license tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, *Independent Warehouses* v. *Scheele*, 331 U.S. 70 (1947).

*Laundries:* exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. *Quong Wing* v. *Kirkendall*, 223 U.S. 59 (1912).

*Merchants:* exemption from license tax measured by amount of purchases, of manufacturers within the State selling their own product. *Armour & Co.* v. *Virginia*, 246 U.S. 1 (1918).

*Sugar refineries:* exemption from license applicable to refiners of sugar and molasses of planters and farmers grinding and refining their own sugar and molasses. *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89 (1900).

*Theaters:* license graded according to price of admission. *Metropolis Theatre Co.* v. *Chicago*, 228 U.S. 61 (1913).

*Wholesalers of oil:* occupation tax on wholesalers in oil not applicable to wholesalers in other products. *Southwestern Oil Co.* v. *Texas*, 217 U.S. 114 (1910).

[6] *Quong Wing* v. *Kirkendall*, 223 U.S. 59, 62 (1912). *See also Hammond Packing Co.* v. *Montana*, 233 U.S. 331 (1914); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959).

[7] *Puget Sound Co.* v. *Seattle*, 291 U.S. 619, 625 (1934). *See City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

[8] *Colgate* v. *Harvey*, 296 U.S. 404, 422 (1935).

must be based on a real and substantial difference [9] and the difference need not be great or conspicuous,[10] but there must be no discrimination in favor of one as against another of the same class.[11] Also, discriminations of an unusual character are scrutinized with special care.[12] A gross sales tax graduated at increasing rates with the volume of sales,[13] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country,[14] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals,[15] have been held to be a repugnant to the equal protection clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which prompted the adoption of the statute.[16] If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.[17]

One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection of the law.[18] If a tax applies to a class which may be separately taxed, those within the class may not complain because the class might have been more aptly defined nor because others, not of the class, are taxed improperly.[19]

***Foreign Corporations.***—The equal protection clause does not require identical taxes upon all foreign and domestic corporations in every case.[20] In 1886, a Pennsylvania corporation previously li-

[9] *Southern Railway Co.* v. *Green Co.*, 216 U.S. 400, 417 (1910); *Quaker City Cab* v. *Pennsylvania*, 277 U.S. 389, 400 (1928).

[10] *Keeney* v. *New York*, 222 U.S. 525, 536 (1912); *Tax Comrs.* v. *Jackson*, 283 U.S. 527, 538 (1931).

[11] *Giozza* v. *Tierman*, 148 U.S. 657, 662 (1893).

[12] *Louisville Gas Co.* v. *Coleman*, 227 U.S. 32, 37 (1928). *See also Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890).

[13] *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935). *See also Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U.S. 32 (1936).

[14] *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517 (1933).

[15] *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928). This case was formally overruled in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

[16] *Tax Commrs.* v. *Jackson*, 283 U.S. 527, 537 (1931).

[17] *Colgate* v. *Harvey*, 296 U.S. 404, 422 (1935).

[18] *Darnell* v. *Indiana*, 226 U.S. 390, 398 (1912); *Farmers Bank* v. *Minnesota*, 232 U.S. 516, 531 (1914).

[19] *Morf* v. *Bingaman*, 298 U.S. 407, 413 (1936).

[20] *Baltic Mining Co.* v. *Massachusetts*, 231 U.S. 68, 88 (1913), *See also Cheney Brothers Co.* v. *Massachusetts*, 246 U.S. 147, 157 (1918).

censed to do business in New York challenged an increased annual license tax imposed by that State in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the State, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee.[21] Later cases whittled down this rule considerably. The Court decided that "after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind," [22] and that where it has acquired property of a fixed and permanent nature in a State, it cannot be subjected to a more onerous tax for the privilege of doing business than domestic corporations.[23] A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the equal protection clause where foreign companies writing only casualty insurance were not subject to a similar tax.[24] Later, the doctrine of *Philadelphia Fire Association* v. *New York* was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from foreign but not from domestic corporations.[25] Even though the right of a foreign corporation to do business in a State rests on a license, yet the equal protection clause is held to insure it equality of treatment, at least so far as *ad valorem* taxation is concerned.[1] The Court, in *WHYY* v. *Glassboro* [2] held that a foreign nonprofit corporation licensed to do business in the taxing State is denied equal treatment in violation of the equal protection clause where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation solely because it was organized under the laws of a sister State and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing State.

***Income Taxes.***—A state law which taxes the entire income, including that derived within the State, of domestic corporations which do business in the State, while exempting entirely the income received outside the State by domestic corporations which

[21] *Philadelphia Fire Association* v. *New York*, 119 U.S. 110, 119 (1886).
[22] *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494, 511 (1926).
[23] *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 418 (1910).
[24] *Concordia Ins. Co.* v. *Illinois*, 292 U.S. 535 (1934).
[25] *Lincoln Life Ins. Co.* v. *Read*, 325 U.S. 673 (1945).
[1] *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571, 572 (1949).
[2] 393 U.S. 117 (1968).

do no local business, is arbitrary and invalid.[3] In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the State, although residents are permitted to deduct all losses, wherever incurred.[4] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year which were deductible from gross income under the law in effect when they were received, is not obnoxious to the equal protection clause.[5]

***Inheritance Taxes.***—There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred and strangers of the blood or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.[6] A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the remainder passes to collateral heirs.[7] There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law.[8] Vested and contingent remainders may be treated differently.[9] The exemption of property bequeathed to charitable or educational institutions may be limited to those within the State.[10] In computing the tax collectible from a nonresident decedent's property within the State, a State may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the State bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.[11]

***Motor Vehicle Taxation.***—In demanding compensation for the use of highways, a State may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax on carriers.[12] A state maintenance tax act, which taxes vehicle

[3] *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920). *See also Walters* v. *City of St. Louis*, 347 U.S. 231 (1954), sustaining municipal income tax imposed on gross wages of employed persons but only on net profits of business men and self-employed.

[4] *Shaffer* v. *Carter*, 252 U.S. 37, 56, 57 (1920); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 75, 76 (1920).

[5] *Welch* v. *Henry*, 305 U.S. 134 (1938).

[6] *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288, 300 (1898).

[7] *Billings* v. *Illinois*, 188 U.S. 97 (1903).

[8] *Campbell* v. *California*, 200 U.S. 87 (1906).

[9] *Salomon* v. *State Tax Comm.*, 278 U.S. 484 (1929).

[10] *Board of Education* v. *Illinois*, 203 U.S. 553 (1906).

[11] *Maxwell* v. *Bugbee*, 250 U.S. 525 (1919).

[12] *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932).

property carriers for hire at greater rates than similar vehicles carrying property not for hire is reasonable, since the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less than that of one engaged in business as a common carrier.[13] A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than taxes on property not so employed.[14] Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.[15] A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the State for purpose of sale does not violate the equal protection clause as applied to cars moving in caravans.[16] The exemption from a tax for a permit to bring cars into the State in caravans of cars moved for sale between zones in the State is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt.[17] Also sustained as valid have been exemptions of vehicles weighing less than 3000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the exempt vehicles, when loaded, may outweigh those taxed; [18] exemptions from vehicle license taxes levied on private motor carriers of persons whose vehicles haul passengers and farm products between points not having railroad facilities or farm and dairy products for producers thereof.[19]

***Property Taxes.***—The State's latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,[20] whether the exemption results from the terms of the statute or the conduct of a state official under it.[21] A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist only in a part of the State.[22] Intentional and systematic undervaluation by state offi-

[13] *Dixie Ohio Co.* v. *Comm.*, 306 U.S. 72, 78 (1939).
[14] *Alward* v. *Johnson*, 282 U.S. 509 (1931).
[15] *Bekins Van Lines* v. *Riley*, 280 U.S. 80 (1929).
[16] *Morf* v. *Bingaman*, 298 U.S. 407 (1936).
[17] *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939).
[18] *Carley & Hamilton* v. *Snook*, 281 U.S. 66 (1930).
[19] *Aero Transit Co.* v. *Georgia Comm.*, 295 U.S. 285 (1935).
[20] *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).
[21] *Missouri* v. *Dockery*, 191 U.S. 165 (1903).
[22] *Kentucky Union Co.* v. *Kentucky*, 219 U.S. 140, 161 (1911).

cials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property,[23] but mere errors in judgment resulting in unequal overvaluation or undervaluation, not intentional or systematic, will not support a claim of discrimination.[24] Differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.[25] An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[1] Equal protection is denied if a State does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.[2] A corporation whose valuations were accepted by the assessing commission cannot complain that it was taxed disproportionately, as compared with others, if the commission did not act fraudulently.[3]

***Special Assessment.***—A special assessment is not discriminatory because apportioned on an *ad valorem* basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[4] Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.[5] A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are based on real property alone.[6] A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.[7] In taxing railroads within a

[23] *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918); *Raymond* v. *Chicago Traction Co.*, 207 U.S. 20, 35, 37 (1907).

[24] *Coutler* v. *Louisville & Nashville R.R. Co.*, 196 U.S. 599 (1905). *See also Chicago, B. & Q. Ry Co.* v. *Babcock*, 204 U.S. 585 (1907).

[25] *Charleston Assn.* v. *Alderson*, 324 U.S. 182 (1945); *Nashville C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1940).

[1] *Sioux City Bridge* v. *Dakota County*, 260 U.S. 441, 446 (1923).

[2] *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946).

[3] *St. Louis-San Francisco Ry* v. *Middlekamp*, 256 U.S. 226, 230 (1921).

[4] *Memphis & Charleston Ry.* v. *Pace*, 282 U.S. 241 (1931).

[5] *Kansas City So. Ry.* v. *Road Imp. Dist. No. 6*, 256 U.S. 658 (1921); *Thomas* v. *Kansas City So. Ry.*, 261 U.S. 481 (1923).

[6] *Road Imp. Dist.* v. *Missouri Pacific R.R. Co.*, 274 U.S. 188 (1927).

[7] *Branson* v. *Bush*, 251 U.S. 182 (1919).

levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having less than 25 miles of main line within the district than for those having more.[8]

**Police Power Regulation**

***Classification.***—Justice Holmes' characterization of the equal protection clause as the "usual last refuge of constitutional arguments" [9] was no doubt made with the practice in mind of contestants of state economic regulation in appending to a due process argument a claim that the regulation denied equal protection as well. Few police regulations have been held unconstitutional on this ground.

"[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." [10] The Court has made it clear that only the totally irrational classification in the economic field will be struck down,[11] and it has held that legislative classifica-

[8] *Columbus & Greenville Ry.* v. *Miller*, 283 U.S. 96 (1931).

[9] *Buck* v. *Bell*, 274 U.S. 200, 208 (1927).

[10] *McGowan* v *Maryland*, 366 U.S. 420, 425–426 (1961).

[11] *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operations for more than eight years, the Court summarized its method of decision here. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a super-legislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . .; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Id., 303–304.

tions that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[12] So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable, so long as the legislative *"could rationally have decided"* that its classification would foster its goal.[13]

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[12] The "grandfather" clause preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained as (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. Id. 305–306. *See also Friedman* v. *Rogers*, 440 U.S. 1, 17–18 (1979); *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970).

[13] *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461–470 (1981). The quoted phrase is id., 466 (emphasis by Court). Purporting to promote the purposes of resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evidence that a distinction is wholly irrational. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153–154 (1938).

Classifications under police regulations have been held valid as follows:

*Advertising:* discrimination between billboard and newpaper advertising of cigarettes, *Packer Corporation* v. *Utah*, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner and not used mainly for advertising, *Fifth Ave. Coach Co.* v. *New York*, 221 U.S. 467 (1911); prohibition of advertising on motor vehicles except notices or advertising of products of the owner, *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949); prohibition against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, *Halter* v. *Nebraska*, 205 U.S. 34 (1907).

*Amusement:* prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. *Murphy* v. *California*, 225 U.S. 623 (1912).

*Attorneys:* Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. *Martin* v. *Walton*, 368 U.S. 25 (1961). Two dissenters, Justices Douglas and Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

*Cattle:* a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. *Bacon* v. *Walker*, 204 U.S. 311 (1907). *See also Omaechevarria* v. *Idaho*, 246 U.S. 343 (1918).

*Cotton gins:* in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. *Corporation Comm.* v. *Lowe*, 281 U.S. 431 (1930).

*Debt adjustment business:* operation only as incident to legitimate practice of law. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).

*Eye glasses:* law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

*Fish processing:* stricter regulation of reduction of fish to flour or meal than of canning. *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936).

*Food:* bread sold in loaves must be of prescribed standard sizes, *Schmidinger* v. *Chicago*, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, *Price* v. *Illinois*, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, *Armour & Co.* v. *North Dakota*, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, *Lieberman* v. *Van De Carr*, 199 U.S. 552 (1906); vendors producing milk outside city may be classified separately, *Adams* v. *Milwaukee*, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, *St. John* v. *New York*, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, *Nebbia* v. *New York*, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, *Corn Products Rfg. Co.* v. *Eddy*, 249 U.S. 427 (1919).

*Geographical discriminations:* legislation limited in application to a particular geographical or political subdivision of a State, *Ft. Smith Co.* v. *Paving Dist.*, 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, *Welch* v. *Swasey*, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd character shall dwell, *L'Hote* v. *New Orleans*, 177 U.S. 587, 595 (1900). *And see North* v. *Russell*, 427 U.S. 328, 338 (1976).

*Hotels:* requirement that keepers of hotels having over fifty guests employ night watchmen. *Miller* v. *Strahl*, 239 U.S. 426 (1915).

*Insurance companies:* regulation of fire insurance rates with exemption for farmers mutuals, *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, *Daniel* v. *Family Ins. Co.*, 336 U.S. 220 (1949).

*Intoxicating liquors:* exception of druggist or manufacturers from regulation. *Lloyd* v. *Dollison*, 194 U.S. 445 (1904); *Eberle* v. *Michigan*, 232 U.S. 700 (1914).

*Landlord-tenant:* requiring trial no later than six days after service of complaint and limiting triable issues to the tenant's default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for nonpayment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. *Lindsey* v. *Normet*, 405 U.S. 56 (1972).

*Lodging houses:* requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. *Queenside Hills Co.* v. *Saxl*, 328 U.S. 80 (1946).

*Markets:* prohibition against operation of private market within six squares of public market. *Natal* v. *Louisiana*, 139 U.S. 621 (1891).

*Medicine:* a uniform standard of professional attainment and conduct for all physicians, *Hurwitz* v. *North*, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. *Watson* v. *Maryland*, 218 U.S. 173 (1910); exemption of persons

who heal by prayer from regulations applicable to drugless physicians, *Crane* v. *Johnson*, 242 U.S 339 (1917); exclusion of osteopathic physicians from public hospitals, *Hayman* v. *Galveston*, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, *McNaughton* v. *Johnson*, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935).

*Motor vehicles:* guest passenger regulation applicable to automobiles but not to other classes of vehicles, *Silver* v. *Silver*, 280 U.S. 117 (1929); exemption of vehicles from other States from registration requirement, *Storaasli* v. *Minnesota*, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, *Hodge Co.* v. *Cincinnati*, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, *Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, *Sproles* v. *Binford*, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, *Bradley* v. *Public Utility Comm.*, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, *Hicklin* v. *Coney*, 290 U.S. 169 (1933); exemption of private vehicles, street cars and omnibuses from insurance requirements applicable to taxicabs, *Packard* v. *Banton*, 264 U.S. 140 (1924).

*Peddlers and solicitors:* a State may classify and regulate itinerant vendors and peddlers, *Emert* v. *Missouri*, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, *Baccus* v. *Louisiana*, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, *Williams* v. *Arkansas*, 217 U.S. 79 (1910); or solicitation of employment to prosecute or collect claims, *McCloskey* v. *Tobin*, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. *Breard* v. *Alexandria*, 341 U.S. 622 (1951).

*Property destruction:* destruction of cedar trees to protect apple orchards from cedar rust, *Miller* v. *Schoene*, 276 U.S. 272 (1928).

*Railroads:* forbid operation on a certain street, *Richmond, F. & P. R. Co.* v. *Richmond*, 96 U.S. 521 (1878); require fences and cattle guards and allow recovery of multiple damages for failure to comply, *Missouri Pacific Ry. Co.* v. *Humes*, 115 U.S. 512 (1885); *Minneapolis Ry. Co.* v. *Beckwith*, 129 U.S. 26 (1889); *Minneapolis & St. Louis Ry.* v. *Emmons*, 149 U.S. 364 (1893); charge them with entire expense of altering a grade crossing, *New York & N.E. Railroad Co.* v. *Bristol*, 151 U.S. 556 (1894); makes them responsible for fire communicated by their engines, *St. Louis & San Francisco Ry. Co.* v. *Mathews*, 165 U.S. 1 (1897); requires cutting of certain weeds, *Missouri, Ry. Co.* v. *May*, 194 U.S. 267 (1904); create a presumption against a railroad failing to give prescribed warning signals, *Atlantic Coast Line* v. *Ford*, 287 U.S. 502 (1933); require use of locomotive headlights of a specified form and power, *Atlantic Coast Line* v. *Georgia*, 234 U.S. 280 (1914); make railroads liable for damage caused by operation of their locomotives, unless they make it appear that their agents exercised all ordinary and reasonable care and diligence, *Seaboard Air Line Ry. Co.* v. *Watson*, 287 U.S. 86 (1932); require sprinkling of streets between tracks to lay the dust, *Pacific Gas Co.* v. *Police Court*, 251 U.S. 22 (1919). State "full-crew" laws do not violate the equal protection clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, *Firemen* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968).

*Sales in bulk:* requirement of notice of bulk sales applicable only to retail dealers. *Lemieux* v. *Young*, 211 U.S. 489 (1909).

*Secret societies:* regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tenden-

The Court has condemned a variety of statutory classifications as failing to survive the rational basis test, although some of the cases are of doubtful vitality today and some have been questioned. Thus, the Court has condemned a status which forbade stock insurance companies to act through agents who were their salaried employees but permitted mutual companies to operate in this manner.[14] A law which required private motor vehicle carriers to obtain certificates of convenience and necessity and to furnish security for the protection of the public was held invalid because of the exemption of carriers of fish, farm, and dairy products.[15] The same result befell a statute which permitted mill dealers without well advertised trade names the benefit of a price differential but which restricted this benefit to such dealers entering the business before a certain date.[16] In a decision since overruled, the Court struck down a law which exempted by name the American Express Company from the terms pertaining to the licensing, bonding, regulation, and inspection of "currency exchanges" engaged in the sale of money orders.[17]

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cy to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928).

*Securities:* a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, e.g., cotton, grain. *Otis* v. *Parker*, 187 U.S. 606 (1903).

*Sunday closing law:* notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown* v. *McGinley*, 366 U.S. 582 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961). *See also Soon Hing* v. *Crowley*, 113 U.S. 703 (1885); *Petit* v. *Minnesota*, 177 U.S. 164 (1900).

*Telegraph companies:* a statute prohibiting stipulation against liability for negligence in the delivery of interstate messages, which did not forbid express companies and other common carriers to limit their liability by contract. *Western Union Telegraph Co.* v. *Milling Co.*, 218 U.S. 406 (1910).

[14] *Hartford Ins. Co.* v. *Harrison*, 301 U.S. 459 (1937).

[15] *Smith* v. *Cahoon*, 283 U.S. 553 (1931).

[16] *Mayflower Farms* v. *Ten Eyck*, 297 U.S. 266 (1936). *See United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 7 n. 2 (1970) (reserving question of case's validity, but interpreting it as standing for the proposition that no showing of a valid legislative purpose had been made).

[17] *Morey* v. *Doud*, 354 U.S. 457 (1957), overruled in *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), where the exemption of one concern had been by precise description rather than by name.

**Other Business and Employment Relations**

***Labor Relations.***—Objections to labor legislation on the ground that the limitation of particular regulations to specified industries was obnoxious to the equal protection clause have been consistently overruled. Statutes limiting hours of labor for employees in mines, smelters,[1] mills, factories,[2] or on public works [3] have been sustained. And a statute forbidding persons engaged in mining and manufacturing to issue orders for payment of labor unless redeemable at face value in cash was similarly held unobjectionable.[4] The exemption of mines employing less than ten persons from a law pertaining to measurement of coal to determine a miner's wages is not unreasonable.[5] All corporations [6] or public service corporations [7] may be required to issue to employees who leave their service letters stating the nature of the service and the cause of leaving even though other employers are not.

Industries may be classified in a workmen's compensation act according to the respective hazards of each,[8] and the exemption of farm laborers and domestic servants does not render such an act invalid.[9] A statute providing that no person shall be denied opportunity for employment because he is not a member of a labor union does not offend the equal protection clause.[10] At a time when protective labor legislation generally was falling under "liberty of contract" applications of the due process clause, the Court generally approved protective legislation directed solely to women workers [11]

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[1] *Holden* v. *Hardy*, 160 U.S. 366 (1988).

[2] *Bunting* v. *Oregon*, 243 U.S. 426 (1917).

[3] *Atkin* v. *Kansas*, 191 U.S. 207 (1903).

[4] *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224 (1914). *See also Knoxville Iron Co.* v. *Harbison*, 183 U.S. 13 (1901).

[5] *McLean* v. *Arkansas*, 211 U.S. 539 (1909).

[6] *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530 (1922).

[7] *Chicago, R.I. & P. Ry.* v. *Perry*, 259 U.S. 548 (1922).

[8] *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917).

[9] *New York Central R. Co.* v. *White*, 243 U.S. 188 (1917); *Middletown* v. *Texas Power Light Co.*, 249 U.S. 152 (1919); *Ward & Gow* v. *Krinsky*, 259 U.S. 503 (1922).

[10] *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). Neither is it a denial of equal protection for a city to refuse to withhold from its employees' paychecks dues owing their union, although it withholds for taxes, retirement-insurance programs, saving programs, and certain charities, because its offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method to avoid the burden of withholding money for all persons or organizations that request a checkoff. *City of Charlotte* v. *Firefighters*, 426 U.S. 283 (1976).

[11] E.g., *Muller* v. *Oregon*, 208 U.S. 412 (1908).

and this solicitude continued into present times in the approval of laws which were more questionable,[12] but passage of the sex discrimination provision of the 1964 Civil Rights Act has generally called into question all such protective legislation addressed solely to women.[13]

***Monopolies and Unfair Trade Practices.***—On the principle that the law may hit the evil where it is most felt, state antitrust laws applicable to corporations but not to individuals,[14] or to vendors of commodities but not to vendors of labor,[15] have been upheld. Centrary to its earlier view, the Court now holds that an antitrust act which exempts agricultural products in the hands of the producer is valid.[16] Diversity with respect to penalties also has been sustained. Corporations violating the law may be proceeded against by bill in equity, while individuals are indicted and tried.[17] A provision, superimposed upon the general antitrust law, for revocation of the licenses of fire insurance companies which enter into illegal combinations, does not violate the equal protection clause.[18] A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause.[19] Likewise, enforcement of an unfair sales act, whereby merchants are privileged to give trading stamps, worth two and one-half percent of the price, with goods sold at or near statutory cost, while a competing merchant, not issuing stamps, is precluded from making an equivalent price reduction effects no discrimination. There is a reasonable basis for concluding that destructive, deceptive competition results from selective loss-leader selling whereas such abuses do not attend issuance of trading stamps "across the board," as a discount for payment in cash.[20]

***Administrative Discretion.***—A municipal ordinance which vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is

[12] *Goesaert* v. *Cleary*, 335 U.S. 464 (1948).

[13] Title VII, 78 Stat. 253, 42 U.S.C. § 2000e. On sex discrimination generally, *see infra, pp.* 1509–1511.

[14] *Mallinckrodt Works* v. *St. Louis*, 238 U.S. 41 (1915).

[15] *International Harvester Co.* v. *Missouri*, 234 U.S. 199 (1914).

[16] *Tigner* v. *Texas*, 310 U.S. 141 (1940), overruling *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

[17] *Standard Oil Co.* v. *Tennessee*, 217 U.S. 413 (1910).

[18] *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401 (1905).

[19] *Pacific States Co.* v. *White*, 296 U.S. 176 (1935); *See also Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873); *Nebbia* v. *New York*, 291 U.S. 502, 529 (1934).

[20] *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334, 339–341 (1959).

withheld from certain persons solely on the basis of nationality.[21] But a city council may reserve to itself the power to make exceptions from a ban on the operation of a dairy within the city,[22] or from building line restrictions.[23] Written permission of the mayor or president of the city council may be required before any person shall move a building on a street.[24] The mayor may be empowered to determine whether an applicant has a good character and reputation and is a suitable person to receive a license for the sale of cigarettes.[25] In a later case,[1] the Court held that the unfettered discretion of officer river pilots to select their apprentices, which was almost invariably exercised in favor of their relatives and friends, was not a denial of equal protection to persons not selected despite the fact that such apprenticeship was requisite for appointment as a pilot.

***Social Welfare.***—The traditional "reasonable basis" standard of equal protection adjudication developed in the main in cases involving state regulation of business and industry. "The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard." [2] Thus, a formula for dispensing aid to dependent children which imposed an upper limit on the amount one family could receive, regardless of the number of children in the family, so that the more children in a family the less money per child was received, was found to be rationally related to the legitimate state interest in encouraging employment and in maintaining an equitable balance between welfare families and the families of the working poor.[3] Similarly, a state welfare assistance formula which,

[21] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

[22] *Fischer* v. *St. Louis*, 194 U.S. 361 (1904).

[23] *Gorieb* v. *Fox*, 274 U.S. 603 (1927).

[24] *Wilson* v. *Eureka City*, 173 U.S. 32 (1899).

[25] *Gundling* v. *Chicago*, 177 U.S. 183 (1900).

[1] *Kotch* v. *Board of River Port Pilot Comm.*, 330 U.S. 552 (1947).

[2] *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Decisions respecting the rights of the indigent in the criminal process and dicta in *Shapiro* v. *Thompson*, 394 U.S. 618, 627 (1969), had raised the prospect that because of the importance of "food, shelter, and other necessities of life," classifications with an adverse or perhaps severe impact on the poor and needy would be subjected to a higher scrutiny. *Dandridge* was a rejection of this approach, which was more fully elaborated in another context in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 18–29 (1973).

[3] *Dandridge* v. *Williams*, 397 U.S. 471, 483–487 (1970).

after calculation of individual need, provided less of the determined amount to families with dependent children than to those persons in the aged and infirm categories did not violate equal protection because a State could reasonably believe that the aged and infirm are the least able to bear the hardships of an inadequate standard of living and the apportionment of limited funds was therefore rational.[4] While reiterating that this standard of review is "not a toothless one," the Court has nonetheless sustained a variety of distinctions on the basis that Congress could rationally have believed them justified,[5] acting to invalidate a provision only once and then on the premise that Congress was actuated by an improper purpose.[6]

Similarly, the Court has rejected the contention that access to housing, despite its great importance, is of any fundamental interest which would place a bar upon the legislature's giving landlords a much more favorable and summary process of judicially-controlled eviction actions than was available in other kinds of litigation.[7]

However, a statute which forbade the dispensing of contraceptive devices to single persons for birth control but not for disease prevention purposes and which contained no limitation on dispensation to married persons was held to violate the equal protection clause on several grounds. On the basis of its view with regard to the right infringed by the limitation, there was no rational basis for the State to distinguish between married and unmarried persons. Similarly, the exemption from the prohibition for purposes of disease prevention nullified the argument that the rational basis for the law was the deterrence of fornication, the rationality of

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[4] *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). *See also Richardson* v. *Belcher*, 404 U.S. 78 (1971) (sustaining Social Security provision reducing disability benefits by amount received from worker's compensation but not that received from private insurance).

[5] E.g., *Mathews* v. *DeCastro*, 429 U.S. 181 (1976) (provision giving benefits to married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying benefits to divorced woman under 62 with dependents represents rational judgment with respect to likely dependency of married but not divorced women); *Califano* v. *Boles*, 443 U.S. 282 (1979) (limitation of benefits to widows and divorced wives of wage earners does not deprive mothers of illegitimate child who was never married to wage earner of equal protection).

[6] *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (also questioning rationality).

[7] *Lindsey* v. *Normet*, 405 U.S. 56 (1972). The Court did invalidate one provision of the law requiring tenants against whom an eviction judgment had been entered after a trial to post a bond in double the amout of rent to become due by the determination of the appeal, because it bore no reasonable relationship to any valid state objective and arbitrarily distinguished between defendants in eviction actions and defendants in other actions. Id., 74–79.

which the Court doubted in any case.[8] By affording married parents, divorced parents, and unmarried mothers an opportunity to be heard with regard to the issue of their fitness to continue or to take custody of their children, an opportunity the Court decided was mandated by due process, but presuming the unfitness of the unmarried father and giving him no hearing, a State denied him equal protection.[9]

***Punishment of Crime.***—Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances.[10] Comparative gravity of criminal offenses is, however, largely a matter of state discretion and the fact that some offenses are punished with less severity than others does not deny equal protection.[11] Heavier penalties may be imposed upon habitual criminals for like offenses,[12] even after a pardon for an earlier offense,[13] and such persons may be made ineligible for parole.[14] A state law doubling the sentence on prisoners attempting to escape does not deny equal protection in subjecting prisoners who attempt to escape together to different sentences depending on their original sentences.[15]

A statute denying state prisoners good time credit for presentence incarceration but permitting those prisoners who obtain bail or other release immediately to receive good time credit for the entire period which they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection inasmuch as the distinction is rationally justified by the fact that good time credit is designed to encourage prisoners to engage in rehabilita-

[8] *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

[9] *Stanley* v. *Illinois*, 405 U.S. 645, 658 (1972).

[10] *Pace* v. *Alabama*, 106 U.S. 583 (1883). *See Salzburg* v. *Maryland*, 346 U.S. 545 (1954), sustaining law rendering illegally seized evidence inadmissible in prosecutions in state courts for misdemeanors but permitting use of such evidence in one county in prosecutions for certain gambling misdemeanors. Distinctions based on county areas were deemed reasonable. In *North* v. *Russell*, 427 U.S. 328 (1976), the Court sustained the provision of law-trained judges for some police courts and lay judges for others, depending upon the state constitutional classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justifiable.

[11] *Collins* v. *Johnston*, 237 U.S. 502, 510 (1915); *Pennsylvania* v. *Ashe*, 302 U.S. 51 (1937).

[12] *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901); *Moore* v. *Missouri*, 159 U.S. 673 (1895); *Graham* v. *West Virginia*, 224 U.S. 616 (1912).

[13] *Carlesi* v. *New York*, 233 U.S. 51 (1914).

[14] *Ughbanks* v. *Armstrong*, 208 U.S. 481 (1908).

[15] *Pennsylvania* v. *Ashe*, 302 U.S. 51 (1937).

tion courses and activities which exist only in state prisons and not in local jails.[16]

The equal protection clause does, however, render invalid a statute requiring the sterilization of persons convicted of various offenses when the statute draws a line between like offenses, such as between larceny by fraud and embezzlement.[17] A statute which provided that convicted defendants sentenced to imprisonment must reimburse the State for the funishing of free transcripts of their trial by having amounts deducted from prison pay denied such persons equal protection when it did not require reimbursement of those fined, given suspended sentences, or placed on probation.[18] Similarly, a statute enabling the State to recover the costs of such transcripts and other legal defense fees by a civil action was defective under the equal protection clause because indigent defendants against whom judgment was entered under the statute did not have the benefit of exemptions and benefits afforded other civil judgment debtors.[19] But a bail reform statute which provided for liberalized forms of release and which imposed the costs of operating the system upon one category of released defendants, generally those most indigent, was not invalid because the classification was rational and because the measure was in any event a substantial improvement upon the old bail system.[20] The Court in the last several years has applied the clause strictly to prohibit numerous *de jure* and *de facto* distinctions based on wealth or indigency.[21]

## EQUAL PROTECTION AND RACE

### Overview

The Fourteenth Amendment "is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times

[16] *McGinnis* v. *Royster*, 410 U.S. 263 (1973). *Cf. Hurtado* v. *United States*, 410 U.S. 578 (1973).

[17] *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

[18] *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966). *But see Fuller* v. *Oregon*, 417 U.S. 40 (1974) (imposition of reimbursement obligation for state-provided defense assistance upon convicted defendants but not upon those not convicted or whose convictions are reversed is objectively rational).

[19] *James* v. *Strange*, 407 U.S. 128 (1972).

[20] *Schilb* v. *Kuebel*, 404 U.S. 357 (1971).

[21] *Infra*, *pp.* 1800–1809.

when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provision by appropriate legislation." [1] Thus, a state law which on its face worked a discrimination against Negroes was void,[2] but "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." [3]

**Education**

***Development and Application of "Separate But Equal".***—Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race,[4]

[1] *Strauder* v. *West Virginia*, 100 U.S. 303, 306–307 (1880).

[2] Ibid. (law providing for jury service specified white males). Moreover it will not do to argue that a law discriminates equally against both races, inasmuch as the right conferred is personal. *Buchanan* v. *Warley*, 245 U.S. 60 (1917) (ordinance prohibiting Negroes from occupying houses in blocks where whites were predominant and whites from occupying houses in blocks where Negroes were predominant). *Compare Pace* v. *Alabama*, 106 U.S. 583 (1883) (sustaining conviction under statute that forbade adultery or fornication between a white person and a Negro that imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race, using "equal application" theory), *with McLaughlin* v. *Florida*, 379 U.S. 184, 188 (1964), and *Loving* v. *Virginia*, 388 U.S. 1, 10 (1967) (rejecting theory).

[3] *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–374 (1886) (discrimination against Chinese).

[4] *Slaughter House Cases*, 16 Wall. (83 U.S.) 36, 67–72 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303, 307–308 (1880); *Virginia* v. *Rives*, 100 U.S. 313, 318 (1880); *Ex parte Virginia*, 100 U.S. 339, 344–345 (1880).

but the Court in *Plessy* v. *Ferguson* [5] adopted a principle first propounded in litigation attacking racial segregation in the schools of Boston, Massachusetts.[6] *Plessy* concerned not schools but a state law requiring the furnishing of "equal but separate" facilities for rail transportation and requiring the separation of white and Negro passengers. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power." [7] The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, "even by courts of states where the political rights of the colored race have been longest and most earnestly enforced." [8]

Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decision assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with Negroes and sent to school with them rather than with whites [9] and it upheld the refusal of an injunction to require a school board to close a white high school until it opened a high school for Negroes.[10] And no violation of the equal protection

[5] 163 U.S. 537 (1896).

[6] *Roberts* v. *City of Boston*, 59 Mass. 198, 206 (1849).

[7] *Plessy* v. *Ferguson*, 163 U.S. 537, 543–544 (1896). "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Id., 552, 559.

[8] Id., 544–545. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped Negroes with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Id., 552, 559.

[9] *Gong Lum* v. *Rice*, 275 U.S. 78 (1927).

[10] *Cummings* v. *Board of Education*, 175 U.S. 528 (1899).

clause was found when a state law prohibited a private college from teaching whites and Negroes together.[11]

In 1938, the Court began to move away from "separate but equal." It then held that a State which operated a law school open to whites only and which did not operate any law school open to Negroes violated an applicant's right to equal protection, even though the State offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the State.[12] When Texas established a law school for Negroes after plaintiff had applied and been denied admission to the school maintained for whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the white school necessarily meant that the separate school was unequal.[13] Equally objectionable was the fact that when Oklahoma admitted a Negro law student to its only law school it required him to remain physically separate from the other students.[14]

***Brown* v. *Board of Education.***—"Separate but equal" was formally abandoned in *Brown* v. *Board of Education*,[15] involving challenges to segregation *per se* in the schools of four States in which the lower courts had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not "turn the clock back to 1867 . . . or even to 1896. . . ." but must rather consider the issue in the context of the vital importance of education in 1954. Denial of opportunity to an adequate education must often be a denial of the opportunity to succeed in life, separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore the equal protection clause was violated by such separation. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." [16]

[11] *Berea College* v. *Kentucky*, 211 U.S. 45 (1908).

[12] *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). *See also Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948).

[13] *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

[14] *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950).

[15] 347 U.S. 483 (1954). Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

[16] *Brown* v. *Board of Education*, 347 U.S. 438, 489–490, 492–493, 494–495 (1954).

After hearing argument on the remedial order which should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." The lower courts were directed to "require that the defendants make a prompt and reasonable start toward full compliance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." But in any event the lower courts were to require compliance "with all deliberate speed." [17]

***Brown's Aftermath.***—For the next several years, the Court declined to interfere with the administration of its mandate, ruling only in those years on the efforts of Arkansas to block desegregation of schools in Little Rock.[18] In the main, these years were taken up with enactment and administration of "pupil placement laws" by which officials assigned each student individually to a school on the basis of formally nondiscriminatory criteria, which required the exhaustion of state administrative remedies by each pupil seeking reassignment and the bringing of individual litigation once this process has been exhausted.[19] The lower courts eventually began voiding these laws for discriminatory application and permitting class actions [20] and the Supreme Court ruled out the exhaustion of state remedies requirement.[21] In the early 1960's, various state practices—school closings,[22] minority transfer

[17] *Brown* v. *Board of Education*, 349 U.S. 294, 300–301 (1955).

[18] *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

[19] E.g., *Covington* v. *Edwards*, 264 F.2d 780 (C.A. 4), *cert. den.*, 361 U.S. 840 (1959); *Holt* v. *Raleigh City Board of Education*, 265 F.2d 95 (C.A. 4), *cert. den.*, 361 U.S. 818 (1959); *Dove* v. *Parham*, 271 F.2d 132 (C.A. 8, 1959).

[20] E.g., *McCoy* v. *Greensboro City Board of Education*, 283 F.2d 667 (C.A. 4, 1960); *Green* v. *School Board of City of Roanoke*, 304 F.2d 118 (C.A. 4, 1962); *Gibson* v. *Board of Public Instruction of Dade County*, 272 F.2d 763 (C.A. 5, 1959); *Northcross* v. *Board of Education of City of Memphis*, 302 F.2d 818 (C.A. 6, 1962), *cert. den.*, 370 U.S. 944 (1962).

[21] *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

[22] *Griffin* v. *Board of Supervisors of Prince Edward County*, 377 U.S. 218 (1964) (holding that "under the circumstances" the closing by a county of its schools while all the other schools in the State were open denied equal protection, the circumstances apparently being the state permission and authority for the closing and the existence of state and county tuition grant-tax credit programs making an official connection with the "private" schools operating in the county and holding that a federal court is empowered to direct the appropriate officials to raise and expend money to operate schools). On school closing legislation in another State, *see Bush* v.

plans,[23] zoning,[24] and the like—were ruled inadmissible and it was indicated that the time was running out for full implementation of the *Brown* mandate.[25]

About this time, "freedom of choice" plans were promulgated under which each child in the school district could choose each year which school he wished to attend and subject to space limitations he could attend that school. These were first approved by the lower courts as acceptable means to implement desegregation, subject to the reservation that they be fairly administered.[1] Enactment of Title VI of the Civil Rights Act of 1964 and HEW enforcement in a manner as to require effective implementation of affirmative actions to desegregate [2] led to a change of attitude in the lower courts and to a three-case decision in the Supreme Court posited on the principle that the only desegregation plan permissible is one which actually results in the abolition of the dual school and charging school officials with an affirmative obligation to achieve it.[3] School boards must present to the district courts "a plan that

*Orleans Parish School Board*, 187 F. Supp. 42, 188 F. Supp. 916 (D.C.E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (D.C.E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962).

[23] *Goss* v. *Board of Education of City of Knoxville*, 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.

[24] *Northcross* v. *Board of Education of City of Memphis*, 333 F.2d 661 (C.A. 6, 1964).

[25] The first comment appeared in dictum in a nonschool case, *Watson* v. *City of Memphis*, 373 U.S. 526, 530 (1963), was implied in *Goss* v. *Board of Education of City of Knoxville*, 373 U.S. 683, 689 (1963), and in *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103, 105 (1965), it was announced that "[d]elays in desegregating school systems are no longer tolerable." A grade-a-year plan was implicitly disapproved in *Calhoun* v. *Latiner*, 377 U.S. 263 (1964), *vacating and remanding* 321 F.2d 302 (C.A. 5, 1963). *See Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865 (C.A. 5, 1966).

[1] E.g., *Bradley* v. *School Board of City of Richmond*, 345 F.2d 310 (C.A. 4), *rev'd on other grounds*, 382 U.S. 103 (1965); *Bowman* v. *School Board of Charles City County*, 382 F.2d 326 (C.A. 4, 1967).

[2] 78 Stat. 252, 42 U.S.C. § 2000d *et seq.* (prohibiting discrimination in federally assisted programs). HEW guidelines were designed to afford guidance to state-local officials in interpretations of the law and were accepted as authoritative by the courts and utilized. *Davis* v. *Board of School Comrs. of Mobile County*, 364 F.2d 896 (C.A. 5, 1966); *Kemp* v. *Beasley*, 352 F.2d 14 (C.A. 8, 1965).

[3] *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Board of Education of Gould School District*, 391 U.S. 443 (1968). These cases had been preceded by a circuit-wide promulgation of similar standards in *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), *mod. & aff'd. en banc*, 380 F.2d 385 (C.A. 5), *cert. den.*, 389 U.S. 840 (1967).

promises realistically to work and promises realistically to work *now*," in such a manner as "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." [4] Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the abolition of dual attendance systems for students but faculty,[5] staff, and services merging as well into one system so that no school could be marked as either a "black" or a "white" school.[6]

***Implementation of School Desegregation.***—In the aftermath of *Green*, the various Courts of Appeal held inadequate an increasing number of school board plans based on "freedom of choice," on zoning which followed traditional residential patterns, or some combination of the two.[7] The Supreme Court's next opportunity to speak on the subject came when HEW sought to withdraw desegregation plans it had submitted at court request and asked for a postponement of a court-imposed deadline, which was reluctantly granted by the Fifth Circuit. The Court unanimously reversed and announced that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." [8]

[4] *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439, 442 (1968). "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Id., 437–438. The case laid to rest the dictum of *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (D.C.E.D.S.C. 1955), that the Constitution "does not require integration" but "merely forbids discrimination." *Green* and *Raney* v. *Board of Education of Gould School District*, 391 U.S. 443 (1968), found "freedom of choice" plans inadequate, and *Monroe* v. *Board of Comrs. of City of Jackson*, 391 U.S. 450 (1968), found a "free transfer" plan inadequate.

[5] *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969) (upholding district court order requiring assignment of faculty and staff on a ratio based on racial population of district).

[6] *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), *mod. & aff'd. en banc*, 380 F.2d 385 (C.A. 5), *cert. den.*, 389 U.S. 840 (1967).

[7] *Hall* v. *St. Helena Parish School Board*, 417 F.2d 801 (C.A. 5), *cert. den.*, 396 U.S. 904 (1969); *Henry* v. *Clarksdale Municipal Separate School District*, 409 F.2d 682 (C.A. 5), *cert. den.*, 396 U.S. 940 (1969); *Brewer* v. *School Board of City of Norfolk*, 397 F.2d 37 (C.A. 4, 1968); *Clark* v. *Board of Education of City of Little Rock*, 426 F.2d 1035 (C.A. 8, 1970).

[8] *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969). The Court summarily reiterated its point several times in the Term. *Carter* v. *West Feli-*

In the October 1970 Term the Court undertook to elaborate the requirements of achieving a unitary school system and delineating the methods which could or must be used to achieve it [9] and at the same time struck down state inhibitions on the process.[10] The opinion in *Swann* emphasized that the goal since the decision in *Brown* was the dismantling of an officially-imposed dual school system. "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." [11] While "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," any such situation must be closely scrutinized by the lower courts and a heavy burden is upon school officials to prove that the situation is not the result of state-fostered segregation. Any desegregation plan which contemplates such a situation must before a court accepts it be shown not to be affected by present or past discriminatory action on the part of state and local officials.[12] In developing a desegregation plan when it must, a federal court must start with an appreciation of the mathematics of the racial composition of the school district population and its plan may rely to some extent on mathematical ratios but it should exercise care that this use is only a starting point.[13]

Because the present situation may be attributable to past discriminatory actions in site selection and location of school buildings, it is permissible, and may be required, to resort to altering of attendance boundaries and grouping or pairing schools in noncontiguous fashion in order to promote desegregation and undo past official action; in the remedial process, conscious assignment of students and drawing of boundaries on the basis of race is permissible for the moment.[14] Transportation of students—busing—is a per-

*ciana Parish School Board*, 396 U.S. 290 (1970); *Northcross* v. *Board of Education of City of Memphis*, 397 U.S. 232 (1970); *Dowell* v. *Board of Education of Oklahoma City*, 396 U.S. 269 (1969).

[9] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis* v. *Board of School Comrs. of Mobile County*, 402 U.S. 33 (1971).

[10] *McDaniel* v. *Barresi*, 402 U.S. 39 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971).

[11] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971).

[12] Id., 25–27.

[13] Id., 22–25.

[14] Id., 27–29.

missible tool of educational and desegregation policy, inasmuch as a neighborhood attendance policy reflecting past discrimination may be inadequate. The soundness of any busing plan must be weighed on the basis of many factors, including the age of the students, and when the time or distance of travel is so great as to risk the health of children or significantly impinge on the educational process, the weight shifts.[15] Finally, the Court indicated, once a unitary system has been established, no affirmative obligation rests on school boards to adjust attendance year by year to reflect changes in composition of neighborhoods so long as the change is solely attributable to private action.[16]

***Northern Schools: Inter- and Intradistrict Desegregation.***—The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections required the development of standards for determining when segregation was *de jure* and what remedies must or should be imposed when such official separation was found.[17]

Accepting the findings of lower courts that the actions of public school officials in Detroit and of the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court set aside a desegregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban school districts.[18] The basic holding of the Court was that such a remedy

[15] Id., 29–31.

[16] Id., 31–32. In *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976) the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court's power to order it subsequently to implement a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id., 436, 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but it thought that was irrelevant to the issue of neutral student assignments.

[17] The presence or absence of a statute mandating separation provides no talisman indicating the distinction between *de jure* and *de facto* segregation. *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 457 n.5 (1979). As early as *Ex parte Virginia*, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition: and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.

[18] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the interdistrict segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district.[19] The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." [20] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school districts, the Court indicated, would impose a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through elected representatives.[21] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." [22]

"The controlling principle consistently expounded in our holdings," said the Court in the *Detroit* case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation." [23] While this axiom caused little problem when the

[19] Id., 745.

[20] Id., 741–742.

[21] Id., 742–743. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractible areas. *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 500–502 (1974). In *Hills* v. *Gautreaux*, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . ." In other places, the Court stressed the absence of interdistrict violations, id., 294, and in still others paired the two reasons. Id., 296.

[22] *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an inter-district order. Id., 757, 762, 781.

[23] Id., 744. *See Hills* v. *Gautreaux*, 425 U.S. 284, 294 n. 11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power."); *Austin Ind. School Dist.* v. *United States*, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in *Milliken*).

violation consisted of statutorily mandated separation,[24] it has required a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory but official action operated to the contrary. At first, the difficulty was obscured through the creation of presumptions that eased the burden of proof on plaintiffs, but more recently the Court had appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes* v. *Denver School District*.[25] The lower courts had found the school segregation existing within one part of the City to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived and the burden is on the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.[1]

[24] When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is required. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." *Davis* v. *Bd. of School Comrs.*, 402 U.S. 33, 37 (1971). *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971).

[25] 413 U.S. 189 (1973).

[1] Id., 207–211. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id., 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id., 217, 236 (concurring and dissenting). *See* his opinion in *Austin Ind. School Dist.* v. *United States*, 429 U.S. 990, 991 (1976) (concurring).

*Keyes* then was consistent with both the necessity of showing official complicity in separation and in limiting the remedy to the violation found; it simply through its creation of presumptions afforded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit* inter-district case, however, of the "controlling principle" of school desegregation cases, the Court appeared to move away from the *Keyes* approach.[2] First, in *Pasadena City Bd. of Educ.* v. *Spangler*,[3] although not all of the district court's order had been effectuated, the student assignment plan had resulted in integration of the schools, but in the following years residential pattern changes had again resulted in pupil racial imbalances and the district court ordered the school board to remedy those imbalances. The Court held that federal equity power was lacking to impose orders to correct shifts "not attributed to any segregative actions on the part of the defendants." [4]

Second, in the first *Dayton* case, the lower courts had found three constitutional violations that had resulted in some pupil segregation and based on these three, viewed as "cumulative violations," a districtwide transportation plan had been imposed. Reversing, the Supreme Court reiterated that the remedial powers of the federal courts are called forth by violations and are limited by the scope of those violations. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' " [5] The goal is to restore the plaintiffs to the position they would have occupied had they not been subject to unconstitutional action. Lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." [6] The Court then sent the case back to

[2] Of significance was the disallowance of the disproportionate impact analysis in constitutional interpretation and the adoption of an apparently strengthened intent requirement. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Massachusetts Personnel Admr.* v. *Feeney*, 442 U.S. 256 (1979). This principle applies in the school area. *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977).

[3] 427 U.S. 424 (1976).

[4] Id., 436.

[5] *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) (quoting *Hills* v. *Gautreaux*, 425 U.S. 284, 294 (1976)).

[6] *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977). The Court did not discuss the presumptions that had been permitted by *Keyes*. Justice Brennan, the

the district court for the taking of evidence, the finding of the nature of the violations, and the development of an appropriate remedy.

Surprisingly, however, *Keyes* was reaffirmed and broadly applied in subsequent appeals of the *Dayton* case after remand and in an appeal from Columbus, Ohio.[7] Following the Supreme Court standards, the *Dayton* district court held that plaintiffs had failed to prove official segregative intent but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in *Brown* v. *Board of Education*. The *Keyes* presumption therefore required the school boards to show that systems had not existed and they failed to do so. Because each system was a dual one in 1954, it was subject to an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." [8] Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be utilized to infer segregative intent, thus satisfying the *Davis-Arlington Heights* standards.[9] The Court further affirmed the district-wide remedies, holding that its earlier *Dayton* ruling had been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.[10]

Reaffirmation of the breadth of federal judicial remedial powers came when, in a second appeal of the *Detroit* case, the Court unanimously upheld the order of a district court mandating

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author of *Keyes*, concurred on the basis that the the violations found did not justify the remedy imposed, asserting the methods of proof utilized in *Keyes* as continuingly valid. Id., 421.

[7] *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526 (1979). Justice Stewart and Chief Justice Burger concurred with the Court in *Columbus* but dissented in *Dayton*, id., 433 U.S. 469, primarily on the basis of deference to the findings of the two district courts. Justices Powell and Rehnquist dissented in both cases. Id., 479, 489.

[8] *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 459 (1979) (quoting *Green* v. *School Board of New Kent County*, 391 U.S. 430, 437–438 (1968)).

[9] Id., 461–463, 464–465.

[10] Id., 465–467.

compensatory or remedial educational programs for school children who have been subjected to past acts of *de jure* segregation. So long as the remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.[11]

***Efforts to Curb Busing and Other Desegregation Remedies.***— Flux marks the state of the law respecting the definition of and the remedies for *de jure* racial separation in the public schools, both North and South. The greatest amount of controversy surrounding the remedy to be imposed relates to busing. *Swann*, of course, sanctioned an order requiring fairly extensive busing, as did the most recent *Dayton* and *Columbus* cases, but the earlier case cautioned as well that there were limits occasioned by the nature of the educational process and the well-being of children that courts must observe[12] and subsequent cases contain the principle that the remedy must be no more extensive than the violation found.[13] Congress has enacted several provisions of law, either permanent statutes or annual appropriations limits, that purport to restrict the power of federal courts and administrative agencies to order or to require busing, but these, either because of drafting infelicities or because of modifications required to obtain passage have been largely ineffectual.[14] Stronger proposals, for statutes or for constitutional amendments, have been made in Congress but have yet to pass both Houses and become law.[15] Dissenting Justices have

[11] *Milliken* v. *Bradley*, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id., 288–291.

[12] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30–31 (1971).

[13] *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974).

[14] E.g., § 407(a) of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. § 2000c–6, construed to cover only *de facto* segregation in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17–18 (1971); § 803 of the Education Amendments of 1972, 86 Stat. 372, 20 U.S.C. § 1653 (expired), interpreted in *Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Justice Powell in Chambers), and the Equal Educational Opportunities and Transportation of Students Act of 1974, 88 Stat. 514 (1974), 20 U.S.C. §§ 1701–1757, see § 1714, interpreted in *Morgan* v. *Kerrigan*, 530 F.2d 401, 411–415 (C.A. 1), *cert. den.*, 426 U.S. 995 (1976), and *United States* v. *Texas Education Agency*, 532 F.2d 380, 394 n. 18 (C.A. 5), *vacated on other grounds sub nom. Austin Ind. School Dist.* v. *United States*, 429 U.S. 990 (1976); and a series of annual appropriations riders, first passed as riders to the 1976 and 1977 Labor-HEW bills, § 108, 90 Stat. 1434 (1976), and § 101, 91 Stat. 1460, 42 U.S.C. § 2000d, upheld against facial attack in *Brown* v. *Califano*, 627 F.2d 1221 (C.A.D.C. 1980).

[15] *See The 14th Amendment and School Busing*, Hearings before the Senate Judiciary Subcommittee on the Constitution, 97th Congress, 1st sess. (1981); *School Desegregation*, Hearings before the House Judiciary Subcommittee on Civil and Constitutional Rights, 97th Congress, 1st sess. (1981).

argued that particular Court orders have been too broad, but the Court itself seems at least for the moment to be merely watching developments in the lower courts.[16]

Of considerable importance to the possible validity of any substantial congressional restriction on judicial provision of remedies for *de jure* segregation violations are two decisions contrastingly dealing with referenda-approved restrictions on busing and other remedies in Washington State and California.[17] In the former State, following a decision by the school board in Seattle to undertake a mandatory busing program, the voters of the State approved an initiative that prohibited school boards from assigning students to any but the nearest or next nearest school that offered the students' course of study but which contained so many exceptions that it really only reached busing for racial purposes. In the latter State, the state courts had interpreted the state constitution to require school systems to eliminate both *de jure* and *de facto* segregation. The voters approved an initiative that prohibited state courts from ordering busing unless the segregation was in violation of the Fourteenth Amendment and a federal judge would be empowered to order it under United States Supreme Court precedents.

By a narrow division, the Court held unconstitutional the Washington measure and with almost unanimity of result if not of reasoning it sustained the California measure. The constitutional flaw in the Washington measure, the Court held, was that it had chosen a racial classification—busing for desegregation, and imposed more severe burdens upon those seeking to obtain such a policy than it imposed with respect to any other policy. Local school boards could make education policy on anything but busing. By singling out busing and making it more difficult than anything else, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority.[18] With respect to Califor-

[16] Following the decisions in *Dayton* and *Columbus*, it appeared the Court would review an appeal premised solely on the busing order but it was eventually dismissed without decision, *Estes* v. *Metropolitan Branches of NAACP*, 572 F.2d 1010 (C.A. 5, 1978), *cert. dismd. as improvidently granted*, 444 U.S. 437 (1980) (Justices Powell, Stewart, and Rehnquist dissenting), and the Court refused to review other cases. *Cleveland Bd. of Educ.* v. *Reed*, 607 F.2d 714 (C.A. 6, 1979), *cert. den.*, 445 U.S. 935 (1980) (Justices Rehnquist and Powell and Chief Justice Burger dissenting); *Delaware State Bd. of Educ.* v. *Evans*, 582 F.2d 750 (C.A. 3, 1978), *cert. den.*, 446 U.S. 923 (1980) (Justices Rehnquist, Stewart, and Powell dissenting).

[17] *Washington* v. *Seattle School Dist.*, 458 U.S. 457 (1982); *Crawford* v. *Los Angeles Board of Educ.*, 458 U.S. 527 (1982). The decisions were in essence an application of *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

[18] *Washington* v. *Seattle School Dist.*, 458 U.S. 457, 470–482 (1982). Justice Blackmun wrote the opinion of the Court and was joined by Justices Brennan, White, Marshall, and Stevens. Dissenting were Justices Powell, Rehnquist, O'Con-

nia, however, the Court discerned no such impediment. The initiative was a simple repeal of a remedy that had been within the government's discretion to provide. Moreover, the State continued under an obligation to alleviate *de facto* segregation by every other feasible means. The initiative had simply foreclosed one particular remedy—court-ordered mandatory busing—as inappropriate.[19]

**Juries**

It has been established since *Strauder* v. *West Virginia* [1] that exclusion of an identifiable racial or ethnic group from a grand jury [2] which indicts a defendant or a petit jury [3] which tries him, or from both,[4] denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment.[5] At least when the persons excluded from jury service on the basis of race are Negroes, any defendant, whether Negro or not, is entitled to raise the issue and to have his conviction or indictment set aside if he proves such exclusion.[6] "Defend-

nor, and Chief Justice Burger. Id., 488. The dissent essentially argued that because the State was ultimately entirely responsible for all educational decisions, its choice to take back part of the power it had delegated did not raise the issues the majority thought it did.

[19] *Crawford* v. *Los Angeles Board of Educ.*, 458 U.S. 527, 535–540 (1982). Justice Powell wrote the opinion of the Court, which was joined by the remainder of the Court, save for Justice Marshall who dissented. Id., 547. Justices Blackmun and Brennan also submitted a limiting concurrence. Id., 545.

[1] 100 U.S. 303 (1880). *Cf. Virginia* v. *Rives*, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has been statutorily illegal as well since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See Ex parte Virginia*, 100 U.S. 339 (1880). In *Hernandez* v. *Texas*, 347 U.S. 475 (1954), the Court found jury discrimination against Mexican-Americans a denial of equal protection, a ruling it reiterated in *Castaneda* v. *Partida*, 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and the selecting officials were majority Mexican-American.

[2] *Bush* v. *Kentucky*, 107 U.S. 110 (1883); *Carter* v. *Texas*, 177 U.S. 442 (1900); *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Hill* v. *Texas*, 316 U.S. 400 (1942); *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Arnold* v. *North Carolina*, 376 U.S. 773 (1964); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972).

[3] *Hollins* v. *Oklahoma*, 295 U.S. 394 (1935); *Avery* v. *Georgia*, 345 U.S. 559 (1953).

[4] *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Martin* v. *Texas*, 200 U.S. 316 (1906); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hale* v. *Kentucky*, 303 U.S. 613 (1938); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Coleman* v. *Alabama*, 377 U.S. 129 (1964); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967); *Sims* v. *Georgia*, 385 U.S. 538 (1967).

[5] Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972).

[6] *Peters* v. *Kiff*, 407 U.S. 493 (1972). The Court was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of

ants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." [7] Thus, persons may bring actions seeking affirmative relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.[8]

A *prima facie* case of deliberate and systematic exclusion is made when it is shown that no Negroes have served on juries for a period of years [9] or when it is shown that the number of Negroes who served was grossly disproportionate to the percentage of Negroes in the population and eligible for jury service.[10] Once this *prima facie* showing has been made, the burden is upon the jurisdiction to prove that discrimination was not practiced and it is not adequate that jury selection officials testify under oath that they did not discriminate.[11] Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices which made discrimination easy to accomplish,[12] it has not outlawed discretionary selection pursuant to general standards of educational attainment and character which can be administered fairly.[13] Similarly, it has not ordered that Negroes must be included on all-white jury commissions which administer the jury selection laws in some States.[14]

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the excluded class—but in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board.

[7] *Carter* v. *Jury Comm. of Greene County*, 396 U.S. 320, 329 (1970).

[8] Ibid.; *Turner* v. *Fouche*, 396 U.S. 346 (1970).

[9] *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Hill* v. *Texas*, 316 U.S. 400 (1942).

[10] *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). For an elaborate discussion of statistical proof, *see Castenada* v. *Partida*, 430 U.S. 482 (1977).

[11] *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Eubanks* v. *Georgia*, 385 U.S. 545 (1967); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Turner* v. *Fouche*, 396 U.S. 346, 360-361 (1970).

[12] *Avery* v. *Georgia*, 345 U.S. 559 (1953) (names of whites and Negroes listed on differently colored paper for drawing for jury duty); *Whitus* v. *Georgia*, 385 U.S. 545 (1967) (jurors selected from county tax books, in which names of Negroes were marked with a "c").

[13] *Carter* v. *Jury Comm. of Greene County*, 396 U.S. 320, 331-337 (1970), and cases cited.

[14] Id., 340-341.

In *Swain* v. *Alabama*,[15] Negroes regularly appeared on jury venires but no Negro had actually served on a jury. It appeared that the absence was attributable to the action of the prosecutor in peremptorily challenging all potential Negro jurors, but the Court refused to set aside the conviction. The use of peremptory challenges to exclude the Negroes in the particular case was permissible, the Court held, regardless of the prosecutor's motive, although it was indicated the consistent use of such challenges to remove Negroes would be unconstitutional. Because the record did not disclose that the prosecution was responsible solely for the fact that no Negro had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, defendant's claims were rejected.[16]

**Housing**

*Buchanan* v. *Warley*[17] invalidated an ordinance which prohibited Negroes from occupying houses in blocks where the greater number of houses were occupied by whites and which prohibited whites from doing so where the greater number of houses were occupied by Negroes. Although racially restrictive covenants do not themselves violate the equal protection clause the judicial enforcement of them, either by injunctive relief or through entertaining damage actions, does violate the Fourteenth Amendment.[18] Referendum passage of a constitutional amendment repealing "fair housing" law and prohibiting further state or local action in that direction was held unconstitutional in *Reitman* v. *Mulkey*,[19] though on somewhat ambiguous grounds, while a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was found to accord with the equal protection clause.[20] Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination.[21] Provision of pub-

[15] 380 U.S. 202 (1965).

[16] Swain continues under attack in both federal and state courts, with the attacks being premised on both the Sixth and Fourteenth Amendments.

[17] 245 U.S. 60 (1917). *See also Harmon* v. *Tyler*, 273 U.S. 668 (1927); *Richmond* v. *Deans*, 281 U.S. 704 (1930).

[18] *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Barrows* v. *Jackson*, 346 U.S. 249 (1953). *Cf. Corrigan* v. *Buckley*, 271 U.S. 323 (1926).

[19] 387 U.S. 369 (1967).

[20] *James* v. *Valtierra*, 402 U.S. 137 (1971). The Court did not perceive that either on its face or as applied the provision was other than racially neutral. Justices Marshall, Brennan, and Blackmun dissented. Id., 143.

[21] Civil Rights Act of 1866, 14 Stat. 27, U.S.C. § 1982, *see Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and Title VIII of the Civil Rights Act of 1968, 82 Stat. 73, 42 U.S.C. § 3601 *et seq.*

licly assisted housing, of course, must be on a nondiscriminatory basis.[22]

**Other Areas of Discrimination**

***Transportation.***—The "separate but equal" doctrine won Supreme Court endorsement in the transportation context [1] and its passing in the education field did not long predate its demise in transportation as well.[2] During the interval, the Court held invalid a state statute which permitted carriers to provide sleeping and dining cars for white persons only,[3] held that a carrier's provision of unequal, or nonexistent, first class accommodations to Negroes violated the Interstate Commerce Act,[4] and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce.[5] *Boynton* v. *Virginia* [6] voided a trespass conviction of an interstate Negro bus passenger who had refused to leave a restaurant which the Court viewed as an integral part of the facilities devoted to interstate commerce and therefore subject to the Interstate Commerce Act.

***Public Facilities.***—In the aftermath of *Brown* v. *Board of Education*, the Court in a lengthy series of *per curiam* opinions established the invalidity of segregation in publicly provided or supported facilities and of required segregation in any facility or function.[7] A municipality could not operate a racially-segregated park pursuant to a will which left the property for that purpose and which specified that only whites could use the park,[8] but it was permissi-

[22] *See Hills* v. *Gautreaux*, 425 U.S. 284 (1976).

[1] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[2] *Gayle* v. *Browder*, 352 U.S. 903 (1956), *aff'g.* 142 F. Supp. 707 (D.C.M.D. Ala.) (statute requiring segregation on buses is unconstitutional). "We have settled beyond question that no State may require racial segregation of interstate transportation facilities . . . . This question is no longer open; it is foreclosed as a litigable issue." *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962).

[3] *McCabe* v. *Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914).

[4] *Mitchell* v. *United States*, 313 U.S. 80 (1941).

[5] *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Henderson* v. *United States*, 339 U.S. 816 (1950).

[6] 364 U.S. 454 (1960).

[7] E.g., *Mayor & City Council of Baltimore* v. *Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses); *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Muir* v. *Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954) (city lease of park facilities); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U.S. 54 (1958) (public parks and golf courses); *State Athletic Comm.* v. *Dorsey*, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); *Turner* v. *City of Memphis*, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); *Schiro* v. *Bynum*, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[8] *Evans* v. *Newton*, 382 U.S. 296 (1966). State courts had removed the city as trustee but the Court thought the city was still inextricably bound up in the oper-

ble for the state courts to hold that the trust had failed and to imply a reverter to the decedent's heirs.[9] A municipality under court order to desegregate its publicly-owned swimming pools was held to be entitled to close the pools instead, so long as it ceased operation entirely of them.[10]

***Marriage.***—Statutes which forbid the contracting of marriage between persons of different races are unconstitutional [11] as are statutes which penalize interracial cohabitation.[12]

***Judicial System.***—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience [13] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[14] Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.[15]

***Public Designation.***—It is unconstitutional to designate candidates on the ballot by race [16] and apparently any sort of designation by race on public records is suspect although not necessarily unlawful.[17]

***Public Accommodations.***—Whether or not discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960's and it avoided finally deciding

ation and maintenance of the park. Justices Black, Harlan, and Stewart dissented because they thought the removal of the city as trustee removed the element of state action. Id., 312, 315.

[9] *Evans* v. *Abney*, 396 U.S. 435 (1970). The Court thought that in effectuating the testator's intent in the fashion best permitted by the Fourteenth Amendment the state courts engaged in no action violating the equal protection clause. Justices Douglas and Brennan dissented. Id., 448, 450.

[10] *Palmer* v. *Thompson*, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized Negroes for asserting their rights. Id., 240. Justice Douglas also dissented. Id. 231.

[11] *Loving* v. *Virginia*, 388 U.S. 1 (1967).

[12] *McLaughlin* v. *Florida*, 379 U.S. 184 (1964).

[13] *Johnson* v. *Virginia*, 373 U.S. 61 (1963).

[14] *Hamilton* v. *Alabama*, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[15] *Lee* v. *Washington*, 390 U.S. 333 (1968); *Wilson* v. *Kelley*, 294 F. Supp. 1005 (D.C.N.D.Ga.), *aff'd*, 393 U.S. 266 (1968).

[16] *Anderson* v. *Martin*, 375 U.S. 399 (1964).

[17] *Tancil* v. *Woolls* and *Virginia State Board of Elections* v. *Hamm*, 379 U.S. 19 (1964) (aff'g lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife but voiding laws requiring separate lists of whites and Negroes in voting, tax and property records).

one way or the other, generally finding forbidden state action in some aspect of the situation,[18] and passage of the 1964 Civil Rights Act obviated any necessity to resolve the issue.[19]

***Elections.***—While, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress,[20] the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection as well.[21] Additionally, cases of gerrymandering of electoral districts and the creation of maintenance of electoral practices that dilute and weaken black and other minority voting strength is subject to Fourteenth and Fifteenth Amendment and statutory attack.[22]

**Permissible Remedial Utilizations of Racial Classifications**

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account in order to formulate and implement a remedy to overcome the effects of past discrimination against the class; often the issue is framed in terms of "reverse discrimination" inasmuch as the governmental action deliberately favors the members of the class and may simultaneously impact adversely upon nonmembers of the class.[1] While the Court in prior cases had accepted both the use of race and other suspect criteria as valid factors in formulating remedies to overcome discrmination [2] and the according of preferences to class members when the

[18] E.g., *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Turner* v. *City of Memphis*, 369 U.S. 350 (1962); *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *Robinson* v. *Florida*, 378 U.S. 153 (1964).

[19] Title II, 78 Stat. 243, 42 U.S.C. § 2000a et seq. *See Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1964). On the various positions of the Justices on the constitutional issue, see the opinions in *Bell* v. *Maryland*, 378 U.S. 226 (1964).

[20] *See infra, pp.* 1820–1835.

[21] E.g., *Hadnott* v. *Amos*, 394 U.S. 358 (1971).

[22] E.g., *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *United Jewish Orgs.* v. *Carey*, 430 U.S. 144 (1977); *Rogers* v. *Lodge*, 458 U.S. 613 (1982).

[1] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. E.g., *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that whites were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. Id., 280 n. 8. In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans.

[2] E.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22–25 (1971).

class has been previously the object of discrimination,[3] it has never until recently given plenary review to programs that expressly used race as the prime consideration in the awarding of some public benefit.[4]

In *United Jewish Orgs.* v. *Carey*[5] the State in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law had drawn a plan which consciously used racial criteria to create a certain number of districts with nonwhite populations large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts and plaintiffs sued alleging that the value of the votes of the residents of the community had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, the Justice argued that compliance with the Act necessarily required States to be race conscious in the drawing of lines so as not to dilute minority voting strength, that this requirement was not dependent upon a showing of past discrimination, and that the States retained discretion to determine just what majority minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.[6]

Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the State had done did not violate either the Fourteenth or the Fifteenth Amendment.

[3] Programs to overcome past societal discriminations against women have been approved, *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Califano* v. *Webster*, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, *Morton* v. *Mancari*, 417 U.S. 535 (1975), but on the basis that the classification was political rather than racial.

[4] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in *DeFunis* v. *Odegard*, 416 U.S. 312 (1974), but the merits were not reached.

[5] 430 U.S. 144 (1977). Chief Justice Burger dissented, id., 180, and Justice Marshall did not participate.

[6] Id., 155–165. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.

This was the case because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; and the plan did not operate to minimize or unfairly cancel out white voting strength because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[7]

With the court so divided, light on the constitutionality of such affirmative action—benign use of race was thought to await decision in *Regents of the Univ. of California* v. *Bakke*[8] but again the Court fragmented. The Davis campus medical school admitted each year 100 students; the school set aside 16 seats each year for which disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places were, could compete for admission. Twice denied admission. Bakke sued, arguing that had not the 16 positions been set aside he could have been admitted; the state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.

Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964[9] outlawed the college's program and made unnecessary any consideration of the Constitution. They thus would admit Bakke and bar use of race in admissions.[10] The remaining five Justices agreed among themelves that Title VI, on its face and in light of its legislative history, proscribed only what the equal protection clause proscribed.[11] They

[7] Id., 165–168. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. Id., 168. Justices Stewart and Powell concurred basically in this part of the White opinion on the basis that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id., 179.

[8] 438 U.S. 265 (1978).

[9] 78 Stat. 252, 42 U.S.C. § 2000d *et seq.* The Act bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance.

[10] Id, 438 U.S. 408–421 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger).

[11] Id., 284–287 (Justice Powell), 328–355 (Justices Brennan, White, Marshall, and Blackmun).

thus reached the constitutional issue but resolved it differently. Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances, but benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down any remedial racial classification that stigmatized any group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.[12] Justice Powell argued that all racial classifications are suspect and call for strict scrutiny. None of the justifications asserted by the college met this high standard of review and consequently the program must fail. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.[13] Justice Powell thus joined the first group in agreeing that Bakke should be admitted, but he joined the second group in permitting the college to consider race to some degree in its admissions.[14]

Finally, in *Fullilove* v. *Klutznick*,[15] the Court resolved most of the outstanding constitutional question regarding the validity of race-conscious affirmative action programs. Although again there was no majority opinion of the Court, the series of opinions by the six Justices voting to uphold a congressional provision requiring that at least ten percent of public works funds be set aside for minority business enterprises all recognized that alleviation and re-

[12] Id., 355–379 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that promulgated to be applied in gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Id., 359.

[13] Id., 287–320.

[14] *See* id., 319–320 (Justice Powell).

[15] 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dissented in one opinion, id., 522, while Justice Stevens dissented in another. Id., 532.

mediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Judgment of the Court was issued by Chief Justice Burger who emphasized Congress' preeminent role under the Commerce Clause and under the Fourteenth Amendment to find as a fact the existence of past discrimination and its continuing effects and to implement remedies which were race conscious in order to cure those effects.[16] The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, utilizing the middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination." [17]

Taken together, the opinions recognize that at least in Congress there resides the clear power to make the findings that will form the basis for a judgment of the necessity to use racial classifications in an affirmative way; these findings need not be extensive or express and may be collected in many ways. Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies is left unsettled but that they have some such power seems evident.[18] Further, while the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to it, thus leaving the way open for programs of a scope sufficient to remedy all the identified effects of past discrimination.[19] But the most important part of these opinions rests in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. Rejected were the arguments respecting stigma attaching to those minority beneficiaries of such program, respecting the burdens on innocent third parties, and respecting the overinclusiveness arising from the fact that some minorities who had suffered no discrimination received the benefit of the remedies.[20]

[16] Id., 456–492. Justice White and Powell joined this opinion. Justice Powell also concurred in a separate opinion, id., 495, which qualified to some extent his agreement with the Chief Justice.

[17] Id., 517.

[18] Id., 473–480. The program was an exercise of Congress' spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress' regulatory powers, which in this case undergirded the spending power, and found the power to repose in the commerce clause with respect to private contractors and in § 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

[19] Id., 484–485, 489 (Chief Justice Burger), 513–515 (Justice Powell).

[20] Id., 484–489 (Chief Justice Burger), 514–515 (Justice Powell), 520–521 (Justice Marshall).

## THE NEW EQUAL PROTECTION

### Classifications Meriting Close Scrutiny

***Alienage and Nationality.***—"It has long been settled . . . that the term 'person' [in the equal protection clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." [1] Thus, one of the earliest equal protection decisions struck down the administration of a facially-lawful licensing ordinance which was being applied to discriminate against Chinese.[2] But the Court in many cases thereafter recognized a permissible state interest in distinguishing between its citizens and aliens in terms of restricting enjoyment of resources and public employment to its own citizens.[3] But in *Hirabayashi* v. *United States,*[4] it was announced that "[d]istinctions between citizens solely because of their ancestry" was "odius to a free people whose institutions are founded upon the doctrine of equality." And in *Korematsu* v. *United States,*[5] classifications based upon

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[1] *Graham* v. *Richardson,* 403 U.S. 365, 371 (1971). *See also Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886); *Truax* v. *Raich,* 239 U.S. 33, 39 (1915); *Takahisi* v. *Fish & Game Comm.,* 334 U.S. 410, 420 (1948). Aliens, even unlawful aliens, are "persons" to whom the Fifth and Fourteenth Amendment apply. *Plyler* v. *Doe,* 457 U.S. 202, 210–216 (1982). While the Federal Government may not discriminate invidiously against aliens, *Mathews* v. *Diaz,* 426 U.S. 67, 77 (1976), because of the plenary power delegated by the Constitution to the national government to deal with aliens and naturalization, federal classifications are judged by less demanding standards than are those of the States and many classifications which would fail if attempted by the States have been sustained because Congress has made them. Id., 78–84; *Fiallo* v. *Bell,* 430 U.S. 787 (1977). Additionally, state discrimination against aliens may fail because it imposes burdens not permitted or contemplated by Congress in its regulations of admission and conditions of admission. *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Toll* v. *Moreno,* 458 U.S. 1 (1982). Such discrimination may also violate treaty obligations and be void under the supremacy clause, *Askura* v. *City of Seattle,* 265 U.S. 332 (1924), and some federal civil rights statutes, such as 42 U.S.C. § 1981, protects resident aliens as well as citizens. *Graham* v. *Richardson, supra,* 376–380.

[2] *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

[3] *McGready* v. *Virginia,* 94 U.S. 391 (1877); *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914) (limiting aliens' rights to develop natural resources); *Hauenstein* v. *Lynham,* 100 U.S. 483 (1880); *Blythe* v. *Hinckley,* 180 U.S. 333 (1901) (restriction of devolution of property to aliens); *Terrace* v. *Thompson,* 263 U.S. 197 (1923); *Porterfield* v. *Webb,* 263 U.S. 225 (1923); *Webb* v. *O'Brien,* 263 U.S. 313 (1923); *Frick* v. *Webb,* 263 U.S. 326 (1923) (denial of right to own and acquire land); *Heim* v. *McCall,* 239 U.S. 175 (1915); *People* v. *Crane,* 214 N.Y. 154, 108 N. E. 427, *aff'd,* 239 U.S. 195 (1915) (barring public employment to aliens); *Ohio ex rel. Clarke* v. *Deckebach,* 274 U.S. 392 (1927) (prohibiting aliens from operating poolrooms). The Court struck down a statute restricting the employment of aliens by private employers, however. *Truax* v. *Raich,* 239 U.S. 33 (1915).

[4] 320 U.S. 81, 100 (1943).

[5] 323 U.S. 214, 216 (1944).

race and nationality were said to be suspect and subject to the "most rigid scrutiny." These dicta resulted in a 1948 decision which appeared to call into question the rationale of the "particular interest" doctrine under which earlier discriminations had been justified. There the Court held void a statute barring issuance of commerical fishing licenses to persons "ineligible to citizenship" which in effect meant resident alien Japanese.[6] "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." Justice Black said for the Court. ". . . . [T]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." [7]

Announcing "that classifications based on alienage . . . are inherently suspect and subject to close scrutiny," the Court struck down state statutes which either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residence requirement on eligibility.[8] Thereafter, in a series of decisions, the Court adhered to its conclusion that alienage was a suspect classification and voided a variety of restrictions. More recently, however, it has created a major "political function" exception to strict scrutiny review, which shows some potential of displacing the previous analysis almost entirely.

In *Sugarman* v. *Dougall*,[9] the Court voided the total exclusion of aliens from a State's competitive civil service. A State's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[10] the Court held, and this power would extend "also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." [11] But a

[6] *Takahashi* v. *Fish & Game Comm.*, 334 U.S. 410 (1948).

[7] Id., 420. The decision was preceded by *Oyama* v. *California*, 332 U.S. 633 (1948), which was also susceptible to being read as questioning the premise of the earlier cases.

[8] *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971).

[9] 413 U.S. 634 (1973).

[10] Id., 647-649. *See also Foley* v. *Connelie*, 435 U.S. 291, 296 (1978). Thus, aliens can be excluded from voting, *Skafte* v. *Rorex*, 553 P.2d 830 (Colo. 1976), *app. dismd. for lack of substantial federal question*, 430 U.S. 961 (1977), and from service on juries. *Perkins* v. *Smith*, 370 F. Supp. 134 (D.C.D.Md. 1974) (3-judge court), *aff'd.* 426 U.S. 913 (1976).

[11] *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). Such state restrictions are "not wholly immune from scrutiny under the Equal Protection Clause." Id., 648.

flat ban upon much of the State's career public service, both of policy-making and non-policy-making jobs, ran afoul of the requirement that in achieving a valid interest through the use of a suspect classification the State must employ means that are precisely drawn in light of the valid purpose.[12]

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the State had not met the "heavy burden" of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The State's admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.[13] Nor could Puerto Pico offer a justification for excluding aliens from one of the "common occupations of the community" and its bar on licensing aliens as civil engineers was voided.[14]

In *Nyquist* v. *Mauclet*,[15] the Court seemed to expand the doctrine of the cases. Challenged was a statute that restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Under the circumstances, therefore, the disqualification was not aimed at aliens as a class and because any aliens could escape the limitation by a voluntary act on his part the classification was not on an immutable characteristic possessed by a "discrete and insular minority" which was the basis for declaring alienage a suspect category. But the Court voided the statute. "The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." [16] Two

[12] Justice Rehnquist dissented. Id., 649. In the course of the opinion, the Court held inapplicable the doctrine of special-public-interest, the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of the citizens of that State is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id., 643–645.

[13] *In re Griffiths*, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id., 730, and 413 U.S., 649.

[14] *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976). Since the jurisdiction was Puerto Rico, the Court was not sure whether the requirement should be governed by the Fifth or Fourteenth Amendment but deemed the question immaterial since the same result would be achieved. The quoted expression is from *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

[15] 432 U.S. 1 (1977).

[16] Id., 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id., 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.

proffered justifications were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

However, in the following Term, the Court denied that every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.' " [17] Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former "is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historic power to exclude aliens from participation in its democratic political institutions,' . . . as part of the sovereign's obligation ' "to preserve the basic conception of a political community." ' " [18] When a State acts thusly by classifying against aliens, its action is not subject to strict scrutiny but rather need only meet the rational basis test. It is therefore permissible to reserve to citizens offices having the "most important policy responsibilities," a reservation drawn from *Sugarman*, but the critical factor in this case is the analysis finding that the police function is "one of the basic functions of government." "The execution of the broad powers vested" in police officers "affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community'. . . ." [19]

Continuing to enlarge the exception, the Court in *Ambach* v. *Norwick* [20] upheld a bar to qualifying as a public school teacher for

[17] *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978). The opinion was by Chief Justice Burger and the quoted phrase was from his dissent in *Nyquist* v. *Mauclet*, 432 U.S. 1, 14 (1977). Justices Marshall, Stevens, and Brennan dissented. Id. 302, 307.

[18] Id., 295–296. Formally following *Sugarman* v. *Dougall*, *supra*, the opinion considerably enlarged the exception noted in that case; see also *Nyquist* v. *Mauclet*, 432 U.S. 1, 11 (1977) (emphasizing the "narrowness of the exception"). Concurring in *Foley*, *supra*, 300, Justice Stewart observed that "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." On the other hand, Justice Blackmun, who had written several of the past decisions, including *Mauclet*, concurred also, finding the case consistent. Ibid.

[19] Id., 297–298. In *Elrod* v. *Burns*, 427 U.S. 347 (1976), barring patronage dismissals of police officers, the Court had nonetheless recognized an exception for policymaking officers which it did not extend to the police.

[20] 411 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Black-

resident aliens who have not manifested an intention to apply for citizenship. The "governmental function" test took on added significance, the Court saying that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." [21] Thus, "governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens." [22] Teachers, the Court thought, because of the role of public education in inculcating civic values and in preparing children for participation in society as citizens and because of the responsibility and discretion they have in fulfilling that role, perform a task that "go[es] to the heart of representative government." [23] The citizenship requirement need only bear a rational relationship to the state interest and the Court concluded it clearly did so.

Then, in *Cabell* v. *Chavez-Salido*,[24] the Court sustained a state law imposing a citizenship requirement upon all positions designated as "peace officers," upholding in context that eligibility prerequisite for probation officers. First, the Court held that the extension of the requirement to an enormous range of people who were variously classified as "peace officers" did not reach so far nor was it so broad and haphazard as to belie the claim that the State was attempting to ensure that an important function of government be in the hands of those having a bond of citizenship. "[T]he classifications used need not be precise; there need only be a substantial fit." [25] As to the particular positions, the Court held that "they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens." [1]

Thus, the Court has drawn so far a tripartite differentiation with respect to governmental restrictions on aliens. First, it has disapproved the earlier line of cases and now would foreclose attempts by the States to retain certain economic benefits, employment and opportunities for livelihood primarily, exclusively for citi-

mun, Brennan, Marshall, and Stevens. The disqualification standard was of course, that held invalid as a disqualification for receipt of educational assistance in *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977).

[21] *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979).

[22] Ibid.

[23] Id., 75–80. The quotation, at id., 76, is from *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973).

[24] 454 U.S. 432 (1982). Joining the opinion of the Court were Justices White, Powell, Rehnquist, O'Connor, and Chief Justice Burger. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. Id., 447.

[25] Id., 442.

[1] Id., 445.

zens. Second, when government exercises principally its economic functions, such as those with respect to public employment generally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity, when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government, its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis scrutiny.[2] However, the "political function" standard is elastic and so long as disqualifications are attached to specific occupations [3] rather than to the civil service in general, as in *Sugarman*, the concept seems capable of encompassing the exclusion.

When confronted with a state statute that authorized local school boards to exclude from public schools alien children who were not legally admitted to the United States, the Court determined that an intermediate level of scrutiny was appropriate and found that the proffered justifications did not sustain the classification.[4] Inasmuch as it was clear that the undocumented status of the children was not irrelevant to valid government goals and inasmuch as the Court had previously held that access to education was not a "fundamental interest" which triggered strict scrutiny of governmental distinctions relating to education,[5] the Court's decision to accord intermediate review was based upon an amalgam of at least three factors. First, alienage was a characteristic that provokes special judicial protection when used as a basis for discrimination. Second, the children here were innocent parties who were

[2] Id., 438–439

[3] Thus, the statute in *Chavez-Salido* applied to such positions as toll-service employees, cemetery sextons, fish and game wardens, and furniture and bedding inspectors, and yet the overall classification was deemed not so ill-fitting as to require its voiding.

[4] *Plyler* v. *Doe*, 457 U.S. 432 (1982). Joining the opinion of the Court were Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Id., 242.

[5] In *San Antonio School District* v. *Rodrigues*, 411 U.S. 1 (1973), while holding that education is not a fundamental interest, the Court expressly reserved the question whether a total denial of education to a class of children would infringe upon a fundamental interest. Id., 18, 25 n. 60, 37. The *Plyler* Court's emphasis upon the total denial here and the generally suspect nature of alienage classifications left ambiguous whether the state discrimination here would have been subjected to strict scrutiny if it had survived intermediate scrutiny. Justice Powell thought the Court had rejected strict scrutiny, id., 457 U.S., 238 n. 2 (concurring), while Justice Blackmun thought it had not reached the question, Id., 235 n. 3 (concurring). Indeed, their concurring opinions seem directed more toward the disability visited upon innocent children that the broader complex of factors set out in the opinion of the Court. Id., 231, 236.

having a particular onus imposed on them because of the misconduct of their parents. Third, the total denial of an education to these children would stamp them with an "enduring disability" that would harm both them and the State all their lives.[6] The Court evaluated each of the State's attempted justifications and found none of them satisfying the level of review demanded.[7] It seems evident that *Plyler* v. *Doe* is a unique case and that whatever it may doctrinally stand for a sufficiently similar factual situation is unlikely to be replication calling for application of the standards discussed by the Justices.

***Sex***.—Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court and the Court rejected the challenge in tones which until recently have prevailed. "The civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." [8] On the same premise, a statute restricting the franchise to men was sustained.[9]

[6] Id., 223-224.

[7] State concerns rejected including the interests in preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who are more likely to remain in the State and contribute to its welfare. Id., 227-230.

[8] *Bradwell* v. *Illinois*, 16 Wall. (83 U.S.) 130, 141 (1873). The cases involving alleged discrimination against women contain large numbers of quaint quotations from unlikely sources. Upholding a law which imposed a fee upon all persons engaged in the laundry business, except, that it did not apply to women so engaged where not more than two women were employed, Justice Holmes said: "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference." *Quong Wing* v. *Kirkendall*, 223 U.S. 59, 63 (1912). And upholding a law prohibiting most women from tending bar, Justice Frankfurter said: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948).

[9] *Minor* v. *Happersett*, 21 Wall. (88 U.S.) 162 (1875) (privileges and immunities).

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours [10] or minimum wages [11] or by restricting some of the things women could be required to do.[12] A 1961 decision upheld a state law which required jury service of men but which gave women the option of serving or not. "We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." [13] Another type of protective legislation for women which has been sustained is that promised on protection of morals, as by forbidding the sale of liquor to women.[14] In a highly controversial ruling, the Court sustained a state law which forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception being justified by the consideration that such women would be under the eyes of a protective male.[15]

A wide variety of sex discriminations by governmental and private parties, including the protective labor legislation previously sustained, is now subjected to federal statutory proscription, banning, for instance, sex discrimination in employment and requiring equal pay for equal work.[16] While the proposed Equal Rights

[10] *Muller* v. *Oregon*, 208 U.S. 412 (1908); *Dominion Hotel* v. *Arizona*, 249 U.S. 265 (1919).

[11] *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).

[12] E.g., *Radice* v. *New York*, 264 U.S. 292 (1924) (prohibiting nightwork by women in restaurants). A similar restriction was a maximum weight women could be required to lift.

[13] *Hoyt* v. *Florida*, 368 U.S. 57, 62 (1961).

[14] *Cronin* v. *Adams*, 192 U.S. 108 (1904).

[15] *Goesaert* v. *Cleary*, 335 U.S. 464 (1948).

[16] Thus, title VII of the Civil Rights Act of 1964, 80 Stat. 662, 42 U.S.C. § 2000e *et seq.*, bans discrimination against either sex in employment. *See*, e.g., *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). Reversing rulings that pregnancy discrimination is not reached by the statutory bar on sex discrimination, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), Congress enacted the Pregnancy Discrimination Act, P.L. 95–555 (1978), 92 Stat. 2076, amending 42 U.S.C. § 2000e. The Equal Pay Act, 77 Stat. 56 (1963), amending the Fair Labor Standards Act, 29 U.S.C. § 206(d), generally applies to wages paid for work requiring "equal skill, effort, and responsibility." *See Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). On the controversial issue of "comparable worth" and the interrelationship of title VII and the Equal Pay Act, *see County of Washington* v. *Gunther*, 452 U.S. 161 (1981).

Amendment pended before the States and ultimately failed of ratification,[17] the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a "heightened" traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard, which continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification, to provide the analysis for evaluation of sex classifications.

In *Reed* v. *Reed,*[18] the Court held invalid a state probate law which gave males preference over females when both were equally entitled to administer an estate. Because the statute "provides that different treatment be accorded to the applicants on the basis of their sex," Chief Justice Burger wrote, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the State advanced in defense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a State may be advanced by a classification based solely on sex.[19]

It now established that sex classifications, in order to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to achievement of those objectives." [20] Thus, after several years in which sex distinc-

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[17] On the Equal Rights Amendment, *see supra, pp.* 903–905, 911–912.

[18] 404 U.S. 71 (1971).

[19] Id., 75–77. *Cf. Eisenstadt* v. *Baird,* 405 U.S. 438, 447 n. 7 (1972). A statute similar to that in *Reed* was before the Court in *Kirchberg* v. *Feenstra,* 450 U.S. 455 (1981) (statute giving husband unilateral right to dispose of jointly owned community property without wife's consent).

[20] *Craig* v. *Boren,* 429 U.S. 190, 197 (1976); *Califano* v. *Goldfarb,* 430 U.S. 199, 210–211 (1977) (plurality opinion); *Califano* v. *Webster,* 430 U.S. 313, 316–317 (1977); *Orr* v. *Orr,* 440 U.S. 268, 279 (1979); *Caban* v. *Mohammed,* 441 U.S. 380, 388 (1979); *Massachusetts Personnel Admr.* v. *Feeney,* 442 U.S. 256, 273 (1979); *Califano* v. *Westcott,* 443 U.S. 76, 85 (1979); *Wengler* v. *Druggists Mutual Ins. Co.,* 446 U.S. 142, 150 (1980); *Kirchberg* v. *Feenstra,* 450 U.S. 455, 461 (1981); *Mississippi Univ. for Women* v. *Hogan,* 458 U.S. 718, 723–724 (1982). *But see Michael M.* v. *Superior Court,* 450 U.S. 464, 468–469 (1981) (plurality opinion); id., 483 (Justice Blackmun concurring); *Rostker* v. *Goldberg,* 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, *Orr* v. *Orr, supra,* 279; *Caban* v. *Mohammed, supra,* 394; *Mississippi Univ. for Women* v. *Hogan, supra,* 724. although Justice Rehnquist and Chief Justice Burger have strongly argued that when males

tions were more often voided than sustained without a clear statement of the standard of review,[21] a majority of the Court has arrived at the intermediate standard which many had thought it was applying in any event.[22] It appears that in sex classification cases, the Court will examine the statutory or administrative scheme to determine if the purpose or objective is permissible and if it is whether it is important and, then, having ascertained the actual motivation of the classification, it will engage in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.[23]

Some sex distinctions were seen to be based solely upon "old notions" about the respective roles of the sexes in society which were no longer valid if ever they were and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as 18 for females and 21 for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.[24]

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are disadvantaged only the rational basis test is appropriate. *Craig* v. *Boren*, *supra*, 217, 218-221; *Califano* v. *Goldfarb*, *supra*, 224. That adoption of a standard has not made easy the Court's problem of deciding such cases should be evident by perusal of the cases following.

[21] In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. Id., 684-687 (Justices Brennan, Douglas, White, and Marshall). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classifications, finding that inappropriate while the Equal Rights Amendment was pending. Id., 691 (Justices Powell and Blackmun and Chief Justice Burger). Justice Stewart found the statute void under traditional scrutiny and Justice Rehnquist dissented. Id., 691. In *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 n. 9 (1982), Justice O'Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.

[22] While their concurrences in *Craig* v. *Boren*, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Powell and Stevens have since joined or written opinions stating the test and applying it. E.g., *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); *Parham* v. *Hughes*, 441 U.S. 347, 359 (1979) (Justice Powell concurring); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 (1977) (Justice Stevens concurring); *Caban* v. *Mohammed*, *supra*, 401 (Justice Stevens dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test although their deference to legislative judgment approaches the traditional scrutiny test. *But see Califano* v. *Westcott*, *supra*, 93 (joining Court on substantive decision). *And cf. Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 734-735 (1982) (Justice Blackmun dissenting).

[23] The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when sex is involved.

[24] *Stanton* v. *Stanton*, 421 U.S. 7 (1975). *See also Stanton* v. *Stanton*, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for

Similarly, a state jury system that in effect excluded almost all women was deemed to be based upon an overbroad generalization about the role of women as a class in society and the administrative convenience served could not justify it.[25]

Assumptions with respect to the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny requires evidence of the existence of the fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case which first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of "non-intoxicating" 3.2 beer to males under 21 and to females under 18.[1] Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the State as of value, while cautioning that statistical analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause," the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction.[2]

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court acknowledged that assisting needy spouses was a legitimate and important governmental objective and would then have turned to ascertaining whether sex was a sufficiently accurate proxy for dependency, so it could be said that the classification was substantially related to achievement of the objective.[3] However, the Court observed that the State

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support of classifications under the intermediate scrutiny standard. E.g., *Orr* v. *Orr*, 440 U.S. 268, 279–280 (1979); *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981). Justice Stevens in particular has been concerned whether legislative classifications by sex simply reflect traditional ways of thinking or are the result of a reasoned attempt to reach some neutral goal, e.g., *Califano* v. *Goldfarb*, 430 U.S. 199, 222–223 (1978) (concurring), and he will sustain some otherwise impermissible distinctions if he finds the legislative reasoning to approximate the latter approach. *Caban* v. *Mohammed*, 441 U.S. 380, 401 (1979) (dissenting).

[25] *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in *Hoyt* v. *Florida*, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

[1] *Craig* v. *Boren*, 429 U.S. 190 (1976).

[2] Id., 198, 199–200, 201–204.

[3] *Orr* v. *Orr*, 440 U.S. 268 (1979).

already conducted individualized hearings with respect to the need of the wife, so that with little additional burden needy males could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[4]

Differentation between unwed mothers and unwed fathers received different treatments through the Court's perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and had maintained a close relationship with the child over the years, the Court could discern no substantial relationship to some important interest of the classification. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad as the facts of the case revealed. No barrier existed to the State dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.[5] On the other hand, the Court sustained a Georgia statute which permitted the mother of an illegitimate child to sue for the wrongful death of the child but which allowed the father to sue only if he had legitimated the child and there is no mother.[6] There was no opinion of the Court but

[4] Id., 280–283. An administrative convenience justification was not available, therefore. Id., 281 & n. 12. While such an argument has been accepted as a sufficient justification in at least some illegitimacy cases, *Matheus* v. *Lucas*, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In *Lucas*, *supra*, 509–510, the Court interpreted *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In *Wengler* v. *Druggists Mutual Ins., Co.* 446 U.S. 142, 152 (1980) the Court said that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny . . ., but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers." Justice Stevens would appear to demand a factual showing of substantial savings. *Califano* v. *Goldfarb*, 430 U.S. 199, 219 (1977) (concurring).

[5] *Caban* v. *Mohammed*, 441 U.S. 380 (1979). Four Justices dissented. Id., 394 (Justice Stewart), 401 (Justices Stevens and Rehnquist and Chief Justice Burger). For the conceptually different problem of classification between different groups of women on the basis of marriage or absence of marriage to a wage earner at a particular point, *see Califano* v. *Boles*, 443 U.S. 282 (1979).

[6] *Parham* v. *Hughes*, 441 U.S. 347 (1979). Justices White, Brennan, Marshall, and Blackmun, who had been in the majority in *Caban*, dissented. Id., 361.

both opinions making up the result emphasized that the objective of the State, the avoidance of difficulties in proving paternity, was an important one which was advanced by the classification.[7]

As in the instance of illegitimacy classifications, sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of men and women who are similarly situated not justified by the administrative convenience rationale.[8] In *Weinberger* v. *Wiesenfield*,[9] the Court struck down a Social Security provision that gave survivor's benefits based on the insured's earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Since the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill fitted the end and was invidiously discriminatory.

But when in *Califano* v. *Goldfarb* [10] the Court was confronted with a Social Security provision structured much as the benefit sec-

[7] The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could legitimate children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. The means thus needed only to be a rational way of dealing with the problem of proving paternity. Id., 353–358. Justice Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by legitimating the child. Id., 359.

[8] *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

[9] 420 U.S. 636 (1975).

[10] 430 U.S. 199 (1977). The dissent argued that whatever the classification utilized, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. Id., 224 (Justice Rehnquist with Chief Justice Burger and Justices Stewart and Blackmun). Only Justice Rehnquist continues to adhere to this view in this area, although the others may have yielded only to precedent. *See Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (voiding a state workers' compensation provision identical to that voided in *Goldfarb*).

tions struck down in *Frontiero* and *Wiesenfeld,* even in the light of an express heightened scrutiny, no majority of the Court could be obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency which ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy.[11] Justice Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification neither purpose was served by the sex classification actually used in this statute.[12]

Again, the Court divided closely when it *sustained* two instances of classifications claimed to constitute sex discrimination. In *Rostker* v. *Goldberg,*[13] rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of *Craig* v. *Boren.* However, it did so in the context of its often-stated preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congres-

[11] Id., 430 U.S. 204-209, 212-217 (Justices Brennan, White, Marshall, and Powell).

[12] Id., 217. Justice Stevens adhered to this view in *Wengler* v. *Druggists Mutual Ins. Co.,* 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in voiding in *Califano* v. *Westcott,* 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

[13] 453 U.S. 57 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, Blackmun, Powell, and Stevens, and Chief Justice Burger. Dissenting were Justices White, Marshall, and Brennan. Id., 83, 86.

sional determination, the Court found that it has not been "unthinking" or "reflexively" based upon traditional notions of the differences between men and women, but Congress had extensively deliberated over its decision. It had found, the Court asserted, that the purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only "sufficiently but closely" related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system.[14]

In *Michael M.* v. *Superior Court,*[15] the Court did expressly adopt the *Craig* v. *Boren* intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. *Michael M.* involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a nonspousal person under 18 years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that while the law was founded on a clear sex distinction it was justified because it did serve an important governmental interest, the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additionally-imposed legal deterrence of a criminal penalty. Thus, the law recognized that for purposes of this classification men and women were not similarly situated and the statute did not deny equal protection.[16]

Cases of "benign" discrimination, that is, statutory classifications that benefit women and disadvantage men in order to overcome the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational

[14] Id., 69–72, 78–83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. Id., 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, id., 81, was contrary to recent precedent. *Supra, p.* 1766 n. 4.

[15] 450 U.S. 464 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, and Powell, and Chief Justice Burger, constituting only a plurality. Justice Blackmun concurred in a somewhat more limited opinion. Id., 481. Dissenting were Justices Brennan, White, Marshall, and Stevens. Id., 488, 496.

[16] Id., 470–474, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether if it was the classification was substantially related to achievement of the goal. Id., 488, 496.

basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification. *Kahn* v. *Shevin* [17] upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the State had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The state provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." [18] And in *Schlesinger* v. *Ballard*,[19] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to 13 years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the proffered justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." [20] Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women," it serves an important governmental objective and will be

[17] 416 U.S. 351 (1974).

[18] Id., 355.

[19] 419 U.S. 498 (1975).

[20] *Weinberger* v. *Wisenfeld*, 420 U.S. 636, 648 (1975); *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n. 8 (1977); *Orr* v. *Orr*, 440 U.S. 268, 280–282 (1979); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150–152 (1980). In light of the stiffened standard, Justice Stevens has called for overruling *Kahn*, *Califano* v. *Goldfarb*, *supra*, 223–224, but Justice Blackmun would preserve that case. *Orr* v. *Orr*, *supra*, 284. *Cf. Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 302–303 (1978) (Justice Powell; less stringent standard of review for benign sex classifications).

sustained if it is substantially related to achievement of that objective.[21]

Many of these lines of cases converged in *Mississippi Univ. for Women* v. *Hogan*,[22] in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefiting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he were unable to attend this particular school he would have had to have commuted 147 miles to another nursing school which did accept men, which he would have had difficulty doing and retaining his job. The State defended on the basis that the female-only policy was justified as providing "educational affirmative action for females." Recitation of a benign purpose, the Court said, was not alone sufficient. "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[23] But women did not lack opportunities to obtain training in nursing, and in fact they dominated the field. Indeed, in the Court's view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a woman's job. "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."[24] Even if the classification was premised on the proffered basis, the Court concluded, it did not substantially and directly relate to the objective, because the school permitted men to audit the nursing classes and women could still be adversely affected by the presence of men.[25]

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[21] *Califano* v. *Webster*, 430 U.S. 313, 316–318, 320 (1977). There was no doubt that the provision sustained in *Webster* had been adopted expressly to relieve past societal discrimination. The four *Goldfarb* dissenters concurred specially, finding no difference between the two provisions. Id., 321.

[22] 458 U.S. 718 (1982). Joining the opinion of the Court were Justices O'Connor, Brennan, White, Marshall, and Stevens. Dissenting were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Id., 733, 735.

[23] Id., 728.

[24] Id., 730. In addition to obligating the State to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the State "to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination." Id., 730 n. 16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards.

[25] In the major dissent, Justice Powell argued that only a rational basis standard ought to be applied to sex classifications that would "*expand* women's choices,"

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleveland Board of Education* v. *LaFluer,*[1] a case decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels.[2] The absence of supportable reasons in one case and their presence in the other may well have made the significant difference.

***Illegitimacy.***—After wrestling with the question of the permissibility of governmental classifications disadvantaging illegitimates and the standard for determining which classifications are sustainable, the Court has arrived through decision in 18 cases since 1968 at a standard difficult to state and even more difficult to apply.[3]

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but that the exclusion here satisfied intermediate review because it promoted diversity of educational opportunity and was premised on the belief that single-sex colleges offer "distinctive benefits" to society. Id., 735, 740 (emphasis by Justice), 743. The Court noted that the State maintained no other single-sex public university or college, thus not presenting "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," id., 720 n. 1, although Justice Powell though the decision did preclude such institutions. Id., 742–744. See *Vorchheimer* v. *School Dist. of Philadelphia,* 532 F. 2d 880 (C.A 3, 1976) (finding no equal protection violation in maintenance of two single-sex high schools of equal educational offerings, one for males, one for females), *aff'd. by an equally divided Court,* 430 U.S. 703 (1977) (Justice Rehnquist not participating).

[1] 414 U.S. 632 (1974). Justice Powell concurred on equal protection grounds. Id., 651. *See also Turner* v. *Dept. of Employment Security,* 423 U.S. 44 (1975).

[2] *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy and while only women can become pregnant the fact alone was not determinative. "The program divides potential recipients into two groups—pregnant woman and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id., 496 n. 20. For a rejection of a similar attempted distinction, *see Nyquist* v. *Mauclet,* 432 U.S. 1, 9 (1977); *Trimble* v. *Gordon,* 430 U.S. 762, 774 (1977). *See also Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971). For the transmutation of *Geduldig* into statutory interpretation and Congress' response, *see supra, p.* 1763 n 16.

[3] The first cases set the stage for the lack of consistency. *Compare Levy* v. *Louisiana,* 391 U.S. 68 (1968), and *Glona* v. *American Guarantee & Liability Ins. Co.,* 391 U.S. 73 (1968), invalidating laws which precluded wrongful death actions in cases involving the child or the mother when the child was illegitimate, in which scrutiny

Although "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny'." The scrutiny to which it is entitled "is not a toothless one," and is an intermediate one, somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim.[4] The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly consistent,[5] but the theme that seems to be imposed on them by the more recent cases is that so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments that some illegitimates who would otherwise qualify in terms of the statute's legitimate purposes are disabled from participation, the imposition of greater burdens upon illegitimates or some classes of illegitimates than upon legitimates is permissible.[6]

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was strict, *with Labine* v. *Vincent*, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, *with Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), involving a workmen's compensation statute distinguishing between legitimates and illegitimates, in which scrutiny was intermediate.

[4] *Mathews* v. *Lucus*, 427 U.S. 495, 503-506 (1976); *Trimble* v. *Gordon*, 430 U.S. 762, 766-767 (1977); *Lalli* v. *Lalli*, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, *Labine* v. *Vincent*, 401 U.S. 532 (1971), to something approaching strictness, *Jiminez* v. *Weinberger*, 417 U.S. 628, 631-632 (1974). *Mathews* itself illustrates the uncertainty of statement, suggesting at one point that the *Labine* standard may be appropriate, *supra*, 506, at another that the standard appropriate to sex classifications is to be used, id., 510, while observing a few pages earlier that illegitimacy is entitled to less exacting scrutiny than either race *or sex*. Id., 506. *Trimble* settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. *See Parham* v. *Hughes*, 441 U.S. 347 (1979), and *Caban* v. *Mohammed*, 441 U.S. 380 (1979) (both cases involving classifications reflecting both sex and illegitimacy interests).

[5] The major inconsistency arises from three 5-to-4 decisions. *Labine* v. *Vincent*, 401 U.S. 532 (1971), largely overruled by *Trimble* v. *Gordon*, 430 U.S. 762 (1977), itself substantially limited by *Lalli* v. *Lalli*, 439 U.S. 259 (1978). In the latter two cases, eight Justices would have decided both the same way, but Justice Powell applying a narrower approach than each set of four Justices governed the different disposition of each of the cases. Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, *Lalli* v. *Lalli*, *supra*, 277 (Justices Brennan, White, Marshall, and Stevens dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, *Trimble* v. *Gordon*, *supra*, 776, 777 (Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell follows his own path of intermediate scrutiny and selective voiding-sustaining, *Lalli* v. *Lalli*, *supra*, (plurality opinion by Justice Powell).

[6] A classification that absolutely distinguishes between legitimates and illegitimates is not alone subject to such review; one that distinguishes among classes of illegitimates is also subject to it, *Trimble* v. *Gordon*, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. E.g., *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977) (alienage).

Intestate succession rights for illegitimates has divided the Court over the entire period. At first adverting to the broad power of the States over descent of real property, the Court scrutinized very relaxedly and sustained a law denying illegitimates the right to share equally with legitimates in the state of their common father who had acknowledged the illegitimates but who had died intestate, finding it well within the permissible scope of state powers.[7] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble* v. *Gordon*,[8] which held a denial of equal protection a statute allowing illegitimate children to inherit by intestate succession from their mothers but from their fathers only if the father had "acknowledged" the child and the child had been legitimated by the marriage of the parents. The child in *Trimble* had not been acknowledged by her father nor had he married her mother, but he had been found by a judicial support decree to be in fact her father. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable and that one not well suited to serve the purpose. First, it was impermissible to attempt to influence the conduct of adults not to engage in illicit sexual activities by visiting the consequences upon the offspring.[9] Second, the assertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they would have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.[10] Third, the argument that since decedent could have left a will, married the mother, or taken steps to legitimate her, and the statute would not have barred her, therefore the law presented no insurmountable barrier to illegitimates inheriting, was rejected as inapposite.[11] Fourth, the statute did address a substantial prob-

[7] *Labine* v. *Vincent*, 401 U.S. 532 (1971). *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 (1972), had confined the analysis of *Labine* to the area of state inheritance laws in expanding review of illegitimacy classifications.

[8] 430 U.S. 762, 766 n. 12, 769, 773–774, 776 n. 17 (1977). Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissented, finding the statute "constitutionally indistinguishable" from the one sustained in *Labine*. Id., 776. Justice Rehnquist also dissented separately. Id., 777.

[9] Id., 768–770. While this purpose had been alluded to in *Labine* v. *Vincent*, 401 U.S. 532, 538 (1971), it was rejected as a justification in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 173, 175 (1972). Visiting consequences upon the parent appears to be permissible. *Parham* v. *Hughes*, 441 U.S. 347, 352–353 (1979).

[10] *Trimble* v. *Gordon*, 430 U.S. 762, 774–776 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

[11] Id., 773–774. This justification had been prominent in *Labine* v. *Vincent*, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 170–171 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonable-

lem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws." [12] Because the state law did not follow a reasonable middle ground, it was invalidated.

A reasonable middle ground was discerned, at least by Justice Powell, in *Lalli* v. *Lalli*,[13] concerning a statute which permitted legitimate children to inherit automatically from both their parents and illegitimates to inherit automatically from their mothers but to inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate

ness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. *Lalli* v. *Lalli*, 439 U.S. 259, 266-274 (1978); *Parham* v. *Hughes*, 441 U.S. 347, 359 (1979) (Justice Powell concurring). *See also Nyquist* v. *Mauclet*, 432 U.S. 1 (1977) (alienage); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723 n. 8 (1982) (sex); *and compare* id., 736 (Justice Powell dissenting).

[12] *Trimble* v. *Gordon*, 430 U.S. 762, 770-773 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice Rehnquist's dissent is especially critical of this approach. Id., 777, 781-786.

[13] 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Powell in the result, although only two joined his opinion. Justices Blackmun and Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. Id., 276. The four dissenters, who had joined the *Trimble* majority with Justice Powell, thought the two cases were indistinguishable. Id., 277.

estates. To be sure, some illegitimates who were unquestionably established as children of the decreased would be disqualified because of failure of compliance but individual fairness is not the test, rather whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed is the test. Also, no doubt the State's interest could have been served by permitting other kinds of proof but that too is not the test of the statute's validity. Hence, the balancing necessitated by the Court's promulgation of standards in such cases caused it closely in both cases to come to different results on closely related fact patterns, making the process of predictability quite difficult but perhaps manageable.[14]

Aside from the area of descent of property, the Court has also faced difficulty arriving at predictable results. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right to illegitimate children denied the latter equal protection. "A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother." [15]

Similarly, a federal Social Security provision was held invalid which made eligible for benefits, because of an insured parent's disability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law

[14] Illustrating the difficulty are two cases in which the fathers of illegitimate children challenged statutes treating them differently than mothers of such children were treated. In *Parham* v. *Hughes*, 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than as an illegitimacy classification and sustained a bar to the father of an illegitimate child suing for his wrongful death if he had not legitimated him; in *Caban* v. *Mohammed*, 441 U.S. 380 (1980), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of an illegitimate child to block his adoption by refusing to consent. Both decisions were 5-to-4.

[15] *Gomez* v. *Perez*, 409 U.S. 535, 538 (1978) (emphasis supplied). Following the decision, Texas authorized illegitimate children to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined and imposed a limitations period within which suit must be brought of one year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age 18. In *Mills* v. *Habluetzel*, 456 U.S. 91 (1982), the Court held invalid the one-year limitation. While a State has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity.

and those children who were illegitimate only because of a nonobvious defect in their parents' marriage, regardless of whether they were born after the onset of the disability, but which made all other illegitimate children eligible only if they were born prior to the onset of disability and if they were dependent upon the parent prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on illigitimates was necessary to avoid fraud.[16]

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all legitimate children as well as those illegitimate children who were able to inherit under state intestacy laws, who were illegitimate only because of the technical invalidity of the parent's marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had been held entitled to the father's support by a court. Illegitimate children not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience which was a permissible device because those illegitimate children who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact and it was irrelevant that other children not dependent in fact also received benefits.[17]

[16] *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974). But compare *Califano* v. *Boles*, 443 U.S. 282 (1979). *See also New Jersey Welfare Rights Org.* v. *Cahill*, 411 U.S. 619 (1973) (limiting welfare assistance to households in which parents are ceremonially married and the children are legitimate or adopted denied illegitimate children equal protection); *Richardson* v. *Davis*, 409 U.S. 1069 (1972), *aff'g.* 342 F. Supp. 588 (D.C.D. Conn.) (3-judge court), and *Richardson* v. *Griffin*, 409 U.S. 1069 (1972), *aff'g.* 346 F. Supp. 1226 (D.C.D.Md.) (3-judge court) (Social Security provision entitling illegitimate children to monthly benefit payments only to extent that payments to widow and legitimate children do not exhaust benefits allowed by law denies illegitimates equal protection).

[17] *Mathews* v. *Lucas*, 427 U.S. 495 (1976). It can be seen that the only difference between *Jiminez* and *Lucas* is that in the former the Court viewed the benefits owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlay the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-to-4 decision read differently the purpose, *see Califano* v. *Boles*, 443 U.S. 282 (1979).

**Fundamental Interests: The Political Process**

"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . , absent of course the discrimination which the Constitution condemns." [1] The Constitution provides that the qualifications of electors in congressional elections are to be determined by reference to the qualifications prescribed in the States for the electors of the most numerous branch of the legislature and the States are authorized to determine the manner in which presidential electors are selected.[2] The second section of the Fourteenth Amendment provides for a proportionate reduction in a State's representation in the House when it denies the franchise to its qualified male citizens [3] and specific discriminations on the basis of race, sex, and age are addressed in other Amendments. "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualification of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot." [4]

The perspective of this 1959 opinion by Justice Douglas has now been revolutionized. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized." [5] "Any unjustified discrimina-

[1] *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 50-51 (1959).

[2] Article I, § 2, cl. 1 (House of Representatives); Seventeenth Amendment (Senators); Article II, § 1, cl. 2 (presidential electors). *See* Article I, § 4, cl. 1. *supra*, *pp.* 108-111.

[3] Fourteenth Amendment, § 2. Justice Harlan argued that the inclusion of this provision impliedly permitted the States to discriminate with only the prescribed penalty in consequence and that therefore the equal protection clause was wholly inapplicable to state election laws. *Reynolds* v. *Sims*, 377 U.S. 533, 389 (1964) (dissenting); *Carrington* v. *Rash*, 380 U.S. 89, 97 (1965) (dissenting); *Oregon* v. *Mitchell*, 400 U.S. 112, 152 (1970) (concurring and dissenting). Justice Brennan undertook a rebuttal of this position in *Oregon* v. *Mitchell*, *supra* 229, 250 (concurring and dissenting). *But see Richardson* v. *Ramirez*, 418 U.S. 24 (1974), where § 2 was relevant in precluding an equal protection challenge.

[4] *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 51 (1959).

[5] *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964).

tion in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.

"And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. . . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable." [6] Using this analytical approach, the Court has established a regime of close review of a vast range of state restrictions on the eligibility to vote, on access to the ballot by candidates and parties, and on the weighing of votes cast through the devices of apportionment and districting. Changes in Court membership over the years has led to some relaxation in the application of principles, but even as the Court has drawn back in other areas it has tended to preserve, both doctrinally and in fact, the election cases.[7]

***Voter Qualifications.***—A State may require residency as a qualification to vote but since durational residency requirements impermissibly restrict the right to vote and penalize the assertion of the constitutional right to travel they are invalid.[8] The Court indicated

[6] *Kramer* v. *Union Free School District*, 395 U.S. 621, 626–628 (1969). *See also Hill* v. *Stone*, 421 U.S. 289, 297 (1975). *But compare Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60 (1978).

[7] Thus, in *San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1, 34–35 nn. 74 & 78 (1973), a major doctrinal effort to curb the "fundamental interest" side of the "new" equal protection, the Court acknowledged that the right to vote did not come within its prescription that rights to be deemed fundamental must be explicitly or implicitly guaranteed in the Constitution. Nontheless, citizens have a "constitutionally protected right to participate in elections" which is protected by the equal protection clause. *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972). The franchise is the guardian of all other rights. *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

[8] *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Justice Blackmun concurred specially, id., 360, Chief Justice Burger dissented, id., 363, and Justices Powell and Rehnquist did not participate. The voided statute imposed a requirement of one year in the State and three months in the county. The Court did not indicate what duration less than ninety days would be permissible, although it should be noted that in the

that the States have a justified interest in preventing fraud and in facilitating determination of the eligibility of potential registrants and granted that durational residency requirements furthered these interests, but, it said, the State had not shown that the requirements were "necessary," that is that the interests could not be furthered by means which imposed a lesser burden on the right to vote. Other asserted interests—knowledgeability of voters, common interests, intelligent voting—were said either not to be served by the requirements or to be impermissible interests.

A 50-day durational residency requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the State's registration process. The period, the Court found, was necessary to achieve the State's legitimate goals.[9]

Inasmuch as Maryland had general criminal, taxing, and other jurisdiction over persons on certain federal enclaves within the State, it could not treat these persons as nonresidents for voting purposes.[10] A statute which provided that one who entered military service outside the State could not obtain voting residence in the State so long as he remained in the military was held to deny to such a person the opportunity such as all non-military persons enjoyed of showing that he had established residence.[11] Restricting the suffrage to those persons who had paid a poll tax was an invidious discrimination because it introduced a "capricious or irrelevant factor" of wealth or ability to pay into an area in which it had no place.[12] Extending this ruling, the Court held that the eligibility to

Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. § 1973aa-1. Congress prescribed a thirty day period for purposes of voting in presidential elections. Note also that it does not matter whether one travels interstate or intrastate. *Hadnott* v. *Amos*, 320 F. Supp. 107 (D.C.M.D. Ala. 1970), *aff'd*, 405 U.S. 1035 (1972).

[9] *Marston* v. *Lewis*, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county recorders before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations had to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable. However, the same period was upheld for another State on the authority of *Marston* in the absence of such justification, but it appeared that plaintiffs had not controverted the State's justifying evidence. *Burns* v. *Fortson*, 410 U.S. 686 (1973). Justices Brennan, Douglas, and Marshall dissented in both cases. Id., 682, 688.

[10] *Evans* v. *Cornman*, 398 U.S. 419 (1970).

[11] *Carrington* v. *Rash*, 380 U.S. 89 (1965).

[12] *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). Justices Black, Harlan, and Stewart dissented. Id., 670, 680. Poll tax qualifications had previously been upheld in *Breedlove* v. *Suttles*, 302 U.S. 277 (1937); *Butler* v. *Thompson*, 341 U.S. 937 (1951).

vote in local school elections may not be limited to persons owning property in the district or who have children in school,[13] and denied States the right to restrict the vote to property owners in elections on the issuance of revenue bonds [14] or general obligation bonds.[15]

However, the Court held that because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district's board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed valuation of land, comported with equal protection standards.[16] Adverting to the reservation in prior local governmental unit election cases [17] that some functions of such units might be so specialized as to permit deviation from the usual rules, the Court then proceeded to assess the franchise restrictions according to the traditional standards of equal protection rather than by those of strict scrutiny.[18] Also narrowly approached was the issue of the effect of the District's activities, the Court focusing upon the assessments against landowners as the sole means of paying expenses rather than additionally noting the impact upon lessees and non-landowning residents of such functions as flood control. The approach taken in this case seems different in great degree from that in prior cases and could in the future alter the results in other local government cases. These cases were extended somewhat in *Ball* v. *James*,[19] in

[13] *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969). The Court assumed without deciding that the franchise in some circumstances could be limited to those "primarily interested" or "primarily affected" by the outcome but found that the restriction permitted some persons with no interest to vote and disqualified others with an interest. Justices Stewart, Black, and Harlan dissented. Id., 594.

[14] *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969). Justices Black, Harlan, and Stewart concurred specially. Id., 707.

[15] *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970). Justice Stewart and Chief Justice Burger dissented. Id., 215. In *Hill* v. *Stone*, 421 U.S. 289 (1975), the Court struck down a limitation on the right to vote on a general obligation bond issue to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district. It was not a "special interest" election since a general obligation bond issue is a matter of general interest.

[16] *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973). *See also Associated Enterprises* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973) (limitation of franchise to property owners in the creation and maintenance of district upheld). Justices Douglas, Brennan, and Marshall dissented in both cases. Id., 735, 745.

[17] 410 U.S., 727–728.

[18] Id., 730, 732. Thus, the Court posited reasons that might have moved the legislature to adopt the exclusions.

[19] 451 U.S. 355 (1981). Joining the opinion of the Court were Justices Stewart, Powell, Rehnquist, Stevens, and Chief Justice Burger. Dissenting were Justices White, Brennan, Marshall, and Blackmun. Id., 374.

which the Court sustained a system in which voting eligibility was limited to landowners and votes were allocated to these voters on the basis of the number of acres they owned. The entity was a water reclamation district which stores and delivers water to 236,000 acres of land in the State and subsidizes its water operations by selling electricity to hundreds of thousands of consumers in a nearby metropolitan area. The entity's board of directors was elected through a system in which the eligibility to vote was as described above. The Court thought the entity was a specialized and limited form to which its general franchise rulings did not apply.

Finding that prevention of "raiding"—the practice whereby voters in sympathy with one party vote in another's primary election in order to distort that election's results—is a legitimate and valid state goal, as one element in the preservation of the integrity of the electoral process, the Court sustained a state law requiring those voters eligible at that time to register to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the party's next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs' voluntary failure to register that they did not meet the deadline.[20] But a law which prohibited a person from voting in the primary election of a political party if he has voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, inasmuch as it constituted a severe restriction upon a voter's right to associate with the party of his choice by requiring him to forgo participation in at least one primary election in order to change parties.[21]

It must not be forgotten, however, that it is when a State extends the franchise to some and denies it to others that a "right to vote" arises and is protected by the equal protection clause. If a State chooses to fill an office by means other than through an election, neither the equal protection clause nor any other constitutional provision prevents it from doing so. Thus, in *Rodriguez* v. *Popular Democratic Party*,[22] the Court unanimously sustained a Puerto

[20] *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id., 763.

[21] *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id., 61, 65.

[22] 457 U.S. 1 (1982). *See also Fortson* v. *Morris*, 385 U.S. 231 (1966) (legislature could select Governor from two candidates having highest number of voters cast when no candidate received majority); *Sailors* v. *Board of Elections*, 387 U.S. 105 (1967) (appointment rather than election of county school board); *Valenti* v. *Rockefeller*, 292 F. Supp. 851 (D.C.S.D.N.Y. 1968) (three-judge court), *aff'd.*, 393 U.S. 405 (1969) (gubernatorial appointment to fill United States Senate vacancy).

Rico statute which authorized the political party to which an incumbent legislator belonged to designate his successor in office until the next general election upon his death or resignation. Neither the fact that the seat was filled by appointment nor the fact that the appointment was by the party, rather than by the Governor or some other official, raised a constitutional question.

The right of unconvicted jail inmates and convicted misdemeanants under no disability to vote by absentee ballot remains unsettled. In an early case, applying a rational basis scrutiny, the Court held that the failure of a State to provide for absentee balloting by unconvicted jail inmates, when absentee ballots were available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way.[23] Subsequently, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences, but it is unclear whether the basis was the fact that persons confined in jails outside the county of their residences could register and vote absentee while those confined in the counties of their residences could not or whether the statute's jumbled distinctions among categories of qualified voters on no rational standard made it wholly arbitrary.[24]

***Access to the Ballot.***—The equal protection clause applies to state specification of qualifications for elective and appointive office. While one may "have no right" to be elected or appointed to an office, all persons "do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." [25] In *Bullock* v. *Carter*,[1] the Court utilized a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates which imposed the cost of the election on the candidates wholly and which made no alternative provision

[23] *McDonald* v. *Board of Election Comrs.*, 394 U.S. 802 (1969). *But see Goosby* v. *Osser*, 409 U.S. 512 (1973) (*McDonald* does not preclude challenge to prohibition).

[24] *O'Brien* v. *Skinner*, 414 U.S. 524 (1974). *See American Party of Texas* v. *White*, 415 U.S. 767, 794–795 (1974).

[25] *Turner* v. *Fouche*, 396 U.S. 346, 362–363 (1970) (voiding a property qualification for appointment to local school board). *See also Chappelle* v. *Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (voiding a qualification for appointment as airport commissioner of ownership of real or personal property that is assessed for taxes in the jurisdiction in which airport is located). *Compare Snowden* v. *Hughes*, 321 U.S. 1 (1944).

[1] 405 U.S. 134, 142–144 (1972).

for candidates unable to pay the fees; the reason for application of the standard, however, was that the fee system deprived some classes of voters of the opportunity to vote for certain candidates and it worked its classifications along lines of wealth or lack of it. The system itself was voided because it was not reasonably connected with the State's interest in regulating the ballot and did not serve that interest and because the cost of the election could be met out of the state treasury, thus avoiding the discrimination.[2]

Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuineness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party's or the candidate's "important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighted in the balance." "[T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." [3] In the absence of reasonable alternative means of ballot access, the Court held, a State may not require from an indigent candidate filing fees he cannot pay.[4]

In *Clements* v. *Fashing*,[5] the Court sustained two provisions of state law, one that barred certain officeholders from seeking elec-

[2] Id., 144–149.

[3] *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

[4] Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, id., 722, but the Court indicated this would be inadequate. Id., 719 n. 5.

[5] 457 U.S. 957 (1982). A plurality of four contended that save in two circumstances, ballot access classifications based on wealth and ballot access classifications imposing burdens on new or small political parties or independent candidates, limitations on candidate access to the ballot merit only traditional rational basis scrutiny, because candidacy is not a fundamental right; the plurality found both classifications met the standard. Id., 962–973 (Justices Rehnquist, Powell, O'Connor, and Chief Justice Burger). Justice Stevens concurred, rejecting the plurality's standard, but finding that inasmuch as the disparate treatment was based solely on the State's classification of the different offices involved, and not on the characteristics of the persons who occupy them or seek them, the action did not violate the equal protection clause. Id., 973. The dissent primarily focused on the First Amendment but asserted that the classifications failed even a rational basis test. Id., 976 (Justices Brennan, White, Marshall, and Blackmun).

tion to the legislature during the term of office for which they had been elected or appointed, without reaching other officeholders whose terms of office expired with the legislators' terms or barring legislators from seeking other offices during their terms, and the other automatically terminating service in office of certain officeholders who announced for election to other offices, without applying to other officeholders who could run for another office while continuing to serve. The Court was splintered in such a way, however, that it is not possible to derive a principle from the decision applicable to other than this particular fact situation.

In *Williams* v. *Rhodes*,[6] a complex statutory structure which had the effect of keeping off the ballot all but the candidates of the two major parties was struck down under the strict test because it deprived the voters of the opportunity of voting for independent and third-party candidates and because it seriously impeded the exercise of the right to associate for political purposes. Similarly, a requirement that an independent candidate for office in order to obtain a ballot position must obtain 25,000 signatures, including 200 signatures from each of at least 50 of the State's 102 counties, was held to discriminate against the political rights of the inhabitants of the most populous counties, when it was shown that 93.4% of the registered voters lived in the 49 most populous counties.[7] But to provide that the candidates of any political organization obtaining 20% or more of the vote in the last gubernatorial or presidential election may obtain a ballot position simply by winning the party's primary election while requiring candidates of other parties or independent candidates to obtain the signatures of less than five percent of those eligible to vote at the last election for the office sought is not to discriminate unlawfully, inasmuch as the State placed no barriers of any sort in the way of obtaining signatures and since write-in votes were also freely permitted.[8]

Reviewing under the strict test the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modi-

[6] 393 U.S. 23 (1968). "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." Id., 34. Justices Douglas and Harlan would have relied solely on the First Amendment. Id., 35, 41, while Justices Stewart and White and Chief Justice Warren dissented. Id., 48, 61, 63.

[7] *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), overruling *MacDougall* v. *Green*, 335 U.S. 281 (1948).

[8] *Jenness* v. *Fortson*, 403 U.S. 431 (1971).

cum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.[9] "[T]o comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." [10] Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'" [11]

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election must be nominated by primary elections and go on the ballot automatically, because the prior vote adequately demonstrates support. Candidates whose parties polled less than 200,000 but more than 2 percent may be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two must be nominated in conventions and may obtain ballot space only if the notarized list of participants at the conventions total at least one percent of the total votes case for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters sign petitions to bring the total up to one percent of the gubernatorial vote. "[W]hat is demanded may not be so exessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot," but the Court thought that one percent, or 22,000 signatures in 1972, "falls within the outer boundaries of support the State may require." [12]

[9] *Storer* v. *Brown*, 415 U.S. 724 (1974); *American Party of Texas* v. *White*, 415 U.S. 767 (1974); *Illinois State Bd. of Elec.* v. *Socialist Workers Party*, 440 U.S. 173 (1979). *And see Indiana Communist Party* v. *Whitcomb*, 414, U.S. 441 (1974) (impermissible to condition ballot access upon a political party's willingness to subscribe to oath that party "does not advocate the overthrow of local, state or national government by force or violence," opinion of Court based on First Amendment, four Justices concurring on equal protection grounds).

[10] *Storer* v. *Brown*, 415 U.S. 724, 746 (1974).

[11] Id., 730, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968).

[12] *American Party of Texas* v. *White*, 415 U.S. 767, 783 (1974). In *Storer* v. *Brown*, 415 U.S. 724, 738–740 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days to gather, in 1972, 325,000 signatures from a pool of qualified voters who had not voted in that year's partisan primary elections.

Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space.[13] A State may validly require that each voter participate only once in each year's nominating process and it may therefore disqualify any person who votes in a primary election from signing nominating or supporting petitions for independent parties or candidates.[14] Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its nomination, within one year prior to the primary election at which nominations for the general election are made.[15] But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.[16]

***Apportionment and Districting.***—Prior to 1962, attacks in federal courts on the drawing of boundaries for congressional and legislative election districts or the apportionment of seats to previously existing units ran afoul of the "political question" doctrine.[17] But *Baker* v. *Carr*[18] reinterpreted the doctrine in considerable degree and opened the federal courts to voter complaints founded on unequally populated voting districts. *Wesberry* v. *Sanders*[19] found in

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*See also Illinois State Bd. of Elec.* v. *Socialist Workers Party*, 440 U.S. 173 (1979) (voiding provision that required a larger number of signatures to get on ballot in subdivisions than statewide).

[13] *American Party of Texas* v. *White*, 415 U.S. 767, 788–791 (1974). The percentages varied with the office but no more than 500 signatures were needed in any event.

[14] Id., 785–787.

[15] *Storer* v. *Brown*, 414 U.S. 724, 728–737 (1974). Dissenting, Justices Brennan, Douglas and Marshall thought the state interest could be adequately served by a shorter time period than a year before the primary election, which meant in effect 17 months before the general election. Id., 755.

[16] *American Party of Texas* v. *White*, 415 U.S. 767, 794–795 (1974). Upheld, however, was state financing of the primary election expenses that excluded convention expenses of the small parties. Id., 791–794. But the major parties had to hold conventions simultaneously with the primary elections the cost of which they had to bear. For consideration of similar contentions in the context of federal financing of presidential elections, *see Buckley* v. *Valeo*, 424 U.S. 1, 93–97 (1976).

[17] *Supra*, *pp.* 701–713. Applicability of the doctrine to cases of this nature was left unresolved in *Smiley* v. *Holm*, 285 U.S. 355 (1932), and *Wood* v. *Broom*, 287 U.S. 1 (1932), was supported by only a plurality in *Colegrove* v. *Green*, 328 U.S. 549 (1946), but became the position of the Court in subsequent cases. *Cook* v. *Fortson*, 329 U.S. 675 (1946); *Colegrove* v. *Barrett*, 330 U.S. 804 (1947); *MacDougall* v. *Green*, 335 U.S. 281 (1948); *South* v. *Peters*, 339 U.S. 276 (1950); *Hartsfield* v. *Sloan*, 357 U.S. 916 (1958).

[18] 369 U.S. 186 (1962).

[19] 376 U.S. 1 (1964). *Supra*, *pp.* 102–105. Striking down a county unit system of electing a governor, the Court, in an opinion by Justice Douglas, had already coined a variant phrase of the more popular "one man, one vote." "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address,

Article I, § 2, of the Constitution a command that in the election of Members of the House of Representatives districts were to be made up of substantially equal numbers of persons. In six decisions handed down on June 15, 1964, the Court required the alteration of the election districts for practically all the legislative bodies in the United States.[20]

"We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State." [21] What was required was that each State "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." [22]

Among the principal issues raised by these decisions were those relating to the units which were covered by the principle, to what degree of exactness population equality was required to be achieved, and to what other elements of the apportionment and districting process the equal protection clause extended.

The first issue has largely been resolved, although some few problem areas persist. It has been held that a school board the members of which were appointed by boards elected in units of dis-

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to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963).

[20] *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964); *Davis* v. *Mann*, 377 U.S. 678 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964); *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964). In the last case, the Court held that approval of the apportionment plan in a vote of the people was insufficient to preserve it from constitutional attack. "An individual's constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause." Id., 736. Justice Harlan dissented wholly, denying that the equal protection clause had any application at all to apportionment and districting and contending that the decisions were actually the result of a "reformist" nonjudicial attitude on the part of the Court. 377 U.S., 589. Justices Stewart and Clark dissented in two and concurred in four cases on the basis of their view that the equal protection clause was satisfied by a plan that was rational and that did not systematically frustrate the majority will. 377 U.S., 741, 744.

[21] *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964).

[22] Id., 577.

parate populations and which exercised only administrative powers rather than legislative powers was not subject to the principle of the apportionment ruling.[23] *Avery* v. *Midland County*[24] held that when a State delegates lawmaking power to local government and provides for the election by district of the officials to whom the power is delegated, the districts must be established of substantially equal populations. But in *Hadley* v. *Junior College District*[25] the Court abandoned much of the limitation which was explicit in these two decisions and held that whenever a State chooses to vest "governmental functions" in a body and to elect the members of that body from districts, the districts must have substantially equal populations. The "governmental functions" should not be characterized as "legislative" or "administrative" or necessarily important or unimportant; it is the fact that members of the body are elected from districts which triggers the application.[1]

The second issue has been largely but not precisely resolved. In *Swann* v. *Adams*,[2] the Court set aside a lower court ruling "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts. . . . *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy." Two congressional district cases were disposed of on the basis of *Swann*,[3] but when the Court ruled that no congression-

[23] *Sailors* v. *Board of Education*, 387 U.S. 105 (1967).

[24] 390 U.S. 474 (1968). Justice Harlan continued his dissent from the *Reynolds* line of cases, id., 486, while Justices Fortas and Stewart called for a more discerning application and would not have applied the principle to the county council here. Id., 495, 509.

[25] 397 U.S. 50 (1970). The governmental body here was the board of trustees of a junior college district. Justices Harlan and Stewart and Chief Justice Burger dissented. Id., 59, 70.

[1] The Court observed that there might be instances "in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds supra*, might not be required. . . ." Id., 56. For cases involving such units, *see Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973); *Associated Enterprises* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973); *Ball* v. *James*, 451 U.S. 355 (1981). Judicial districts need not comply with *Reynolds*. *Wells* v. *Edwards*, 347 F. Supp. 453 (D.C.M.D. La. 1972) (three-judge court), *aff'd. per curiam*, 409 U.S. 1095 (1973).

[2] 385 U.S. 440, 443-444 (1967). *See also Kilgarlin* v. *Hill*, 386 U.S. 120 (1967).

[3] *Kirkpatrick* v. *Preisler*, 385 U.S. 450 (1967); *Duddleston* v. *Grills*, 385 U.S. 455 (1967).

al districting could be approved without a "good-faith effort to achieve precise mathematical equality" or the justification of "each variance, no matter how small," [4] it did not then purport to utilize this standard in judging legislative apportionment and districting.[5] And in *Abate* v. *Mundt* [6] the Court approved a plan for apportioning a county governing body which permitted a substantial population disparity, explaining that in the absence of a built-in bias tending to favor any particular area or interest, a plan could take account of localized factors in justifying deviations from equality which might in other circumstances cause the invalidation of a plan.[7]

Significant changes of policy then occurred in the Court's treatment of the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality, the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter.[8] But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4% deviation from equality of population was justified by the State's policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions *qua* subdivisions, because the legisla-

[4] *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530–531 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969). *Supra*, *pp.* 96–99.

[5] The Court relied on *Swann* in disapproving of only slightly smaller deviations in *Whitcomb* v. *Chavis*, 403 U.S. 124, 161–163 (1971). In *Connor* v. *Williams*, 404 U.S. 549, 550 (1972), the Court said of plaintiffs' reliance on *Preisler* and *Wells* that "these decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment."

[6] 403 U.S. 182 (1971).

[7] It should also be noted that while the Court has used total population figures for purposes of computing variations between districts, it did approve in *Burns* v. *Richardson*, 384 U.S. 73 (1966), the use of eligible voter population as the basis for apportioning in the context of a State with a large transient military population, but with the caution that such a basis would be permissible only so long as the results did not diverge substantially from that obtained by using a total population base. Merely discounting for military populations was disapproved in *Davis* v. *Mann*, 377 U.S. 678, 691 (1964), but whether some more precise way of distinguishing between resident and nonresident population would be constitutionally permissible is unclear. *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 534 (1969); *Hadley* v. *Junior College District*, 397 U.S. 50, 57 n. 9 (1970).

[8] *Mahan* v. *Howell*, 410 U.S. 315, 320–325 (1973).

ture was responsible for much local legislation.[9] Second, just as the first case "demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justified and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." [10] This recognition of a *de minimis* deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population change over the ten-year life of an apportionment, and by the relief it afforded federal courts able thus to avoid over-involvement in essentially a political process. The "goal of fair and effective representation" is furthered by eliminating gross population variations among districts, but it is not achieved by mathematical equality solely. Other relevant factors are to be taken into account.[11] But when a judicially-imposed plan is to be formulated upon state default, it "must ordinarily achieve the goal of population equality with little more than *de minimis* variation" and deviations from approximate population equality must be supported by enunciation of historically significant state policy or unique features.[12]

Gerrymandering and the permissible use of multimember districts present examples of the third major issue. It is clear that raciallybased gerrymandering is unconstitutional under the Fifteenth Amendment, at least when it is accomplished through the manipu-

[9] Id., 325-330. The Court indicated that a 16.4% deviation "may well approach tolerable limits." Id., 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the State, an issue not addressed by the Court. In *Chapman* v. *Meier*, 420 U.S. 1, 21-26 (1975), in considering a 20% variation in a court-developed plan, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. *See also Summers* v. *Cenarrusa*, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation).

[10] *Gaffney* v. *Cummings*, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83%. The Court did not precisely indicate at what point a deviation had to be justified, but it applied the *de minimis* standard in *White* v. *Regester*, 412 U.S. 755 (1973), in which the maximum deviation was 9.9%. "Very likely, larger differences between districts would not be tolerable without justifications." Id., 764. Justices Brennan, Douglas, and Marshall dissented.

[11] *Gaffney* v. *Cummings*, 412 U.S. 735, 748 (1973).

[12] *Chapman* v. *Meier*, 420 U.S. 1, 21-27 (1975). The Court did say that court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. Id., 27 n. 19. Apparently, therefore, the Court's reference to both "*de minimis*" variations and "approximate population equality" must be read as referring to some range approximating the *Gaffney* principle. *See also Connor* v. *Finch*, 431 U.S. 407 (1977).

lation of district lines.[13] The lower courts have pronounced partisan gerrymandering as beyond the cognizance of the courts for a number of reasons, the most compelling of which no doubt is the near impossibility of formulating any workable standards for knowing it and dealing with it.[14] It had been thought that the use of multimember districts to submerge racial, ethnic, and political minorities might be treated differently,[15] but in *Whitcomb* v. *Chavis*,[16] the Court, while dealing with the issue on the merits, so enveloped it in strict standards of proof and definitional analysis as to raise the possibility that it might be beyond judicial review.

There the Court held that inasmuch as the multimember districting represented a state policy of more than 100 years observance and could not therefore be said to be motivated by racial or political bias, only an actual showing that the multimember delegation in fact inadequately represented the allegedly submerged minority would suffice to raise a constitutional question. But the Court also rejected as impermissible the argument that any interest group had any sort of right to be represented in a legislative body, in proportion to its members' numbers or on some other basis, so that the failure of that group to elect anyone merely meant that alone or in combination with other groups it simply lacked the strength to obtain enough votes, whether the election be in single-member or in multimember districts. That fact of life was not of constitutional dimension, whether the group was composed of Negroes, or Republicans or Democrats, or some other category of persons. Thus, the submerging argument was rejected, as was the argument of a voter in another county that the Court should require uniform single-member districting in populous counties because voters in counties which elected large delegations in blocs had in effect greater voting power than voters in other districts;

[13] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Wright* v. *Rockefeller*, 376 U.S. 52 (1964); *Sims* v. *Baggett*, 247 F. Supp. 96 (D.C.M.D. Ala 1965) (three-judge court).

[14] E.g., WMCA, Inc. v. *Lomenzo*, 238 F. Supp. 916 (D.C.S.D.N.Y. 1965) (three-judge court), *aff'd*, 382 U.S. 4 (1965); *Sincock* v. *Gately*, 262 F. Supp. 739 (D.C.D. Del. 1967) (three-judge court). Upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, the Court recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune to judicial scrutiny, "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Gaffney* v. *Cummings*, 412 U.S. 735, 751, 754 (1973).

[15] *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88–89 (1965); *Kilgarlin* v. *Hill*, 386 U.S. 120, 125 n. 3 (1967).

[16] 403 U.S. 124 (1971). Justice Harlan concurred specially, id., 165, and Justices Douglas, Brennan, and Marshall, finding racial discrimination in the operation of the system, dissented. Id., 171.

this argument the Court found too theoretical and too far removed from the actualities of political life.

Subsequently, and surprisingly in light of *Chavis*, the Court in *White* v. *Regester* [17] affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied Negroes and Mexican-Americans the opportunity to participate in the election process in a reliable and meaningful manner.

Doubt was cast on the continuing vitality of *White* v. *Regester*, however, by the badly split opinion of the Court in *City of Mobile* v. *Bolden*.[18] A plurality undermined the earlier case in two respects, although it is not at all clear that a majority of the Court had been or could be assembled on either point. First, the plurality argued that an intent to discriminate on the part of the redistricting body must be shown before multimember districting can be held to violate the equal protection clause.[19] Second, the plurality read *White* v. *Regester* as being consistent with this principle and the various factors developed in that case to demonstrate the existence of unconstitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of circumstances test utilized in *Regester* and evaluated instead whether each factor alone was sufficient proof of intent.[20]

Again switching course, the Court in *Rogers* v. *Lodge* [21] approved the findings of the lower courts that a multi-member elec-

[17] 412 U.S. 755, 765–770 (1973). "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id., 765–766.

[18] 446 U.S. 55 (1980). On Congress' response to the case, *see supra*, p. 1711; *infra*, pp. 1819–1820.

[19] Id., 65–68 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger). On intent versus impact analysis, *see supra*, pp. 1707–1713. Justices Blackmun and Stevens concurred on other grounds, id., 80, 83, and Justices White, Brennan, and Marshall dissented. Id., 94, 103. Justice White agreed that purposeful discrimination must be found, id., 101, while finding it to have been shown. Justice Blackmun assumed that intent was required, and Justices Stevens, Brennan, and Marshall would not so hold.

[20] Id., 68–74. Four Justices rejected this view of the plurality, while Justice Stevens also appeared to do so but followed a mode of analysis significantly different than that of any other Justice.

[21] 458 U.S. 613 (1982). Joining the opinion of the Court were Justices White, Brennan, Marshall, Blackmun, O'Connor, and Chief Justice Burger. Dissenting were Justices Powell and Rehnquist, id., 628, and Justice Stevens, Id., 631.

toral system for electing a county board of commissioners, although it had not been instituted for a racially discriminatory purpose, was being maintained with such an impermissible purpose. Applying a totality of the circumstances test, and deferring to lower court factfinding, the Court, in an opinion by one of the *Mobile* dissenters, canvassed a range of factors which it held could combine to show a discriminatory motive and largely overturned the limitations which the *Mobile* plurality had attempted to impose in this area. With the enactment of congressional legislation specifically addressed to the issue of multimember districting and dilution of the votes of racial minorities, however, it may be that the Court will have little further opportunity to develop the matter in the context of constitutional litigation.[22]

Finally, it should be said that the Court has approved the discretionary exercise of their equity powers by the lower federal courts in drawing district boundaries and granting other relief in districting and apportionment cases,[23] although that power is bounded by the constitutional violations found, so that courts do not have *carte blanche*, and they should ordinarily respect the structural decisions made by state legislatures and the state constitutions.[24]

***Weighing of Votes.***—It is not the weighing of votes but the manner in which it is done which brings the equal protection clause into play. *Gray* v. *Sanders*[25] struck down the Georgia county unit system under which each county was allocated either two, four, or six votes and the candidate carrying the county received those votes.

Since there were a few very populous counties and scores of poorly-populated ones, the rural counties in effect dominated statewide elections and candidates with popular majorities statewide could be and were defeated. But *Gordon* v. *Lance*[26] approved a

[22] On the legislation, *see supra, p.* 1711; *infra, pp.* 1819–1823.

[23] E.g., *Reynolds* v. *Sims*, 377 U.S. 533, 586–587 (1964); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 195–200 (1972); *White* v. *Weiser*, 412 U.S. 783, 794–795 (1973); *Upham* v. *Seamon*, 456 U.S. 37, 41–42 (1982). When courts draw their own plans, the court is held to tighter standards than is a legislature and has to observe smaller population deviations and utilize single-member districts more than multimember ones. *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971); *Chapman* v. *Meier*, 420 U.S. 1, 14–21 (1975); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978). *Cf. Mahan* v. *Howell*, 410 U.S. 315, 333 (1973).

[24] E.g., *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (reduction of numbers of members); *Whitcomb* v. *Chavis*, 403 U.S. 124, 160–161 (1971) (disregard of policy of multimember districts not found unconstitutional); *White* v. *Weiser*, 412 U.S. 783, 794–795 (1973); *Upham* v. *Seamon*, 406 U.S. 37 (1982).

[25] 372 U.S. 368 (1963).

[26] 403 U.S. 1 (1971).

provision requiring a 60 percent affirmative vote in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded. The Court acknowledged that the provision departed from strict majority rule but stated that the Constitution did not prescribe majority rule; it instead proscribed discrimination through dilution of voting power or denial of the franchise because of some class characteristic—race, urban residency, or the like—while the provision in issue was neither directed to nor affected any identifiable class.

**The Right to Travel**

*Durational Residency Requirements.*—A durational residency requirement creates two classes of persons: those who have been within the State for the prescribed period and those who have not been.[1] But persons who have moved recently, at least from State to State,[2] have exercised a right protected by the Constitution of the United States, and the durational residency classification either deters the exercise of the right or it penalizes those who have exercised the right.[3] Any such classification is invalid, "unless shown to be necessary to promote a *compelling* governmental interest . . ."[4] The constitutional right to travel predates the recent cases[5] but it

[1] *Dunn* v. *Blumstein*, 405 U.S. 330, 334 (1972). Inasmuch as the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the privileges and immunities clause, Article IV, § 2, cl. 1. *See supra*, *pp.* 870–881.

[2] Intrastate travel is protected to some degree to the extent that the classification fails to meet equal protection standards in some respect. *Compare Hadnott* v. *Amos*, 320 F. Supp. 107 (M.D.Ala. 1970) (three-judge court), *aff'd. per curiam*, 405 U.S. 1035 (1972), *with Arlington County Bd.* v. *Richards*, 434 U.S. 5 (1977). The same principle applies in the commerce clause cases, in which discrimination may run against in-state as well as out-of-state concerns. *Cf. Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

[3] *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631, 638 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330, 338–342 (1972); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Jones* v. *Helms*, 452 U.S. 412, 420–421 (1981). *See also Oregon* v. *Mitchell*, 400 U.S. 112, 236–239 (1970) (Justices Brennan, White, and Marshall), and id., 285–292 (Justices Stewart and Blackmun and Chief Justice Burger).

[4] *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (emphasis by Court); *Graham* v. *Richardson*, 403 U.S. 365, 375–376 (1971).

[5] *Crandall* v. *Nevada*, 6 Wall. (73 U.S.) (1868); *Edwards* v. *California*, 314 U.S. 160 (1941) (both cases in context of direct restrictions on travel). The source of the right to travel and why it is to the equal protection clause one looks for its protection are questions puzzled over and unresolved by the Court. *United States* v. *Guest*, 383 U.S. 745, 758, 759 (1966), and id., 763–764 (Justice Harlan concurring and dissenting), 777 n. 3 (Justice Brennan concurring and dissenting); *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631 (1969), and id., 671 (Justice Harlan dissenting); *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 31–32 (1973); *Jones* v. *Helms*, 452 U.S. 412, 417–419 (1981); *Zobel* v. *Williams*, 457 U.S. 55, 60 & n. 6 (1982), and id., 66–68 (Justice Brennan concurring), 78–81 (Justice O'Connor concurring).

is in these cases that the strict standard of equal protection review has been applied to nullify those durational residency provisions which have been brought before the Court.

Thus, in *Shapiro* v. *Thompson*,[6] durational residency requirements conditioning eligibility for welfare assistance on one year's residence in the State [7] were voided. If the purpose of the requirements was to inhibit migration by needy persons into the State or to bar the entry of those who came from low-paying States to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible.[8] If on the other hand the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity for fraud, and encouragement of early entry of new residents into the labor force—the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification which infringed on a fundamental interest.[9] Similarly, in *Dunn* v. *Blumstein*,[10] where the durational residency requirements denied the franchise to newcomers, the assertion of such administrative justifications was constitutionally insufficient to justify the classification.

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna* v. *Iowa*.[11] While it is not clear what the precise basis of the ruling is,

[6] 394 U.S. 618 (1969).

[7] The durational residency provision established by Congress for the District of Columbia was also voided. Id., 641–642.

[8] Id., 627–633. *Gaddis* v. *Wyman*, 304 F. Supp. 717 (D.C.N.D.N.Y. 1969), *aff'd sub nom. Wyman* v. *Bowens*, 397 U.S. 49 (1970), struck down a provision construed so as to bar only persons who came into the State solely to obtain welfare assistance.

[9] Id., 394 U.S., 633–638. *Shapiro* was reaffirmed in *Graham* v. *Richardson*, 403 U.S. 365 (1971) (striking down durational residency requirements for aliens applying for welfare assistance), and in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974) (voiding one year's residency in county requirement as condition to indigent's receiving nonemergency hospitalization or medical care at county's expense). When Connecticut and New York reinstituted the requirements, pleading a financial emergency as the compelling state interest, they were summarily rebuffed. *Rivera* v. *Dunn*, 329 F. Supp. 554 (D.C.D.Conn. 1971), *aff'd. per curiam*, 404 U.S. 1054 (1972); *Lopez* v. *Wyman*, Civ. No. 1971–308 (D.C.W.D.N.Y. 1971), *aff'd. per curiam*, 404 U.S. 1055 (1972). The source of the funds, state or federal, is irrelevant to application of the principle. *Pease* v. *Hansen*, 404 U.S. 70 (1971).

[10] 405 U.S. 330 (1972). *But see Marston* v. *Lewis*, 410 U.S. 679 (1973), and *Burns* v. *Fortson*, 410 U.S. 686 (1973). Durational residency requirements of five and seven years respectively for candidates for elective office were sustained in *Kanapaux* v. *Ellisor*, 419 U.S. 891 (1974), and *Sununu* v. *Stark*, 420 U.S. 958 (1975).

[11] 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the merits. Id., 418.

it appears that the Court found the State's interest in requiring that those who seek a divorce from its courts be genuinely attached to the State and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.[12] Similarly, durational residency requirements for lower in-state tuition at public colleges has been held constitutionally justifiable, again, however, with a good deal of uncertainty with regard to the reason.[13]

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska's statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the State. The differences between the durational residency cases previously decided did not alter the bearing of the right to travel principle upon the distribution scheme, but the Court's decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test.[14]

Unresolved still are issues such as durational residency requirements for occupational licenses and other purposes.[15] Too, it should be noted that this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,[16] and the cases do not inhibit the States when, having reasons for doing so, they bar travel by certain persons.[17]

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[12] Id., 409. But the Court also indicated that plaintiff was not absolutely barred from the state courts, merely required to wait for access, which was true in the prior cases as well and there held immaterial, and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

[13] *Starns* v. *Malkerson*, 326 F. Supp. 234 (D.C.D.Minn. 1970), *aff'd. per curiam*, 401 U.S. 985 (1971). *Cf. Vlandis* v. *Kline*, 412 U.S. 441, 452 & n. 9 (1973), and id., 456, 464, 467 (dicta). In *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 256 (1974), the Court, noting the results, stated that "some waiting periods . . . may not be penalties" and thus would be valid.

[14] *Zobel* v. *Williams*, 457 U.S. 55 (1982).

[15] *La Tourette* v. *McMaster*, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.

[16] E.g., *McCarthy* v. *Philadelphia Civil Service Comm.*, 424 U.S. 645 (1976) (ordinance requiring city employees to be and to remain city residents upheld). *See Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 255 (1974).

[17] *Jones* v. *Helms*, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the State).

**Marriage and Familial Relations**

In *Zablocki* v. *Redhail*,[1] importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a "fundamental interest," that necessitates "critical examination" of governmental restrictions which "interfere directly and substantially" with the right.[2] Struck down was a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. Plaintiff was an indigent wishing to marry but prevented from doing so because he was not paying support under a court order to an illegitimate child he had fathered and because the child was receiving public assistance. Applying "critical examination," the Court observed that the statutory prohibition could not be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.[3] Two interests were offered that the Court was willing to accept as legitimate and substantial: requiring permission under the circumstances furnished an opportunity to counsel applicants on the necessity of fulfilling support obligations and the process protected the welfare of children who needed support, either by providing an incentive to make support payments or by preventing applicants from incurring new obligations through marriage. The first interest was found not served, there being no provision for counseling and no authorization of permission to marry once counseling had taken place. The second interest was found not to be effectuated by the means. Alternative devices to collect support existed, the process simply prevented marriage without delivering any money to the children, and it singled out obligations incurred through marriage without reaching any other obligations.

Other restrictions that relate to the incidents of or prerequisites for marriage were carefully preserved by the Court as neither

[1] 434 U.S. 374 (1978).

[2] Although the Court's due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. Id., 396, 397 (Justice Powell concurring).

[3] Id., 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. Id., 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. Id., 400, 406 n. 10.

entitled to rigorous scrutiny nor put in jeopardy by the decision.[4] For example, in *Califano* v. *Jobst*,[5] a unanimous Court sustained a Social Security provision that revoked disabled dependents' benefits of any person who married, except when the person married someone who was also entitled to receive disabled dependents' benefits. Plaintiff, a recipient of such benefits, married someone who was also disabled but not qualified for the benefits, and his benefits were terminated. He sued alleging that distinguishing between classes of persons who married eligible persons and who married ineligible persons infringed upon his right to marry. The Court rejected the argument, finding that benefit entitlement was not based upon need but rather upon the dependency of one upon the wage earner insured; marriage, Congress could have assumed, generally terminates the dependency of one upon his parent-wage earner. Therefore, it was permissible as an administrative convenience to make marriage the terminating point but to make an exception when both marriage partners were receiving benefits as a means of lessening hardship and recognizing that dependency was likely to continue. The marriage rule was therefore not to be strictly scrutinized or invalidated "simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby." [6]

It seems obvious, therefore, that the determination of marriage and familial relationships as fundamental will be a fruitful beginning of litigation in the equal protection area.[7]

[4] Id., 386–387. Chief Justice Burger thought the interference here was "intentional and substantial," whereas the provision in *Jobst* was neither. Id., 391 (concurring).

[5] 434 U.S. 47 (1977).

[6] Id., 54. *See also Mathews* v. *De Castro*, 429 U.S. 181 (1976) (provision giving benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying them to a divorced woman under 62 with dependents represents a rational judgment by Congress with respect to likely dependency of married but not divorced women and does not deny equal protection); *Califano* v. *Boles*, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of illegitimate child who was never married to wage earner of equal protection).

[7] *See*, e.g., *Quillion* v. *Walcott*, 434 U.S. 246 (1978) (State's giving to father of legitimate child who is divorced or separated from mother while denying to father of illegitimate child a veto over the adoption of the child by another does not under the circumstances deny equal protection. The circumstances were that the father never exercised custody over the child or shouldered responsibility for his supervision, education, protection, or care, although he had made some support payments and given him presents).

**Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection**

***Generally.***—Whatever may be the status of wealth distinctions *per se* as a suspect classification,[1] there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has done. The cases begin with *Griffin* v. *Illinois,*[2] surely one of the most seminal cases in modern constitutional law. There, the State conditioned full direct appellate review, review as to which all convicted defendants were entitled, on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. "In criminal trials," Justice Black wrote in the plurality opinion, "a State can no more discriminate on account of poverty than on account of religion, race, or color." While the State was not obligated to provide an appeal at all, when it does so it may not structure its system "in a way that discriminates against some convicted defendants on account of their poverty." The system's fault was than it treated defendants with money differently than it treated defendants without money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." [3]

[1] *San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973).

[2] 351 U.S. 12 (1956). The opinion of the court was joined by Justices Black, Douglas, and Clark, and Chief Justice Warren. Justice Frankfurter concurred. Id., 20. Justices Burton, Minton, Reed, and Harlan dissented. Id., 26, 29.

[3] Id., 17, 18, 19. Although Justice Black is not explicit, it seems clear that the system was found to violate both the due process and the equal protection clauses. Justice Frankfurter's concurrence dealt more expressly with the premise of the Black opinion. "It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." Id., 23.

The principle of *Griffin* was extended in *Douglas* v. *California* [4] in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." [5]

From the beginning, Justice Harlan opposed reliance on the equal protection clause at all, arguing that a due process analysis was the proper criterion to follow. "It is said that a State cannot discriminate between the 'rich' and the 'poor' in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." A fee system neutral on its face was not a classification forbidden by the equal protection clause. "[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional." [6] As he protested in *Douglas:* "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely." [7]

Due process furnished the standard, he felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might

[4] 372 U.S. 353 (1963). Justice Clark dissented, protesting the Court's "new fetish for indigency," id., 358, 359, and Justices Harlan and Stewart dissented. Id., 360.

[5] Id., 357–358.

[6] *Griffin* v. *Illinois*, 351 U.S. 12, 34, 35 (1956).

[7] *Douglas* v. *California*, 372 U.S. 353, 361 (1963).

have been crossed and unfairness resulted, but on the whole he did not see that a system which merely recognized differences between and among economic classes, which as in *Douglas* made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system which denied due process.[8]

***Criminal Procedure.***—"[I]t is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." [9] "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . ." [10] No State may condition the right to appeal [11] or the right to file a petition for *habeas corpus* [12] or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the States are not required to furnish full and complete transcripts of their trials to indigents when exerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.[13] This right may not be denied by drawing a felony-misdemeanor distinction or by limiting it to those cases in which confinement is the penalty.[14] Defendant's right to counsel is to be protected as well as the similar right of the defendant with funds.[15]

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[8] Id., 363–367.

[9] *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966).

[10] *Draper* v. *Washington*, 372 U.S. 487, 496 (1963).

[11] *Burns* v. *Ohio*, 360 U.S. 252 (1959). *Douglas* v. *Green*, 363 U.S. 192 (1960).

[12] *Smith* v. *Bennett*, 365 U.S. 708 (1961).

[13] *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958) (unconstitutional to condition free transcript upon trial judge's certification that "justice will thereby be promoted"); *Draper* v. *Washington*, 372 U.S. 487 (1963) (unconstitutional to condition free transcript upon judge's certification that the allegations of error were not "frivolous"); *Lane* v. *Brown*, 372 U.S. 477 (1963) (unconstitutional to deny free transcript upon determination of public defender that appeal was in vain); *Long* v. *District Court*, 385 U.S. 192 (1966) (indigent prisoner entitled to free transcript of his *habeas corpus* proceeding for use on appeal of adverse decision therein); *Gardner* v. *California*, 393 U.S. 367 (1969) (on filing of new *habeas corpus* petition in appellate court upon an adverse nonappealable *habeas* ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). *See also Rinaldi* v. *Yeager*, 384 U.S. 305 (1966). For instances in which a transcript was held not to be needed, *see Britt* v. *North Carolina*, 404 U.S. 266 (1971); *United States* v. *MacCollom*, 426 U.S. 317 (1976).

[14] *Williams* v. *Oklahoma City*, 395 U.S. 458 (1969); *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971).

[15] *Douglas* v. *California*, 372 U.S. 353 (1963); *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967); *Entsminger* v. *Iowa*, 386 U.S. 748 (1967).

But, deciding a point left unresolved in *Douglas*, the Court held that neither the due process nor the equal protection clause required a State to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the State's higher courts or in the United States Supreme Court. Due process fairness does not require that after an appeal has been provided the State must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[16]

This right to legal assistance especially in the context of the constitutional right to the writ of *habeas corpus* means that in the absence of other adequate assistance, as through a functioning public defender system, a State may not deny other prisoners legal assistance of another inmate [17] and it must make available certain minimal legal materials.[18]

***The Criminal Sentence.***—A convicted defendant may not be imprisoned solely because of his indigency. *Williams* v. *Illinois* [19] held that it was a denial of equal protection for a State to extend the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine which was also levied upon conviction. And *Tate* v. *Short* [20] held that in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not send persons who cannot pay the fine to jail, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to

[16] *Ross* v. *Moffitt*, 417 U.S. 600 (1974). *See also Fuller* v. *Oregon*, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse State for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

[17] *Johnson* v. *Avery*, 393 U.S. 483 (1969).

[18] *Younger* v. *Gilmore*, 404 U.S. 15 (1971); *Bounds* v. *Smith*, 430 U.S. 817 (1977).

[19] 399 U.S. 235 (1970).

[20] 401 U.S. 395 (1971). The Court has not yet treated a case in which the permissible sentence is "$30 or 30 days" or some similar form where either confinement or a fine will satisfy the State's penal policy.

pay. Willful refusal to pay may, however, be punished by confinement.

*Voting.*—Treatment of indigency in a civil type of "fundamental interest" analysis came in *Harper* v. *Virginia Board of Elections*,[21] in which it was held that "a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." The Court emphasized both the fundamental interest in the right to vote and the suspect character of wealth classifications. "[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." [22]

The two factors—classification in effect along wealth lines and adverse effect upon the exercise of the franchise—were tied together in *Bullock* v. *Carter* [23] in which the setting of high filing fees for certain offices was struck down upon analysis by a stricter standard than the traditional equal protection standard but apparently a somewhat lesser standard than the compelling state interest test. The Court held that the high filing fees were not rationally related to the State's interest in allowing on the ballot only serious candidates since some serious candidates could not pay the fees while some frivolous candidates could and that the State could not finance the costs of holding the elections from the fees when the voters were thereby deprived of their opportunity to vote for candidates of their preferences.

Extending *Bullock*, the Court has held it impermissible for a State to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A State must provide such persons a reasonable alternative for getting on the ballot.[24]

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[21] 383 U.S. 663, 666 (1966). The poll tax required to be paid as a condition of voting was $1.50 annually. Justices Black, Harlan, and Stewart dissented. Id., 670, 680.

[22] Id., 668. In concluding, the Court observed that "the right to vote is too precious, too fundamental to be so burdened or conditioned." Id., 670.

[23] 405 U.S. 134 (1972).

[24] *Lubin* v. *Panish*, 415 U.S. 709 (1974). Note that the Court indicates that *Bullock* was decided on the basis of restrained review. Id., 715.

***Access to Courts.***—In *Boddie* v. *Connecticut*,[25] Justice Harlan carried a majority of the Court with him in utilizing a due process analysis to evaluate the constitutionality of a State's filing fees in divorce actions which a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that when the State monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the State could terminate the marital status—then it denied due process by inflexibly imposing fees which kept some persons from using that avenue. Justice Harlan's opinion averred that a facially neutral law or policy which did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental interest. The opinion concluded with a cautioning observation that the case was not to be taken as establishing a general right to access to the courts.

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States* v. *Kras*,[1] the Court held that the imposition of filing fees which blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as *Kras*, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[2]

[25] 401 U.S. 371 (1971).

[1] 409 U.S. 434 (1973).

[2] Id., 443–446. The equal protection argument was rejected by utilizing the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of a filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.[3]

***Educational Opportunity.***—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio School Dist.* v. *Rodriguez* [4] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 States of financing schools primarily out of property taxes with the consequent effect that the funds available to local school boards in each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a *de facto* wealth classification that was "suspect" or that education was a "fundamental" right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to the State's interest in protecting and promoting local control of education.[5]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the

system being considered to be a rational basis. Dissenting, Justice Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. Id., 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. Id., 458. Justice Douglas and Brennan concurred in Justice Stewart's dissent, as indeed did Justice Marshall.

[3] *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). The division was the same 5-to-4 that prevailed in *Kras*. *See also Lindsey* v. *Normet*, 405 U.S. 56 (1972). But cases involving the *Boddie* principle do continue to arise. *Little* v. *Streater*, 452 U.S. 1 (1981) (in paternity suit that State required complainant to initiate, indigent defendant entitled to have State pay for essential blood grouping test); *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18 (1981) (recognizing general right of appointed counsel in indigent parents when State seeks to terminate parental status, but using balancing test to determine that right was not present in this case).

[4] 411 U.S. 1 (1973). The opinion by Justice Powell was concurred in by the Chief Justice and Justices Stewart, Blackmun, and Rehnquist. Justices Douglas, Brennan, White, and Marshall dissented. Id., 62, 63, 70.

[5] Id., 44–55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id., 63.

Court noted that plaintiffs had not identified the "class of disadvantaged 'poor' " in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." [6] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.[7]

*Rodriguez* clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a *per se* suspect classification but it must be related to some interest that is

[6] Id., 20. *But see* id., 70, 117–124 (Justices Marshall and Douglas dissenting).

[7] Id., 29–39. But see id., 62 (Justice Brennan dissenting), 70, 110–117 (Justices Marshall and Douglas dissenting).

fundamental, and *Rodriguez* doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and to the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,[8] the case remains strongly viable.

***Abortion.***—*Rodriguez* furnished the principal analytical basis for the Court's subsequent decision in *Maher* v. *Roe*,[9] holding that a State's refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in *Rodriguez*, it was held that the indigent are not a suspect class.[10] Again, as in *Rodriguez* and in *Kras*, it was held that when the State has not monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not undue governmental interference with a fundamental right.[11] Expansion of this area of the law of equal protection seems especially limited.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State,

[8] *Cf. Plyer* v. *Doe*, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.

[9] 432 U.S. 464 (1977).

[10] Id., 470–471.

[11] Id., 471–474. *See also Harris* v. *McRae*, 448 U.S. 297, 322–323 (1980). Total deprivation was the theme of *Boddie* and was the basis of concurrences by Justices Stewart and Powell in *Zablocki* v. *Redhail*, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that *Dandridge* v. *Williams*, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. *But see Califano* v. *Goldfarb*, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

### APPORTIONMENT OF REPRESENTATION

With the abolition of slavery by the Thirteenth Amendment, the Negroes formerly counted as three-fifths of persons would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, there appeared the prospect that politically the readmitted Southern States would gain the advantage in Congress when combined with Democrats from the North. Inasmuch as the South was adamantly opposed to Negro suffrage, all the congressmen would be elected by whites. Many wished to provide for the enfranchisement of the Negro and proposals to this effect were voted on in both the House and the Senate but only a few Northern States permitted Negroes to vote and a series of referenda on the question in Northern States revealed substantial white hostility to the proposal. Therefore, a compromise was worked out, to effect a reduction in the representation of any State which discriminated against males in the franchise.[1]

No serious effort was ever made in Congress to effectuate § 2 and the only judicial attempt was rebuffed.[2] With subsequent constitutional amendments adopted and the utilization of federal coercive powers to enfranchise persons, the section is little more than an historical curiosity.[3]

[1] *See generally* J. James, *The Framing of the Fourteenth Amendment* (Urbana: 1956).

[2] *Saunders* v. *Wilkins*, 152 F.2d 235 (C.A. 4, 1945), *cert. den.*, 328 U.S. 870 (1946).

[3] The section did furnish a basis to Justice Harlan to argue that inasmuch as § 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying § 1 to questions relating to the franchise. *Compare Oregon* v. *Mitchell*, 400 U.S. 112, 152 (1970) (Justice Harlan concurring and dissenting), with id., 229, 250 (Justice Brennan concurring and dissenting). The language of the section recognizing 21 as the usual minimum voting age no doubt played some part in the Court's decision in *Oregon* v. *Mitchell* as well. It should also be noted that the provision relating to "Indians not taxed" is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 *Op. Atty. Gen.* 518 (1940).

However, in *Richardson* v. *Ramirez*,[4] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of §2 the equal protection clause was simply inapplicable.

SECTION 3. No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

[4] 418 U.S. 24 (1974). Justices Marshall, Douglas, and Brennan dissented. Id., 56, 86.

### DISQUALIFICATION AND PUBLIC DEBT

The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals.[5] In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States." [6] Twenty-six years later, Congress enacted that "the disability imposed by section 3 . . . incurred heretofore, is hereby removed." [7]

Although § 4 "was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. . . . '[T]he validity of the public debt' . . . [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment.[8]

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

### ENFORCEMENT

*Generally.*—In the aftermath of the Civil War, Congress, in addition to proposing to the States the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement to provisions of these Amendments.[1] Sev-

[5] E.g., and notably, the Act of December 14, 1869, 16 Stat. 607.

[6] 17 Stat. 142.

[7] Act of June 6, 1898, 30 Stat. 432. Legislation by Congress providing for removal was necessary to give effect to the prohibition of § 3, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully. *Griffin's Case*, 11 Fed. Cas. 7 (No. 5815) (C.C.D.Va. 1869). Nor were persons who had taken part in the Civil War and had been pardoned by the President before the adoption of this Amendment precluded by this section from again holding office under the United States. 18 *Op Atty. Gen.* 149 (1885). On the construction of "engaged in rebellion," *see United States* v. *Powell*, 27 Fed. Cas. 605 (No. 16,079) (C.C.D.N.C. 1871).

[8] *Perry* v. *United States*, 294 U.S. 330, 354 (1935), in which the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond "went beyond the congressional power." On a Confederate bond problem, *see Branch* v. *Haas*, 16 F.53 (C.C.M.D.Ala. 1883), citing *Hanauer* v. *Woodruff*, 15 Wall. (82 U.S.) 439 (1873), and *Thorington* v. *Smith*, 8 Wall. (75 U.S.) 1 (1869). *See also The Pietro Campanella*, 73 F. Supp. 18 (D.C.D.Md. 1947).

[1] Civil Rights Act of 1866, 14 Stat. 27; the Enforcement Act of 1870, 16 Stat. 140; Act of February 28, 1871, 16 Stat. 433; the Ku Klux Klan Act of 1871, 17 Stat. 13;

eral of these laws were general civil rights statutes which broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the States, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years.[2] In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.[3] Beginning with the Civil Rights Act of 1957, however, Congress acted pursuant generally to its powers under the commerce clause [4] until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War Amendments,[5] which culminated in broad provisions against private interference with civil rights in the 1968 legislation.[6] The story of these years is largely an account of the "state action" doctrine in terms of its limitation on congressional powers; [7] lately, it is the still-unfolding history of the lessening of the doctrine combined with a judicial vesting of discretion in Congress to reinterpret the scope and content of the rights guaranteed in these three constitutional amendments.

***State Action.***—In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their

Civil Rights Act of 1875; 18 Stat. 335. The modern provisions surviving of these statutes are 18 U.S.C. §§ 241, 242, 42 U.S.C. §§ 1981–1983, 1985–1986, and 28 U.S.C. § 1343. Two lesser statutes were the Slave Kidnapping Act of 1866, 14 Stat. 50, and the Peonage Abolition Act, 14 Stat. 546, 18 U.S.C. §§ 1581–1588, and 42 U.S.C. § 1994.

[2] *See generally* R. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: 1947).

[3] For cases under 18 U.S.C. §§ 241, 242 in their previous codifications, *see United States* v. *Mosley*, 238 U.S. 383 (1915); *United States* v. *Gradwell*, 243 U.S. 476 (1917); *United States* v. *Bathgate*, 246 U.S. 220 (1918); *United States* v. *Wheeler*, 254 U.S. 281 (1920). The resurgence of the use of these statutes began with *United States* v. *Classic*, 313 U.S. 299 (1941), and *Screws* v. *United States*, 325 U.S. 91 (1945).

[4] The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.

[5] *United States* v. *Guest*, 383 U.S. 745 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). The development of congressional enforcement powers in these cases were paralleled by a similar expansion of the enforcement powers of Congress with regard to the Thirteenth Amendment, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *supra*, *pp.* 1456–1457, and the Fifteenth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), *infra*, *pp.* 1830–1835.

[6] 82 Stat. 73, 18 U.S.C. § 245. The statute has yet to receive its constitutional testing.

[7] On the "state action" doctrine in the context of the direct application of § 1 of the Fourteenth Amendment, *see supra*, *pp.* 1680–1695.

cases to federal courts,[8] and to provide criminal[9] and civil[10] liability for state officials and agents[11] or persons associated with them[12] who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"[13] present no problems of constitutional foundation, although there may well be other problems of application.[14] But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875[15] Congress had proscribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amusement. The *Civil Rights Cases*[16] found this enactment to be beyond Congress' power to enforce the Fourteenth Amendment. It was observed that § 1 was prohibitory only upon the States and did not reach private conduct. Therefore, Congress' power under § 5 to enforce § 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide

[8] § 3 of the Civil Rights Act of 1866, 14 Stat. 27, 28 U.S.C. § 1443. *See Virginia* v. *Rives*, 100 U.S. 313, 318 (1880); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). The statute is of limited utility because of the interpretation placed on it almost from the beginning. *Compare Georgia* v. *Rachel*, 384 U.S. 780 (1966), with *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966).

[9] 18 U.S.C. §§ 241, 242. *See Screws* v. *United States*, 325 U.S. 91 (1945); *Williams* v. *United States*, 341 U.S. 97 (1951); *United States* v. *Guest*, 383 U.S. 745 (1966); *United States* v. *Price*, 383 U.S. 787 (1966); *United States* v. *Johnson*, 390 U.S. 563 (1968).

[10] 42 U.S.C. § 1983. *See Monroe* v. *Pape*, 365 U.S. 167 (1961); *see also* 42 U.S.C. § 1985(3), construed in *Griffith* v. *Breckenridge*, 403 U.S. 88 (1971).

[11] *Ex parte Virginia*, 100 U.S. 339 (1880).

[12] *United States* v. *Price*, 383 U.S. 787 (1966).

[13] Both 18 U.S.C. § 242 and 42 U.S.C. § 1983 contain language restricting them to deprivations under color of state law, whereas 18 U.S.C. § 241 lacks such language. The newest statute, 18 U.S.C. § 245, contains, of course, no such language. On the meaning of "custom" as used in the "under color of" phrase, *see Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970).

[14] E.g., the problem of "specific intent" in *Screws* v. *United States*, 325 U.S. 91 (1945), and *Williams* v. *United States*, 341 U.S. 97 (1951), and the problem of what "right or privilege" is "secured" to a person by the Constitution and laws of the United States which divided the Court in *United States* v. *Williams*, 341 U.S. 70 (1951), and which was resolved in *United States* v. *Price*, 383 U.S. 787 (1966).

[15] 18 Stat. 335, §§ 1, 2.

[16] 109 U.S. 3 (1883). The Court also rejected the Thirteenth Amendment foundation for the statute, a foundation reviewed by *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 400 (1968).

modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment." [17] The holding in this case had already been preceded by *United States* v. *Cruikshank* [18] and by *United States* v. *Harris* [19] in which the Federal Government had prosecuted individuals for killing and injuring Negroes. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the States themselves. [20]

*Cruikshank* did, however, recognize a small category of federal rights which Congress could protect against private deprivation, rights which the Court viewed as deriving particularly from one's status as a citizen of the United States and as to which Congress had a general police power to protect. [21] These rights included the right to vote in federal elections, general and primary, [22] the right to federal protection while in the custody of federal officers, [23] and the right to inform federal officials of violations of federal law. [24] The right of interstate travel is a basic right derived from the Federal Constitution which Congress may protect. [25] In *United States* v. *Williams*, [1] in the context of state action, the Court divided four-to-four with regard to whether the predecessor of 18 U.S.C. §241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment or was restricted to those rights

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[17] 109 U.S. 11, Justice Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action but also viewed places of public accommodation as serving a quasi-public function which satisfied the state action requirement in any event. Id., 46–48, 56–57.

[18] 92 U.S.C. 542 (1875). The action was pursuant to §6 of the 1870 Enforcement Act, 16 Stat. 140, the predecessor of 18 U.S.C. §241.

[19] 106 U.S. 629 (1883). The case held unconstitutional a provision of §2 of the 1871 Act. 17 Stat. 13.

[20] *See also Baldwin* v. *Franks*, 120 U.S. 678 (1887); *Hodges* v. *United States*, 203 U.S. 1 (1906); *United States* v. *Wheeler*, 254 U.S. 281 (1920). Under the Fifteenth Amendment, *see James* v. *Bowman*, 190 U.S. 127 (1903).

[21] *United States* v. *Cruikshank*, 92 U.S. 542, 552–553, 556 (1876). The rights which the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

[22] *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States* v. *Classic*, 313 U.S. 299 (1941).

[23] *Logan* v. *United States*, 144 U.S. 263 (1892.)

[24] *In re Quarles*, 158 U.S. 532 (1895). *See also United States* v. *Waddell*, 112 U.S. 76 (1884) (right to homestead).

[25] *United States* v. *Guest*, 383 U.S. 745 (1966); *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

[1] 341 U.S. 70 (1951).

"which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in *United States* v. *Price* [2] and *United States* v. *Guest*, [3] again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the due process and equal protection clauses.

Inasmuch as both *Price* and *Guest* concerned conduct which the Court found implicated with sufficient state action, it did not then have to reach the question of § 241's constitutionality when applied to private action interfering with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently intepreted as language in the opinion of the Court construing Congress' power under § 5 of the Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress' power was broader.[4] Although the Fourteenth Amendment itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection." [5] The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights which, in the words of 18 U.S.C. § 241, are "secured . . . by the Constitution," i.e., by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the equal protection clause commands that all "public facilities owned or operat-

[2] 386 U.S. 787 (1966) (due process clause).

[3] 383 U.S. 745 (1966) (equal protection clause).

[4] Justice Brennan's opinion, id., 774, was joined by Chief Justice Warren and Justice Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," id., 782 (emphasis by the Justice), was based upon the language of Justice Clark, joined by Justices Black and Fortas, id., 761, that inasmuch as Justice Brennan reached the issue the three Justices were also of the view "that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Id., 762. In the opinion of the Court, Justice Stewart disclaimed any intention of speaking of Congress' power under § 5. Id., 755.

[5] Id., 782.

ed by or on behalf of the State," be available equally to all persons; that access is a right granted by the Constitution, and § 5 is viewed "as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." Within this discretion is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals" who would deny such access.[6]

It is not clear, following changes in Court personnel and in the absence of definitive adjudication, whether this expansion of Congress' power still commands a majority of the Court.[7] If the Court adheres to the expansion, it is not clear what the limits and potentialities of the expansion are, whether it is only with regard to "state facilities" that Congress may reach private interfering conduct, and what "rights" are reasonably and properly encompassed within the concept of "Fourteenth Amendment rights."

***Congressional Definition of Fourteenth Amendment Rights.***—In the *Civil Rights Cases*,[8] the Court observed that "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," that is, laws to counteract and overrule those state laws

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[6] Id., 777–779, 784.

[7] The civil statute paralleling the criminal statute held unconstitutional in *United States* v. *Harris*, 106 U.S. 629 (1883), is 42 U.S.C. § 1985(3), similarly derived from § 2 of the 1871 Act, 17 Stat. 13, and it too lacks a "color of law" requirement. This provision was read into it in *Collins* v. *Hardyman*, 341 U.S. 651 (1951), to avoid what the Court then saw as a substantial constitutional problem. In *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), "color of law" was read out of the statute. While it might be "difficult to con ive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State." Id., 97. What the language actually required, said the unanimous Court, was an "intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." Id., 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress' § 5 powers. Id., 107.

The lower courts are quite divided with respect to what constitutes a nonrace, class-based animus within the requisite for § 1985(3) coverage and whether a private conspiracy may be reached. *See*, e.g., *Action* v. *Gannon*, 450 F.2d 1227 (C.A. 8, 1971); *Dombrowski* v. *Dowling*, 459 F.2d 190 (C.A. 7, 1972); *Great American Federal Savings & Loan Assn.* v. *Novotny*, 584 F.2d 1235 (C.A.3, 1978) (*en banc*), *rev'd.*, 442 U.S. 366 (1979); *Scott* v. *Moore*, 680 F.2d 979 (C.A. 5, 1982) (*en banc*). The Supreme Court's *Novotny* decision was based solely on statutory interpretation and avoided both questions, although both Justices Powell and Stevens would require a showing of state action. Id., 442 U.S., 378, 381 (concurring).

[8] 109 U.S. 3, 13–14 (1883).

which § 1 forbade the States to adopt. And the Court was quite clear that under its responsibilities of judicial review, it was the body which would determine that a state law was impermissible and that a federal law passed pursuant to § 5 was necessary and proper to enforce § 1.[9] But in *United States* v. *Guest,*[10] Justice Brennan protested that this view "attributes a far too limited objective to the Amendment's sponsors', that in fact "the primary purpose of the Amendment was to augment the power of Congress, not the judiciary."

In *Katzenbach* v. *Morgan,*[11] Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to § 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965 [12] barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce." [13] Inasmuch as the Court had previously upheld an English literacy requirement under equal protection challenge,[14] acceptance of the argument would have doomed the federal law. But, said Justice Brennan, Congress might have itself questioned the justifications put forward by the State in defense of its law and might have concluded that instead of being supported by acceptable reasons the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations which might have led Congress to its conclusion; since Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Con-

[9] *Cf. Marbury* v. *Madison,* 1 Cr. (5 U.S.) 137 (1803).

[10] 383 U.S. 745, 783 and n. 7 (1966) (concurring and dissenting).

[11] 384 U.S. 641 (1966). Besides the ground of decision discussed here, *Morgan* also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the equal protection clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the ballot would afford a means of correcting that situation. The statute therefore was an appropriate means to enforce the equal protection clause under "necessary and proper" standards. Id., 652–653. A similar "necessary and proper" approach underlay *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), under the Fifteenth Amendment's enforcement clause.

[12] 79 Stat. 439, 42 U.S.C. § 1973b(e).

[13] 384 U.S., 648.

[14] *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45 (1959).

gress' prerogative to weigh" the considerations and the Court would sustain the conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination.[15]

In dissent, Justice Harlan protested that "[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court." [16] Justice Brennan rejected this reasoning. "We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." [17] Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on *Morgan* in expanding federal powers to deal with private violence which was racially motivated and to some degree in outlawing most private housing discrimination; [18] on the other hand, it enacted provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking *Morgan*.[19]

Congress' power under *Morgan* returned to the Court's consideration when several States challenged congressional legislation [20] lowering the voting age in all elections to 18 and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that *Morgan's* vitality was in some considerable doubt, at least with regard to the reach which many observers had previously seen.[21] Four Justices accepted

[15] *Katzenbach* v. *Morgan*, 384 U.S. 641, 653–656 (1966).

[16] Id., 668. Justice Stewart joined this dissent.

[17] Id., 651 n. 10. Justice O'Connor for the Court quoted and reiterated Justice Brennan's language in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 731–733 (1982).

[18] 82 Stat. 73, 18 U.S.C. § 245. *See* S. Rep. No. 721, 90th Congress, 1st sess. (1967), 6–7. *See also* 82 Stat. 81, 42 U.S.C. § 3601 *et seq.*

[19] Title II, Omnibus Safe Streets and Crime Control Act, 82 Stat. 210, 18 U.S.C. §§ 3501, 3502. *See* S. Rep. No. 1097, 90th Congress, 2d sess. (1968), 53–63. The cases which were subjects of the legislation were *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *United States* v. *Wade*, 388 U.S. 218 (1967), insofar as federal criminal trials were concerned.

[20] Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa-1, 1973bb.

[21] *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

*Morgan* in full,[22] while one Justice rejected it totally[23] and another would have limited it to racial cases.[24] The other three Justices seemingly restricted *Morgan* to its alternate rationale in passing on the age reduction provision but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.[25]

More recent decisions read broadly Congress' power to make determinations that appear to be substantive decisions with respect to constitutional violations.[1] Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that "result" in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.[2] Moreover, movements have been initiated in Congress by opponents of certain of the Court's decisions, notably the abortion rulings, to utilize § 5 powers to curtail the rights the Court has derived from the due process clause and other provisions of the Constitution.[3]

[22] Id., 229, 278–281 (Justices Brennan, White, and Marshall), 135, 141–144 (Justice Douglas).

[23] Id., 152, 204–209 (Justice Harlan).

[24] Id., 119, 126–131 (Justice Black).

[25] The age reduction provision could be sustained "only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are 'compelling'." Id., 296 (Justices Stewart and Blackmun and Chief Justice Burger). In their view, Congress did not have that power and *Morgan* did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State" without reaching an independent determination of their own that the requirements did in fact have that effect. Id., 286.

[1] *See City of Rome* v. *United States*, 446 U.S. 156, 173–183 (1980), under the Fifteenth Amendment. *Infra*, *pp.* 1833–1835. *See also Fullilove* v. *Klutznick*, 448 U.S. 448, 476–478 (1980) (plurality opinion by Chief Justice Burger), and id., 500–502 (Justice Powell concurring).

[2] The Voting Rights Act Amendments of 1982, P.L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973, were designed to overturn *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). A substantial change of direction in *Rogers* v. *Lodge*, 458 U.S. 613 (1982), handed down coextensively with congressional enactment, seems to have brought Congress and the Court into essential alignment, thus avoiding a possible constitutional conflict.

[3] *See The Human Life Bill*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 97th Congress, lst sess. (1981). An elaborate constitutional analysis of the bill is Estreicher, "Congressional Power and Constitutional Rights: Reflections on Proposed 'Human Life' Legislation," 68 Va. L. Rev. 333 (1982).

# FIFTEENTH AMENDMENT

## RIGHT OF CITIZENS TO VOTE

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## RIGHT OF CITIZENS TO VOTE

### FIFTEENTH AMENDMENT

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

### ABOLITION OF SUFFRAGE QUALIFICATIONS ON BASIS OF RACE

#### Adoption and Judicial Enforcement

***Adoption.***—The final decision of Congress not to include anything relating to the right to vote in the Fourteenth Amendment aside from the provisions of § 2 [1] left the issue of Negro suffrage solely with the States and Northern States were generally as loath to afford Negroes, both the newly-freed and those who had never been slaves, the ballot as were the Southern.[2] But in the second session of the 39th Congress, the right to vote was extended to Negroes by statute in the District of Columbia and the territories and the seceded States as a condition of readmission had to guarantee Negro suffrage.[3] Following the election of President Grant, the "lame duck" third session of the Fortieth Congress sent the proposed Fifteenth amendment to the States for ratification. The struggle was intense because Congress was divided into roughly three factions: those who opposed any federal constitutional guarantee of Negro suffrage, those who wanted to go beyond a limited guarantee and enact universal male suffrage, including abolition of all educational and property-holding tests, and those who wanted

[1] *Supra*, pp. 1810-1811. Of course, at the present the equal protection clause has been extensively utilized by the Court to protect the right to vote. *Supra*, pp. 1779-1796.

[2] W. Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: 1965), 25-28.

[3] Id., 29-31; 14 Stat. 375 (1866) (District of Columbia); 14 Stat. 379 (1867) (territories); 14 Stat. 391, § 3 (1867) (admission of Nebraska to statehood upon condition of guaranteeing against racial qualifications in voting); 14 Stat. 428 (1867) (First Reconstruction Act).

or who were willing to settle for an amendment merely proscribing racial qualifications in determining who could vote under any other standards the States wished to have.[4] The later group ultimately prevailed.

***The Judicial View of the Amendment.***—In its initial appraisals of this Amendment, the Supreme Court appeared disposed to emphasize only its purely negative aspects. "The Fifteenth Amendment," it announced, did "not confer the right . . . [to vote] upon any one," but merely "invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." [5] But in subsequent cases, the Court, conceding "that this article" has originally been construed as giving "no affirmative right to the colored man to vote" and as having been "designed primarily to prevent discrimination against him," professed to be able "to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because . . . it annulled the discriminating word *white*, and this left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which would give the right of voting exclusively to white people. . . ." [6]

***Grandfather Clauses.***—Until quite recently, the history of the Fifteenth Amendment has been largely a record of belated judicial condemnation of various state efforts to disenfranchise Negroes either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory membership practices of political parties. Of several devices which have been voided, one of the first to be held unconstitutional was the "grandfather clause." Beginning in 1895, several States enacted temporary laws whereby persons who had been voters, or descendants of those who had been voters, on January 1,

[4] W. Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: 1965), 46–78. The congressional debate is conveniently collected in 1 B. Schwartz, *Statutory History of the United States—Civil Rights* (New York: 1971), 372.

[5] *United States* v. *Reese*, 92 U.S. 214, 217–218 (1876); *United States* v. *Cruikshank*, 92 U.S. 542, 566 (1876).

[6] *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884); *Guinn* v. *United States* 238 U.S. 347, 363 (1915). A state constitutional provision limiting the right of suffrage to whites was automatically nullified by ratification of the Fifteenth Amendment. *Neal* v. *Delaware*, 103 U.S. 370 (1881).

1867, could be registered notwithstanding their inability to meet any literacy requirement. Unable because of the date to avail themselves of the exemption, Negroes were disabled to vote on grounds of illiteracy or through discriminatory administration of literacy tests while illiterate whites were permited to register without taking any tests. With the achievement of the intended result, most States permitted their laws to lapse, but Oklahoma's grandfather clause had been enacted as a permanent amendment to the state constitution. A unanimous Court condemned the device as recreating and perpetuating "the very conditions which the [Fifteenth] Amendment was intended to destroy." [7]

The Court did not experience any difficulty in voiding a subsequent Oklahoma statute of 1916 which provided that all persons, except those who voted in 1914, who were qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, with some exceptions for sick and absent persons who were given an additional brief period to register, should be perpetually disenfranchised. The Amendment, Justice Frankfurter declared for the Court, "nullified sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." [8] The impermissible effect of the statute, said the Court, was automatically to continue as permanent voters, without their being obliged to register again, all white persons who were on registery lists in 1914 by virtue of the previously invalidated grandfather clause, whereas Negroes, prevented from registering by that clause, were afforded only a 20-day registration opportunity to avoid permanent disenfranchisement.

***The White Primary.***—Indecision was displayed by the Court, however, when it was called upon to deal with the exclusion of Negroes from participation in primary elections.[9] Prior to its becoming convinced that primary contests were in fact elections to which federal constitutional guarantees applied,[10] the Court had relied upon the equal protection clause to strike down the Texas White Primary Law [11] and a subsequent Texas statute which contributed

[7] *Guinn* v. *United States*, 238 U.S. 347 (1915).
[8] *Lane* v. *Wilson*, 307 U.S. 275 (1939).
[9] *See also supra*, p. 117.
[10] *United States* v. *Classic*, 313 U.S. 299 (1941); *Smith* v. *Allwright*, 321 U.S. 649 (1944).
[11] *Nixon* v. *Herndon*, 273 U.S. 536 (1927).

to a like exclusion by limiting voting in primary elections to members of state political parties as determined by the central committees thereof.[12] When exclusion of Negroes was thereafter perpetuated by political parties acting not in obedience to any statutory command, this discrimination was for a time viewed as not constituting state action and therefore as not prohibited by either the Fourteenth or the Fifteenth Amendments.[13] This holding was reversed nine years later when the Court declared that where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a state agency, and hence it may not under the Fifteenth Amendment exclude Negroes from such elections.[14] An effort by South Carolina to escape the effects of this ruling by repealing all statutory provisions regulating primary elections and political organizations conducting them was nullified by a lower federal court with no doctrinal difficulty,[15] but the Supreme Court, although nearly unanimous on the result, was unable to come to a majority agreement with regard to the exclusion of Negroes by the Jaybird Association, a county-wide organization which, independently of state laws and the use of state election machinery or funds, nearly monopolized access to Democratic nomination for local offices. The exclusionary policy was held unconstitutional but there was no opinion of the Court.[16]

***Literacy Tests.***—At an early date the Court held that literacy tests which are drafted so as to apply alike to all applicants for the voting franchise would be deemed to be fair on their face and in the absence of proof of discriminatory enforcement could not be said to deny equal protection.[17] But an Alabama constitutional amendment the legislative history of which disclosed that both its object and its intended administration was to disenfranchise Negroes was condemned as violative of the Fifteenth Amendment.[18]

***Racial Gerrymandering.***—The Court's series of decisions requiring under the equal protection clause the apportionment and districting of legislatures solely on a population basis [19] had its begin-

[12] *Nixon* v. *Condon*, 286 U.S. 73 (1932).

[13] *Grovey* v. *Townsend*, 295 U.S. 45 (1935).

[14] *Smith* v. *Allwright*, 321 U.S. 649 (1944).

[15] *Rice* v. *Elmore*, 165 F.2d 387 (C.A. 4, 1947), *cert. den.*, 333 U.S. 875 (1948); *see also Baskin* v. *Brown*, 174 F.2d 391 (C.A. 4, 1949).

[16] *Terry* v. *Adams*, 345 U.S. 461 (1953). For an analysis of the opinions, *see infra*, p. 1829.

[17] *Williams* v. *Mississippi*, 170 U.S. 213 (1898); *cf. Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1960).

[18] *Davis* v. *Schnell*, 81 F. Supp. 872 (D.C.M.D. Ala. 1949), *aff'd* 336 U.S. 933 (1949). On congressional action on literacy tests, *see infra*, pp. 1830–1833.

[19] *Supra*, pp. 1785–1795.

ning in *Gomillion* v. *Lightfoot* [20] in which the Court held that the redrawing of a municipal boundary line into a 28-sided figure which excluded all but four or five of 400 Negroes from the city but no whites so as to continue white domination of municipal elections constituted a violation of the Fifteenth Amendment. Subsequent decisions, particularly concerning the validity of multimember districting and alleged dilution of minority voting power, were decided under the equal protection clause,[21] and in *City of Mobile* v. *Bolden*,[22] in the course of a considerably divided decision with respect to the requirement of discriminatory motivation in Fifteenth Amendment cases,[23] a plurality of the Court sought to restrict the Fifteenth Amendment to cases in which there is official denial or abridgment of the right to register and vote and to exclude indirect, dilution claims.[24] Congressional amendment of § 2 of the Voting Rights Act may obviate the further development of constitutional jurisprudence in this area, however.[25]

**Congressional Enforcement**

Although the Fifteenth Amendment is "self-executing," [1] the Court early emphasized that the right granted to be free from racial discrimination "should be kept free and pure by congressional enactment whenever that is necessary." [2] Following ratification of the Fifteenth Amendment in 1870, Congress passed the Enforcement Act of 1870 [3] which had started out as a bill to prohibit state

[20] 364 U.S. 339 (1960). *See also Wright* v. *Rockefeller*, 376 U.S. 52 (1964).

[21] E.g., *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *White* v. *Regester*, 412 U.S. 755 (1973).

[22] 446 U.S. 55 (1980).

[23] On the issue of motivation versus impact under the equal protection clause, *see supra*, *pp.* 1708–1714. On the plurality's view, *see* id., 446 U.S. 61–65. Justice White appears clearly to agree that purposeful discrimination is necessary under the equal protection clause and may have agreed as well that the same requirement applies under the Fifteenth Amendment. Id., 94–103. Only Justice Marshall unambiguously adhered to the view that discriminatory effect is sufficient. Id., 125. *See also Beer* v. *United States*, 425 U.S. 130, 146–149 & nn. 3–5 (1976) (dissenting).

[24] Id., 446 U.S., 65. At least three Justices disagreed with this view and would apply the Fifteenth Amendment to vote dilution claims. Id., 84 n. 3 (Justice Stevens concurring), 102 (Justice White dissenting), 125–135 (Justice Marshall dissenting). The issue was reserved in *Rogers* v. *Lodge*, 458 U.S. 613, 619 n 6 (1982).

[25] *See* Voting Rights Act Amendments of 1982, P.L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973. *See supra*, *p.* 1712, and *infra*, *p.* 1834.

[1] *Guinn* v. *United States*, 238 U.S. 347, 362–363 (1915).

[2] *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884).

[3] 16 Stat. 140. Debate on the Act is collected in 1 B. Schwartz, *Statutory History of the United States—Civil Rights* (New York: 1971), 454. *See also* The Force Act of 1871, 17 Stat. 433.

officers from restricting suffrage on racial grounds and providing criminal penalties and ended up as a comprehensive measure aimed as well at private action designed to interfere with the rights guaranteed under the Fourteenth and Fifteenth Amendments. Insofar as this legislation reached private action, it was largely nullified by the Supreme Court and the provisions aimed at official action proved ineffectual and much of it was later repealed.[4] More recent legislation has been much more far-reaching in this respect and has been sustained.

***State Action.***—Like § 1 of the Fourteenth, § 1 of the Fifteenth Amendment prohibits official denial of the rights therein guaranteed, giving rise to the "state action" doctrine.[5] Nevertheless, the Supreme Court in two early cases seemed to be of the opinion that Congress could protect the constitutional right created—the right to be free from discrimination in the prescription of voting qualifications against private deprivation on the basis that Congress impliedly had power to protect the enjoyment of every right conferred by the Constitution against deprivation from any source.[6] But in *James* v. *Bowman* [7] the Court held that legislation based on the Fifteenth Amendment which attempted to prohibit private as well as official interference with the right to vote on racial grounds was unconstitutional and that interpretation was not questioned until

[4] 28 Stat 36 (1894); 35 Stat. 1153 (1909). *See* R. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: 1947), 35–55, for a brief history of the enactment and repeal of the statutes. The surviving statutes of this period are 18 U.S.C. §§ 241–242, and 42 U.S.C. §§ 1971(a), 1983, 1985(3).

[5] *Supra, pp.* 1681–1696. "The State . . . must mean not private citizens but those clothed with the authority and influence which official position affords. The application of the prohibition of the Fifteenth Amendment to 'any State' is translated by legal jargon to read 'State Action.' This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." *Terry* v. *Adams*, 345 U.S. 461, 473 (1953) (Justice Frankfurter concurring).

[6] The idea was fully spelled out in Justice Bradley's opinion on circuit in *United States* v. *Cruikshank*, 25 Fed. Cas. 707, 712, 713 (No. 14,897) (C.C.D. La. 1874). The Supreme Court's decision in *United States* v. *Cruikshank*, 92 U.S. 542, 555–556 (1876), and *United States* v. *Reese*, 92 U.S. 214, 217–218 (1876), may be read to support the contention. *Ex parte Yarbrough*, 110 U.S. 651 (1884), involved a federal election and the assertion of congressional power to reach private interference with the right to vote in federal elections, but the Court went further to broadly state the power of Congress to protect the citizen in the exercise of rights conferred by the Constitution among which was the right to be free from discrimination in voting protected by the Fifteenth Amendment. Id., 665–666.

[7] 190 U.S. 127 (1903), holding unconstitutional Rev. Stat. § 5507, which was § 5 of the Enforcement Act of 1870, 16 Stat. 140.

recently.[8] But the Court's interpretation of the "state action" requirement in cases brought under § 1 of the Amendment narrowed the requirement there and opened the possibility, when these decisions are considered with recent cases decided under the Fourteenth Amendment, that Congress is not limited to legislation directed to official discrimination.[9]

Thus, in *Smith* v. *Allwright*,[10] the exclusion of Negroes from political parties without the compulsion or sanction of state law was nonetheless held to violate the Fifteenth Amendment because the parties were so regulated otherwise as to be in effect agents of the State and thus subject to the Fifteenth Amendment; additionally, in one passage the Court suggested that the failure of the State to prevent the racial exclusion might be the act implicating the Amendment.[11] Then, in *Terry* v. *Adams*,[12] the political organization was not regulated by the State at all and selected its candidates for the Democratic primary election by its own processes; all eligible white voters in the jurisdiction were members of the organization but Negroes were excluded. Nevertheless, the Court held that this exclusion violated the Fifteenth Amendment although no rationale was agreed upon by a majority of the Justices. Four of them thought the case simply indistinguishable from *Smith* v. *Allwright* and thus did not deal with the central issue.[13] Justice Frankfurter thought the participation of local elected officials in the processes of the organization was sufficient to implicate state action.[14] Three Justices thought that when a purportedly private organization is permitted by the State to assume the functions normally performed by an agency of the State, then that association is subject to federal constitutional restrictions,[15] but this opinion also, in citing selected passages of *Yarbrough* and *Reese* and Justice Bradley's circuit opinion in *Cruikshank*, appeared to be suggesting that the state action requirement is not indispensable.[16]

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[8] E.g., *United States* v. *Classic*, 313 U.S. 299, 315 (1941); *United States* v. *Williams*, 341 U.S. 70,77 (1951).

[9] *Supra*, *pp.* 1814–1818.

[10] 321 U.S. 649 (1944).

[11] "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restrictions by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." Id., 664.

[12] 345 U.S. 461 (1953).

[13] Id., 477 (Justices Clark, Reed, and Jackson, and Chief Justice Vinson).

[14] Id., 470.

[15] 462, 468–469, 470 (Justices Black, Douglas, and Burton).

[16] Id., 466–468. Justice Minton understood Justice Black's opinion to do away with the state action requirement. Id., 485 (dissenting).

The 1957 Civil Rights Act [17] included a provision prohibiting private action with intent to intimidate or coerce persons in respect of voting in federal elections and authorized the Attorney General to seek injunctive relief against such private actions regardless of the character of the election. The 1965 Voting Rights Act [18] went further and prohibited and penalized private actions to intimidate voters in federal, state, or local elections. The Supreme Court has yet to consider the constitutionality of these sections.

***Federal Remedial Legislation.***—The history of federal remedial legislation is of modern vintage.[19] The 1957 Civil Rights Act [20] authorized the Attorney General of the United States to seek injunctive relief to prevent interference with the voting rights of citizens. The 1960 Civil Rights Act [21] expanded on this authorization by permitting the Attorney General to seek a court finding of "pattern or practice" of discrimination in any particular jurisdiction and authorizing upon the entering of such a finding the registration of all qualified persons in the jurisdiction of the race discriminated against by court appointed referees. This authorization moved the vindication of voting rights beyond a case-by-case process. Further amendments were added in 1964.[22] Finally, in the Voting Rights Act of 1965 [23] Congress went substantially beyond what it had done before. It provided that if the Attorney General determined that any State or political subdivision maintained on November 1, 1964, any "test or device" [24] and that less than 50 per cent of the

[17] 71 Stat. 637, 42 U.S.C. §§ 1971(b), 1971(c). In a suit to enjoin state officials from violating 42 U.S.C. § 1971(a), derived from Rev. Stat. § 2004, applying to all elections, the defendants challenged the constitutionality of the law because it applied to private action as well as state. The Court held that inasmuch as the statute could constitutionally be applied to the defendants it would not hear their contention that as applied to others it would be void. *United States* v. *Raines*, 362 U.S. 17 (1960), disapproving the approach of *United States* v. *Reese*, 92 U.S. 214 (1876).

[18] 79 Stat. 443, 42 U.S.C. §§ 1973i,1973j.

[19] The 1871 Act, 16 Stat. 433, provided for a detailed federal supervision of the electoral process, from registration to the certification of returns. It was repealed in 1894. 28 Stat. 36. In *Giles* v. *Harris*, 189 U.S. 475 (1903), the Court, in an opinion by Justice Holmes, refused to order the registration of 6,000 Negroes who alleged that they were being wrongly denied the franchise, the Court observing that no judicial order would do them any good in the absence of judicial supervision of the actual voting, which it was not prepared to do, and suggesting that the petitioners apply to Congress or the President for relief.

[20] 71 Stat. 634. *See United States* v. *Raines*, 362 U.S. 17 (1960); *United States* v. *Alabama*, 192 F. Supp. 677 (D.C.M.D. Ala. 1961), *aff'd.*, 304 F.2d 583 (C.A. 5), *aff'd.*, 371 U.S. 37 (1962).

[21] 74 Stat. 86.

[22] 78 Stat. 241.

[23] 79 Stat. 437, 42 U.S.C. § 1973 et seq.

[24] The phrase "test or device" was defined as any requirement for (1) demonstrating the ability to read, write, understand, or interpret any matter, (2) demonstrating any educational achievement or knowledge, (3) demonstrating good moral

voting age population in that jurisdiction was registered on November 1, 1964, or voted in the 1964 presidential election, such tests or devices were to be suspended for five years and no person should be denied the right to vote on the basis of such a test or device. A State could reinstitute such a test or device within the prescribed period only by establishing in a three-judge court in the District of Columbia that the test or device did not have a discriminatory intent or effect and the covered jurisdiction could only change its election laws in that period by obtaining the approval of the Attorney General or a three-judge court in the District of Columbia. The Act also provided for the appointment of federal examiners who could register persons meeting nondiscriminatory state qualifications who then must be permitted to vote.

These laws the Supreme Court upheld and expansively applied. In *United States* v. *Mississippi* [25] the Court held that the Attorney General was properly authorized to sue for preventive relief to protect the right of citizens to vote, that the State could be sued, and that various election officers were defendants and the suit could not be defeated by the resignation of various officers. A lower federal court's judgment voiding an "interpretation test," which required an applicant to interpret a section of the state or federal constitution to the satisfaction of the voting registrar was approved in *Louisiana* v. *United States.*[1] The test was bad because it vested vast discretion in the registrars to determine qualifications while imposing no definite and objective standards for administration of the tests, a system which the evidence showed had been administered so as to disqualify Negroes and qualify whites. The Court also

character, (4) proving qualifications by vouching of registered voters. Aimed primarily at literacy tests, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 333–334 (1966), the Act was considerably broadened through the Court's interpretation of § 5, 42 U.S.C. § 1973c, which require the approval either of the Attorney General or a three-judge court in the District of Columbia before a State could put into effect any new voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting, to include such changes as apportionment and districting, adoption of at-large instead of district elections, candidate qualification regulations, provisions for assistance of illiterate voters, movement of polling places, adoption of appointive instead of elective positions, annexations, and public employer restrictions upon employees running for elective office. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Georgia* v. *United States*, 411 U.S. 526 (1973); *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32 (1978). *See also United States* v. *Bd. of Comrs. of Sheffield*, 435 U.S. 110 (1978) (pre-coverage provisions apply to all entities having power over any aspect of voting, not just "political subdivisions" as defined in Act).

[25] 380 U.S. 128 (1965).

[1] 380 U.S. 145 (1965). *See also United States* v. *Thomas*, 362 U.S. 58 (1960); *United States* v. *Alabama*, 362 U.S. 602 (1960); *Alabama* v. *United States*, 371 U.S. 37 (1962).

affirmed the lower court's decree invalidating imposition of a new objective test for new voters unless the State required all present voters to reregister so that all voters were tested by the same standards.

But it was in upholding the constitutionality of the 1965 Act that the Court sketched in the outlines of a broad power in Congress to enforce the Fifteenth Amendment.[2] While § 1 authorized the courts to strike down state statutes and procedures which denied the vote on the basis of race, the Court held, § 2 authorized Congress to go beyond proscribing certain discriminatory statutes and practices to "enforcing" the guarantee by any rational means at its disposal. The standard was the same as that employed under the "necessary and proper" clause supporting other congressional legislation. Congress was therefore justified in deciding that certain areas of the Nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas; it chose a rational formula which was based on the existence of voting tests which could be used to discriminate and low registration or voting rates demonstrating the likelihood that they had been so used; it could properly suspend for a period all literacy tests in the affected areas upon findings that they had been administered discriminatorily and that illiterate whites had been registered while both literate and illiterate Negroes had not been; it could require the States to seek federal permission to reinstitute old tests or to institute new ones; and it could provide for federal examiners to register qualified voters. The nearly unanimous decisions affords Congress a vast amount of discretion to enact measures designed to enforce the Amendment through broad affirmative prescriptions rather than through proscriptions of specific practices.[3] Subsequent decisions confirm the reach of this power. In one case, the Court held that evidence of discrimination in the educational opportunities available to black children in the county as compared to that available to white children during the period in which most of the adults who were now potential voters were in school precluded a North Carolina county from reinstituting a literacy test because of the past educational discrimination.[4] And when Congress in 1970 [5] suspended for a five-year period literacy

[2] *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

[3] Justice Black dissented from that portion of the decision which upheld the requirement that before a State could change its voting laws it must seek approval of the Attorney General or a federal court. Id., 355.

[4] *Gaston County* v. *United States*, 395 U.S. 285 (1969).

[5] 84 Stat. 315, 42 U.S.C., § 1973aa.

tests throughout the Nation, the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.[6]

Moreover, in *City of Rome* v. *United States*,[7] the Court read even more broadly the scope of Congress' remedial powers under § 2 of the Fifteenth Amendment, paralleling the similar reasoning under § 5 of the Fourteenth. The jurisdiction sought to escape from coverage of the Voting Rights Act by showing that it had not utilized any discriminatory practices within the prescribed period. The lower court had found that the City had engaged in practices without any discriminatory motive but that the practices had had a discriminatory impact. The City thus argued that, inasmuch as the Fifteenth Amendment reached only purposeful discrimination, the Act's proscription of effect as well as purpose went beyond Congress' power. Even if discriminatory intent was a prerequisite to finding a violation of § 1 of the Fifteenth Amendment by the courts,[8] the Court held, Congress had the authority to go beyond that and proscribe electoral devices that had the effect of discriminating. The section, like § 5 of the Fourteenth Amendment, was in effect a "necessary and proper clause" enabling Congress to enact enforcement legislation which was rationally related to the end sought and which was not prohibited by it but was consistent with the letter and spirit of the Constitution, even though the actual practice outlawed or restricted would not be judicially found to violate the Fifteenth Amendment. In so acting, Congress could prohibit state action that perpetuated the effect of past discrimination, or that, because of the existence of past purposeful discrimination, raised a risk of purposeful discrimination that might not lend itself to judicial invalidation. "It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch* v. *Maryland* and *Ex parte Virginia* . . . . Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.[9]

[6] *Oregon* v. *Mitchell*, 400 U.S. 112, 131–134, 144–147, 216–217, 231–236, 282–284 (1970).

[7] 446 U.S. 156 (1980).

[8] *Cf. City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

[9] *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980). Justices Powell, Rehnquist, and Stewart dissented. Id., 193, 206.

*City of Rome* is highly significant for the validity of congressional additions to the Voting Rights Act. In 1975 and 1982, the Act was extended and revised to increase its effectiveness,[10] and the 1982 Amendments were addressed to revitalizing § 2 of the Act, which, unlike §§ 4 and 5, that remain limited to a number of jurisdictions, applies nationwide.[11] As enacted in 1965, § 2 largely tracked the language of the Fifteenth Amendment itself. In *City of Mobile* v. *Bolden*,[12] a majority of the Court agreed that the Fifteenth Amendment and § 2 of the Act were coextensive, but the Justices did not agree on the meaning thus to be ascribed to the statute. A plurality did believe that because the constitutional provision reached only purposeful discrimination, § 2 was similarly limited. It was one major purpose of Congress in 1982 to set aside this possible interpretation and provide that any electoral practice "which *results* in a denial or abridgement" of the right to vote on account of race or color will violate the Act.[13] The subsequent

[10] The 1975 amendments, Pub. L. 94-73, 89 Stat. 400, extended the Act for seven years, expanded it to include those areas having minorities distinguished by their language, i.e., "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 207, 42 U.S.C. § 1973 1f(c)(3), in which certain statistical tests are met and requiring election materials be provided in the language(s) of the group(s), and enlarged to require bilingual elections if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate. The 1982 amendments, Pub. L. 97-205, 96 Stat. 131, in addition to its § 2 revision, alters after August 5, 1984, the provisions by which a covered jurisdiction may take itself from under the Act by proving to the special court in the District of Columbia that it has complied with the Act for the previous ten years and that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence. Moreover, the amendments change the result in *Beer* v. *United States*, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice only if the change would lead to a retrogression in the position of racial minorities; even if the change was only a little ameliorative of existing discrimination, the jurisdiction could implement it. The 1982 amendments provide that the change may not be approved if it would "perpetuate voting discrimination," in effect applying the new § 2 results test to preclearance procedures. S. Rept. 97-417, 97th Congress, 2d sess. (1982), 12; H. Rept. 97-227, 97th Congress, 1st sess. (1981), 28.

[11] Private parties may bring suit to challenge electoral practices under § 2. It provided, before the 1982 amendments, that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

[12] 446 U.S. 55 (1980). *See* id., 60-61 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger), and id., 105 n. 2 (Justice Marshall dissenting).

[13] In § 3 of the 1982 amendments, § 2 of the Act was amended by the insertion of the quoted phrase and the addition of a section setting out a nonexclusive list of factors making up a totality of circumstances test by which a violation of § 2 would be determined. 96 Stat. 134, amending 42 U.S. § 1973.

Court adoption, or re-adoption, of the standards by which it can be determined when a practice denies or abridges the right to vote, though couched in terms of proving intent or motivation, may well bring the constitutional and statutory standards into such close agreement that the constitutional question will not arise.[14]

[14] *See Rogers* v. *Lodge*, 458 U.S. 613 (1982).

# SIXTEENTH AMENDMENT

## INCOME TAX

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## SIXTEENTH AMENDMENT

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## INCOME TAX

### History and purpose of the Amendment

The ratification of this Amendment was the direct consequence of the decision in 1895 [1] whereby the attempt of Congress the previous year to tax incomes uniformly throughout the United States [2] was held by a divided court to be unconstitutional. A tax on incomes derived from property,[3] the Court declared, was a "direct tax" which Congress under the terms of Article I, § 2, and § 9, could impose only by the rule of apportionment according to population, although scarcely fifteen years prior the Justices had unanimously sustained [4] the collection of a similar tax during the Civil War,[5] the only other occasion preceding the Sixteenth Amendment in which Congress had ventured to utilize this method of raising revenue.[6]

During the interim between the *Pollock* decision in 1895, and the ratification of the Sixteenth Amendment in 1913, the Court gave evidence of a greater awareness of the dangerous consequences to national solvency which that holding threatened and partially circumvented it, either by taking refuge in redefinitions of "direct tax" or, and more especially, by emphasizing, virtually to the exclusion of the former, the history of excise taxation. Thus, in

[1] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); 158 U.S. 601 (1895).

[2] 28 Stat. 509, 553.

[3] The Court conceded that taxes on incomes from "professions, trades, employments, or vocations" levied by this act were excise taxes and therefore valid. The entire statute, however, was voided on the ground that Congress never intended to permit the entire "burden of the tax to be borne by professions, trades, employments, or vocations" after real estate and personal property had been exempted, 158 U.S., 635.

[4] *Springer* v. *United States*, 102 U.S. 586 (1881).

[5] 13 Stat. 223, 281 (1864).

[6] For an account of the *Pollock* decision, *see supra*, pp. 383-387.

a series of cases, notably *Nicol* v. *Ames*,[7] *Knowlton* v. *Moore*,[8] and *Patton* v. *Brady*,[9] the Court held the following taxes to have been levied merely upon one of the "incidents of ownership" and hence to be excises: a tax which involved affixing revenue stamps to memoranda evidencing the sale of merchandise on commodity exchanges, an inheritance tax, and a war revenue tax upon tobacco on which the hitherto imposed excise tax had already been paid and which was held by the manufacturer for resale.

Because of such endeavors the Court thus found it possible to sustain a corporate income tax as an excise "measured by income" on the privilege of doing business in corporate form.[10] The adoption of the Sixteenth Amendment, however, put an end to speculation whether the Court, unaided by constitutional amendment, would persist along these lines of construction until it had reversed its holding in the *Pollock* case. Indeed, in its initial appraisal [11] of the Amendment it classified income taxes as being inherently "indirect." "[T]he command of the amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the *Pollock* case by which alone such taxes were removed from the great class of excises, duties, and imports subject to the rule of uniformity and were placed under the other or direct class." [12] "[T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged." [13]

**Income Subject to Taxation**

Building upon definitions formulated in cases construing the Corporation Tax Act of 1909,[1] the Court initially described income

[7] 173 U.S. 509 (1899).

[8] 178 U.S. 41 (1900).

[9] 184 U.S. 608 (1902).

[10] *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911).

[11] *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1 (1916); *Stanton* v. *Baltic Mining Co.*, 240 U.S. 103 (1916); *Tyee Realty Co.* v. *Anderson*, 240 U.S. 115 (1916).

[12] *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 18–19 (1916).

[13] *Stanton* v. *Baltic Mining Co.*, 240 U.S. 103, 112 (1916).

[1] *Stratton's Independence* v. *Howbert*, 231 U.S. 399 (1913); *Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179 (1918).

as the "gain derived from capital, from labor, or from both combined," inclusive of the "profit gained through a sale or conversion of capital assets";[2] in the following array of factual situations it subsequently applied this definition to achieve results that have been productive of extended controversy.

***Corporate Dividends: When Taxable.***—Rendered in conformity with the belief that all income "in the ordinary sense of the word" became taxable under the Sixteenth Amendment, the earliest decisions of the Court on the taxability of corporate dividends occasioned little comment. Emphasizing that in all such cases the stockholder is to be viewed as "a different entity from the corporation," the Court in *Lynch* v. *Hornby*,[3] held that a cash dividend equal to 24 percent of the par value of the outstanding stock and made possible largely by the conversion into money of assets earned prior to the adoption of the Amendment, was income taxable to the stockholder for the year in which he received it, notwithstanding that such an extraordinary payment might appear "to be a mere realization in possession of an inchoate and contingent interest . . . [of] the stockholder . . . in a surplus of corporate assets previously existing." In *Peabody* v. *Eisner*,[4] decided on the same day and deemed to have been controlled by the preceding case, the Court ruled that a dividend paid in the stock of another corporation, although representing earnings that had accrued before ratification of the Amendment, was also taxable to the shareholder as income. The dividend was likened to a distribution in specie.

Two years later the Court decided *Eisner* v. *Macomber*,[5] and the controversy which that decision precipitated still endures. Departing from the interpretation placed upon the Sixteenth Amendment in the earlier cases, i.e., that the purpose of the Amendment was to correct the "error" committed in the *Pollock* case and to re-

[2] *Eisner* v. *Macomber*, 252 U.S. 189 (1920); *Bowers* v. *Kerbaugh-Empire Co.*, 271 U.S. 170 (1926).

[3] 247 U.S. 339, 344 (1918). On the other hand, in *Lynch* v. *Turrish*, 247 U.S. 221 (1918), the single and final dividend distributed upon liquidation of the entire assets of a corporation, although equaling twice the par value of the capital stock, was declared to represent only the intrinsic value of the latter earned prior to the effective date of the Amendment, and hence was not taxable as income to the shareholder in the year in which actually received. Similarly, in *Southern Pacific Co.* v. *Lowe*, 247 U.S. 330 (1918), dividends paid out of surplus accumulated before the effective date of the Amendment by a railway company whose entire capital stock was owned by another railway company and whose physical assets were leased to and used by the later was declared to be a nontaxable bookkeeping transaction between virtually identical corporations.

[4] 247 U.S. 347 (1918).

[5] 252 U.S. 189, 206–208 (1920).

store income taxation to "the category of indirect taxation to which it inherently belonged," Justice Pitney, who delivered the opinion in the *Eisner* case, indicated that the sole purpose of the Sixteenth Amendment was merely to "remove the necessity which otherwise might exist for an apportionment among the States of taxes laid on income." He thereupon undertook to demonstrate how what was not income, but an increment of capital when received, could later be transmitted into income upon sale or conversion and could be taxed as such without the necessity of apportionment. In short, the term "income" acquired to some indefinite extent a restrictive significance.

Specifically, the Justice held that a stock dividend was capital when received by a stockholder of the issuing corporation and did not become taxable without apportionment, that is, as "income," until sold or converted, and then only to the extent that a gain was realized upon the proportion of the original investment which such stock represented. "A stock dividend," Justice Pitney maintained, "far from being a realization of profits to the stockholder, . . . tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution . . . not only does a stock dividend really take nothing from . . . the corporation and add nothing to that of the shareholder, but . . . the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is richer because of an increase of his capital, at the same time shows [that] he has not realized or received any income in" what is no more than a "bookkeeping transaction." But conceding that a stock dividend represented a gain, the Justice concluded that the only gain taxable as "income" under the Amendment was "a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being '*derived*,' that is, *received* or *drawn* by the recipient [the taxpayer] for his *separate* use, benefit, and disposal; . . . ." Only the latter in his opinion, answered the description of income "derived" from property, whereas "a gain accruing to a capital, not a *growth* or an *increment* of value *in* the investment" did not.[6]

[6] Id., 207, 211–212 (1920). This decision has been severely criticized, chiefly on the ground that gains accruing to capital over a period of years are not income and are not transformed into income by being dissevered from capital through sale or conversion. Critics have also experienced difficulty in understanding how a tax on income which has been severed from capital can continue to be labeled a "direct" tax on the capital from which the severance has thus been made. Finally, the contention has been made that in stressing the separate identities of a corporation and

Although steadfastly refusing to depart from the principle[7] which it asserted in *Eisner* v. *Macomber*, the Court in subsequent decisions has, however, slightly narrowed the application thereof. Thus, the distribution, as a dividend, to stockholders of an existing corporation of the stock of a new corporation to which the former corporation, under a reorganization, had transferred all its assets, including a surplus of accumulated profits, was treated as taxable income. The fact that a comparison of the market value of the shares in the older corporation immediately before, with the aggregate market value of those shares plus the dividend shares immediately after, the dividend showed that the stockholders experienced no increase in aggregate wealth was declared not to be a proper test for determining whether taxable income had been received by these stockholders.[8] On the other hand, no taxable income was held to have been produced by the mere receipt by a stockholder of rights to subscribe for shares in a new issue of capital stock, the intrinsic value of which was assumed to be in excess of the issuing price. The right to subscribe was declared to be analogous to a stock divided, and "only so much of the proceeds obtained upon the sale of such rights as represents a realized profit over cost" to the stockholders was deemed to be taxable income.[9] Similarly, on

its stockholders, the Court overlooked the fact that when a surplus has been accumulated, the stockholders are thereby enriched, and that a stock dividend may therefore be appropriately viewed simply as a device whereby the corporation reinvests money earned in their behalf. *See also Merchants' L. & T. Co.* v. *Smietanka*, 255 U.S. 509 (1921).

[7] Reconsideration was refused in *Helvering* v. *Griffths*, 318 U.S. 371 (1943).

[8] *United States* v. *Phellis*, 257 U.S. 156 (1921); *Rockefeller* v. *United States*, 257 U.S. 176 (1921). *See also Cullinan* v. *Walker*, 262 U.S. 134 (1923).

In *Marr* v. *United States*, 268 U.S. 536, 540–541 (1925), it was held that the increased market value of stock issued by a new corporation in exchange for stock of an older corporation, the assets of which it was organized to absorb, was subject to taxation as income to the holder, notwithstanding that the income represented profits of the older corporation and that the capital remained invested in the same general enterprise. *Weiss* v. *Stearn*, 265 U.S. 242 (1924), in which the additional value in new securities was held not taxable, was likened to *Eisner* v. *Macomber*, and distinguished from the aforementioned cases on the ground of preservation of corporate identity. Although the "new corporation had . . . been organized to take over the assets and business of the old . . ., the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State with presumably the same powers as the old. There was also no change in the character of the securities issued," with the result that "the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same."

Under existing law, however, when a taxpayer exchanges all of the outstanding stock for a minor percentage of the total shares of a larger corporation, plus cash, the gain to be recognized in full is not limited to the cash but embraces the excess of the sum of the market value of the stock acquired plus the cash over the cost of the original stock plus the expenses of the sale. *Turnbow* v. *Commissioner*, 368 U.S. 337 (1961).

[9] *Miles* v. *Safe Deposit Co.*, 259 U.S. 247 (1922).

grounds of consistency with *Eisner* v. *Macomber*, the Court has ruled that inasmuch as it gave the stockholder an interest different from that represented by his former holdings, a dividend in common stock to holders of preferred stock,[10] or a dividend in preferred stock accepted by a holder of common stock [11] was income taxable under the Sixteenth Amendment.

***Corporate Earnings: When Taxable.***—On at least two occasions the Court has rejected as untenable the contention that a tax on undistributed corporate profits is essentially a penalty rather than a tax or that it is a direct tax on capital and hence is not exempt from the requirement of apportionment. Inasmuch as the exaction was permissible as a tax, its validity was held not to be impaired by its penal objective, namely, "to force corporations to distribute earnings in order to create a basis for taxation against the stockholders." As to the added contention that, because liabilty was assessed upon a mere purpose to evade imposition of surtaxes against stockholders, the tax was a direct tax on a state of mind, the Court replied that while "the existence of the defined purpose was a condition precedent to the imposition of the tax liability, . . . [did] not prevent it from being a true income tax within the meaning of the Sixteenth Amendment." [12] Subsequently, in *Helvering* v. *Northwest Steel Mills*,[13] this appraisal of the constitutionality of the undistributed profits tax was buttressed by the following observation: "It is true that the surtax is imposed upon the annual income only if it is not distributed, but this does not serve to make it anything other than a true tax on income within the meaning of the Sixteenth Amendment. Nor is it true . . . that because there might be an impairment of the capital stock, the tax on the current annual profit would be the equivalent of a tax upon capital. Whether there was an impairment of the capital stock or not, the tax . . . was imposed on profits earned during . . .—a tax year—and therefore on profits constituting income within the meaning of the Sixteenth Amendment." [14]

[10] *Koshland* v. *Helvering*, 298 U.S. 441 (1936).

[11] *Helvering* v. *Gowran*, 302 U.S. 238 (1937).

[12] *Helvering* v. *Nat. Grocery Co.*, 304 U.S. 282, 288-289 (1938). In *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), the defendant contended the collection of fifty per cent of any deficiency in addition to the deficiency alleged to have resulted from a fraudulent intent to evade the income tax amounted to the imposition of a criminal penalty. The Court, however, described the additional sum as a civil and not a criminal sanction, and one whch could be constitutionally employed to safeguard the Government against loss of revenue. In contrast, the exaction upheld in *Helvering* v. *Nat. Grocery Co.*, though conceded to possess the attributes of a civil sanction, was declared to be sustainable as a tax.

[13] 311 U.S. 46 (1940). *See also Crane-Johnson Co.* v. *Helvering*, 311 U.S. 54 (1940).

[14] 311 U.S. 53.

Likening a cooperative to a corporation, federal courts have also declared to be taxable income the net earnings of a farmers' cooperative, a portion of which was used to pay dividends on capital stock without reference to patronage. The argument that such earnings were in reality accumulated savings of its patrons which the cooperative held as their bailee was rejected as unsound for the reason that "while those who might be entitled to patronage dividends have . . . an interest in such earnings, such interest never ripens into an individual ownership . . . until and if a patronage dividend be declared." Had such net earnings been apportioned to all of the patrons during the year, "there might be . . . a more serious question as to whether such earnings constituted 'income' [of the cooperative] within the Amendment." [15] Similarly, the power of Congress to tax the income of an unincorporated joint stock association has been held to be unaffected by the fact that under state law the association is not a legal entity and cannot hold title to property, or by the fact that the shareholders are liable for its debts as partners.[16]

Whether subsidies paid to corporations in money or in the form of grants of land or other physical property constitute taxable income has also concerned the Court. In *Edwards* v. *Cuba Railroad*,[17] it ruled that subsidies of lands, equipment, and money paid by Cuba for the construction of a railroad were not taxable income but were to be viewed as having been received by the railroad as a reimbursement for capital expenditures in completing such project. On the other hand, sums paid out by the Federal Government to fulfill its guarantee of minimum operating revenue to railroads during the six months following relinquishment of their control by that government were found to be taxable income. Such payments were distinguished from those excluded from computation of income in the preceding case in that the former were neither bonuses, nor gifts, nor subsidies, "that is, contributions to capital." [18] Other corporate receipts deemed to be taxable as income include the following: (1) "insiders profits" realized by a director and stockholder of a corporation from transaction in its stock, which, as required by the Securities and Exchange Act,[19] are paid over to the

[15] *Farmers Union Co-op Co.* v. *CIR*, 90 F.2d 488, 491, 492 (C.A. 8, 1937).
[16] *Burk-Waggoner Assn.* v. *Hopkins*, 269 U.S. 110 (1925).
[17] 268 U.S. 628 (1925).
[18] *Texas & Pacific Ry. Co.* v. *United States*, 286, U.S. 285, 289 (1932); *Continental Tie & L. Co.* v. *United States*, 286 U.S. 290 (1932).
[19] 15 U.S.C. § 78p.

corporation; [20] (2) money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble damage antitrust recovery; [21] and (3) compensation awarded for the fair rental value of trucking facilities operated by the taxpayer under control and possession of the Government during World War II, for in the last instance the Government never acquired title to the property and had not damaged it beyond ordinary wear.[22]

***Gains: When Taxable.***—When through forfeiture of a lease in 1933, a landlord became possessed of a new building erected on his land by the outgoing tenant, the resulting gain to the former was taxable to him in that year. Although "economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. . . . The fact that the gain is a portion of the value of the property received by the . . . [landlord] does not negative its realization. . . . [Nor is it necessary] to recognition of taxable gain that . . . [the landlord] should be able to sever the improvement begetting the gain from his original capital." Hence, the taxpayer was incorrect in contending that the Amendment "does not permit the taxation of such [a] gain without apportionment amongst the states.[23] Consistent with this holding the Court has also ruled that when an apartment house was acquired by bequest subject to an unassumed mortgage and several years thereafter was sold for a price slightly in excess of the mortgage, the basis for determining the gain from that sale was the difference between the selling price, undiminished by the amount of the mortgage, and the value of the property at the time of the acquisition, less deductions for depreciation during the years the building was held by the taxpayer. The latter's contention that the Revenue Act, as thus applied, taxed something which was not revenue was declared to be unfounded.[24]

As against the argument of a donee that a gift of stock became a capital asset when received and that therefore, when disposed of, no part of that value could be treated as taxable income to said donee, the Court has declared that it was within the power of Congress to require a donee of stock, who sells it at a profit, to pay income tax on the difference between the selling price and the value when the donor acquired it.[25] Moreover, "the receipt in cash

[20] *General American Investors Co.*, v. *CIR*, 348 U.S. 434 (1955).
[21] *CIR* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955).
[22] *CIR* v. *Gillette Motor Co.*, 364 U.S. 130 (1960).
[23] *Helvering* v. *Brumn*, 309 U.S. 461, 468–469 (1940).
[24] *Crane* v. *CIR*, 331 U.S. 1, 15–16 (1947).
[25] The donor could not, "by mere gift, enable another to hold this stock free from . . . [the] right . . . [of] the sovereign to take part of any increase in its value

or property . . . not [being] the only characteristic of realization of income to a taxpayer on the cash receipt basis," it follows that one who is normally taxable only on the receipt of interest payments cannot escape taxation thereon by giving away his right to such income in advance of payment. When "the taxpayer does not receive payment of income in money or property, realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." Hence an owner of bonds, reporting on the cash receipts basis, who clipped interest coupons therefrom before their due date and gave them to his son, was held to have realized taxable income in the amount of said coupons, notwithstanding that his son had collected them upon maturity later in the year.[1]

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when separated through sale or conversion and reduced to possession." *Taft* v. *Bowers*, 278 U.S. 470, 482, 484 (1929).

However, when a husband, as part of a divorce settlement, transfers his own corporate stock to his wife, he is deemed to have exchanged the stock for the release of his wife's inchoate, marital rights, the value of which are presumed to be equal to the current, market value of the stock, and, accordingly, he incurs a taxable gain measured by the difference between the initial purchase price of the stock and said market value upon transfer. *United States* v. *Davis*, 370 U.S. 65 (1962).

[1] *Helvering* v. *Horst*, 311 U.S. 112, 115–116 (1940).

With a frequency that for obvious reasons is progressively diminishing, the Court also has been called upon to resolve questions as to whether gains, realized after 1913, on transactions consummated prior to ratification of the Sixteenth Amendment are taxable, and if so, how such tax is to be determined. The Court's answer generally has been that if the gain to the person whose income is under consideration became such subsequently to the date at which the amendment went into effect, namely, March 1, 1913, and is a real, and not merely an apparent, gain, said gain is taxable. Thus, one who purchased stock in 1912 for $500 could not limit his taxable gain to the difference, $695, the value of the stock on March 1, 1913 and $13,931, the price obtained on the sale thereof, in 1916; but was obliged to pay tax on the entire gain, that is the difference between the original purchase price and the proceeds of the sale, *Goodrich* v. *Edwards*, 255 U.S. 527 (1921). Conversely, one who acquired stock in 1912 for $291,600 and who sold the same in 1916 for only $269,346, incurred a loss and could not be taxed at all, notwithstanding the fact that on March 1, 1913, his stock had depreciated to $148,635. *Walsh* v. *Brewster*, 255 U.S. 536 (1921). On the other hand, although the difference between the amount of life insurance premiums paid as of 1908, and the amount distributed in 1919, when the insured received the amount of his policy plus cash dividends apportioned thereto since 1908, constituted a gain, that portion of the latter which accrued between 1908 and 1913 was deemed to be an accretion of capital and hence not taxable. *Lucas* v. *Alexander*, 279 U.S. 473 (1929).

However, a litigant who, in 1915, reduced to judgment, a suit pending on February 26, 1913, for an accounting under a patent infringement, was unable to have treated as capital, and excluded from the taxable income produced by such settlement, that portion of his claim which had accrued prior to March 1, 1913. Income within the meaning of the Amendment was interpreted to be the fruit that is born of capital, not the potency of fruition. All that the taxpayer possessed in 1913 was a contingent chose in action which was inchoate, uncertain, and contested. *United States* v. *Safety Car Heating Co.*, 297 U.S. 88 (1936).

Similarly, purchasers of coal lands subject to mining leases executed before adoption of the Amendment could not successfully contend that royalties received

***Income from Illicit Transactions.***—In *United States* v. *Sullivan*,[2] the Court, held that gains derived from illicit traffic were taxable income under the act of 1921.[3] Said Justice Holmes for the unanimous Court: "We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay." [4] Consistent therewith, although not without dissent, the Court ruled that Congress has the power to tax as income moneys received by an extortioner,[5] and, more recently, that embezzled money is taxable income of an embezzler in the year of embezzlement. "When the taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income . . ., even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.'" [6]

***Deductions and Exemptions.***—Notwithstanding the authorization contained in the Sixteenth Amendment to tax income "from whatever source derived," Congress has been held not to be precluded thereby from granting exemptions.[7] Thus, the fact that "under the Revenue Acts of 1913, 1916, 1917, and 1918, stock fire insurance companies were taxed . . . upon gains realized from the sale . . . of property accruing subsequent to March 1, 1913," but were not so taxed by the Revenue Acts of 1921, 1924, and 1926, did not prevent Congress, under the terms of the Revenue Act of 1928, from taxing all the gain attributable to increase in value after

during 1920–1926 were payments for capital assets sold before March 1, 1913, and hence not taxable. Such an exemption, these purchasers argued, would have been in harmony with applicable local law whereunder title to coal passes immediately to the lessee on execution of such leases. To the Court, on the other hand, such leases were not to be viewed "as a 'sale' of the mineral content of the soil" inasmuch as minerals "may or may not be present in the leased premises, and may or may not be found [therein]. . . . If found, their abstraction . . . is a time consuming operation and the payments made by the lessee . . . do not normally become payable as the result of a single transaction. . . ." The result for tax purposes would have been the same even had the lease provided that title to the minerals would pass only "on severance by the lessee." *Bankers Coal Co.* v. *Burnet*, 287 U.S. 308 (1932); *Burnet* v. *Harmel*, 287 U.S. 103, 106–107, 111 (1932).

[2] 274 U.S. 259 (1927).

[3] 42 Stat. 227, 250, 268.

[4] 274 U.S. 259, 263. Profits from illegal undertakings being taxable as income, expenses in the form of salaries and rentals incurred by bookmakers are deductible. *CIR* v. *Sullivan*, 356 U.S. 27 (1958).

[5] *Rutkin* v. *United States*, 343 U.S. 130 (1952). Four Justices, Black, Reed, Frankfurter, and Douglas, dissented.

[6] *James* v. *United States*, 366 U.S. 213, 219 (1961), reversing *CIR* v. *Wilcox*, 327 U.S. 404 (1946).

[7] *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1 (1916).

March 1, 1913, which such a company realized from a sale of property in 1928. the constitutional power of Congress to tax a gain being well established, Congress was declared competent to choose "the moment of its realization and the amount realized"; and "its failure to impose a tax upon the increase in value in the earlier years . . . [could not] preclude it from taxing the gain in the year when realized . . . " [8] Congress is equally well equipped with the "power to condition, limit, or deny deductions from gross incomes in order to arrive at the net that it chooses to tax." [9] Accordingly, even though the rental value of a building used by its owner does not constitute income within the meaning of the Amendment,[10] Congress was competent to provide that an insurance company shall not be entitle to deductions for depreciation, maintenance, and property taxes on real estate owned and occupied by it unless it includes in its computation of gross income the rental value of the space thus used.[11]

Also, a taxpayer who erected a $3,000,000 office building on land, the unimproved worth of which was $660,000, and who subsequently purchased the lease on the latter for $2,100,000 is entitled to compute depreciation over the remaining useful life of the building on that portion of $1,440,000, representing the difference be-

[8] *MacLaughlin* v. *Alliance Ins. Co.*, 286 U.S. 244, 250 (1932).

[9] *Helvering* v. *Ind. L. Ins. Co.*, 292 U.S. 371, 381 (1934); *Helvering* v. *Winmill*, 305 U.S. 79, 84 (1938).

[10] A tax on the rental value of property so occupied is a direct tax on the land and must be apportioned. *Helvering* v. *Ind. L. Ins. Co.*, 291 U.S. 371, 378-379 (1934).

[11] Id., 381. Expenditures incurred in the prosecution of work under a contract for the purpose of earning profits are not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income. Accordingly, a dredging contractor, recovering a judgment for breach of warranty of the character of the material to be dredged, must include the amount thereof in the gross income of the year in which it was received, rather than of the years during which the contract was performed, even though it merely represents a return of expenditures made in performing the contract and resulting in a loss. The gain or profit subject to tax under the Sixteenth Amendment is the excess of receipts over allowable deductions during the accounting period, without regard to whether or not such excess represents a profit ascertained on the basis of particular transactions of the taxpayer when they are brought to a conclusion. *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359 (1931).

The grant on denial of deductions is not based on the taxpayers' engagement in constitutionally protected activities, and, accordingly, no deduction is granted for sums expended in combating legislation, enactment of which would destroy taxpayer's business. *Commarano* v. *United States*, 358 U.S. 498 (1959).

Likewise, when tank truck owners, either intentionally for business reasons or unintentionally, violate state maximum weight laws, and incur fines, the latter are not deductible, for fines are penalties rather than tolls for the use of highways, and Congress is not to be viewed as having intended to encourage enterprises to violate state policy. *Tank Truck Rentals* v. *Commissioner*, 356 U.S. 30 (1958); *Hoover Express Co.* v. *United States*, 356 U.S. 38 (1958).

tween the price and the unimproved value, as may be allocated to the building; but he cannot deduct the $1,440,000 as a business expense incurred in eliminating the cost of allegedly excessive rentals under the lease, nor can he treat that sum as a prepayment of rent to be amortized over the 21-year period that the lease was to run.[12]

***Diminution of Loss.***—Mere diminution of loss is neither gain, profit, nor income. Accordingly, one who in 1913 borrowed a sum of money to be repaid in German marks and who subsequently lost the money in a business transaction cannot be taxed on the curtailment of debt effected by using depreciated marks in 1921 to settle a liability of $798,144 for $113,688, the "saving" having been exceeded by a loss on the entire operation.[13]

[12] *Millinery Corp.* v. *CIR*, 350 U.S. 456 (1956).
[13] *Bowers* v. *Kerbaugh-Empire Co.*, 271 U.S. 170 (1926).

## POPULAR ELECTION OF SENATORS

### SEVENTEENTH AMENDMENT

Clause 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Clause 2. When vacancies happen in the representation of any State in the Senate, the executive authority of each State shall issue writs of election to fill such vacancies: Provided That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Clause 3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

### POPULAR ELECTION OF SENATORS

The ratification of this Amendment was the outcome of increasing popular dissatisfaction with the operation of the originally established method of electing Senators. As the franchise became exercisable by greater numbers of people, the belief became widespread that Senators ought to be popularly elected in the same manner as Representatives. Acceptance of this idea was fostered by the mounting accumulation of evidence of the practical disadvantages and malpractices attendant upon legislative selection, such as deadlocks within legislatures resulting in vacancies remaining unfilled for substantial intervals, the influencing of legislative selection by corrupt political organizations and special interest groups through purchase of legislative seats, and the neglect of duties by legislators as a consequence of protracted electoral contests. Prior



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to ratification, however, many States had perfected arrangements calculated to afford the voters more effective control over the selection of Senators. State laws were amended so as to enable voters participating in primary elections to designate their preference for one of several party candidates for a senatorial seat, and nominations unofficially effected thereby were transmitted to the legislature. Although their action rested upon no stronger foundation that common understanding, the legislatures generally elected the winning candidate of the majority, and, indeed, in two States, candidates for legislative seats were required to promise to support, without regard to party ties, the senatorial candidate polling the most votes. As a result of such developments, at least 29 States by 1912, one year before ratification, were nominating Senators on a popular basis, and, as a consequence, the constitutional discretion of the legislatures had been reduced to little more than that retained by presidential electors.[1]

Very shortly after ratification it was established that if a person possessed the qualifications requisite for voting for a Senator, his right to vote for such an officer was not derived merely from the constitution and laws of the State in which they are chosen but had its foundation in the Constitution of the United States.[2] Consistent with this view, federal courts declared that when local party authorities, acting pursuant to regulations prescribed by a party's state executive committee, refused to permit a Negro, on account of his race, to vote in a primary to select candidates for the office of U.S. Senator, they deprived him of a right secured to him by the Constitution and laws, in violation of this Amendment.[3] An Illinois statute, on the other hand, which required that a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 voters from at least 50 counties was held not to impair any right under the Seventeenth Amendment, notwithstanding that 52 percent of the State's voters were residents of one county, 87 percent were residents of 49 counties, and only 13 percent resided in the 53 least populous counties.[4]

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[1] 1 G. Haynes, *The Senate of the United States* (New York: 1938), 79-117.

[2] *United States* v. *Aczel*, 219 F. 197 (D.C.D. Ind. 1915), citing *Ex parte Yarbrough*, 110 U.S. 651 (1884).

[3] *Chapman* v. *King*, 154 F.2d 460 (C.A. 5, 1946), *cert. den.* 327 U.S. 800 (1946).

[4] *MacDougall* v. *Green*, 355 U.S. 281 (1948), *overruled on equal protection grounds in Moore* v. *Ogilvie*, 394 U.S. 814 (1969). *See Forssenius* v. *Harman*, 235 F. Supp. 66 (D.C.E.D.Va. 1964) *aff'd on other grounds*, 380 U.S. 529 (1965) where a three-judge District Court held that the certificate of residence requirement established by the Virginia legislature as an alternative to payment of a poll tax in federal election was an additional qualification to voting in violation of the Seventeenth Amendment and Art. I, § 2.

## PROHIBITION OF INTOXICATING LIQUORS

### EIGHTEENTH AMENDMENT

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

**Validity of Adoption**

Cases relating to this question are presented and discussed under Article V.

**Enforcement**

Cases produced by enforcement and arising under the Fourth and Fifth Amendments are considered in the discussion appearing under the latter Amendments.

**Repeal**

This Amendment was repealed by the Twenty-first Amendment, and titles I and II of the National Prohibition Act [1] were subsequently specifically repealed by the act of August 27, 1935,[2]

[1] 48 Stat. 305.
[2] 49 Stat. 872.

federal prohibition laws effective in various Districts and Territories were repealed as follows: District of Columbia—April 5, 1933, and January 24, 1934; [3] Puerto Rico and Virgin Islands—March 2, 1934; [4] Hawaii—March 26, 1934; [5] and Panama Canal Zone—June 19, 1934.[6]

Taking judicial notice of the fact that ratification of the Twenty-first Amendment was consummated on December 5, 1933, the Supreme Court held that the National Prohibition Act, insofar as it rested upon a grant of authority to Congress by the Eighteenth Amendment thereupon become inoperative, with the result that prosecutions for violations of the National Prohibition Act, including proceedings on appeal, pending on, or begun after, the date of repeal, had to be dismissed for want of jurisdiction. Only final judgments of conviction rendered while the National Prohibition Act was in force remained unaffected.[7] Likewise a heavy "special excise tax," insofar as it could be construed as part of the machinery for enforcing the Eighteenth Amendment, was deemed to have become inapplicable automatically upon the latter's repeal.[8] How-

[3] 48 Stat. 28 § 12; 48 Stat. 319.

[4] 48 Stat. 361.

[5] 48 Stat. 467.

[6] 48 Stat. 1116.

[7] *United States* v. *Chambers*, 291 U.S. 217, 222-226 (1934). *See also Ellerbee* v. *Aderhold*, 5 F. Supp. 1022 (D.C.N.D. Ga. 1934); *United States ex rel. Randall* v. *United States Marshal for Eastern Dist. of New York*, 143 F.2d 830 (C.A. 2, 1944). The Twenty-first Amendment containing "no saving clause as to prosecutions for offenses therefore committed," these holdings were rendered unavoidable by virtue of the well-established principle that after "the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was a force. . . ." *The General Pinkney*, 5 Cr. (9 U.S.) 281, 283 (1809), quoted in *United States* v. *Chambers, supra*, 223-221.

[8] *United States* v. *Constantine*, 296 U.S. 287 (1935). The Court also took the position that even if the statute embodying this "tax" had not been "adopted to penalize violations of the Amendment," but merely to obtain a penalty for violations of State liquor laws, "it ceased to be enforceable at the date of repeal," for with the lapse of the unusual enforcement powers contained in the Eighteenth Amendment, Congress could not, without infringing upon powers reserved to the States by the Tenth Amendment, "impose cumulative penalties above and beyond those specified by State law for infractions of . . . [a] State's criminal code by its own citizens." Justice Cardozo, with whom Justices Brandeis and Stone were associated, dissented on the ground that, on its face, the statute levying this "tax" was "an appropriate instrument of . . . fiscal policy. . . . Classification by Congress according to the nature of the calling affected by a tax . . . does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state." Id. 294, 296, 297-298. In earlier cases it was nevertheless recognized that Congress also may tax what it forbids and that the basic tax on distilled spirits remained valid and enforceable during as well as after the life of the Amendment. *See United States* v. *Yuginovich*, 256 U.S. 450, 462 (1921); *United States* v. *Stafoff*, 260 U.S. 477 (1923); *United States* v. *Rizzo*, 297 U.S. 530 (1936).

ever, liability on a bond conditioned upon the return on the day of trial of a vessel seized for illegal transportation of liquor was held not to have been extinguished by repeal when the facts disclosed that the trial took place in 1931 and had resulted in conviction of the crew. The liability become complete upon occurrence of the breach of the express contractual condition and a civil action for recovery was viewed as unaffected by the loss of penal sanctions.[9]

[9] *United States* v. *Mack*, 295 U.S. 480 (1935).

## WOMEN'S SUFFRAGE RIGHTS

### NINETEENTH AMENDMENT

SECTION 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

### WOMEN'S SUFFRAGE

The Amendment was adopted after a long campaign by its advocates who had largely despaired of attaining their goal through modification of individual state laws. Agitation in behalf of women's suffrage was recorded as early as the Jackson Administration but the initial results were meager. Beginning in 1838, Kentucky authorized women to vote in school elections and its action was later copied by a number of other States. Kansas in 1887 granted women unlimited rights to vote in municipal elections. Not until 1869, however, when the Wyoming Territory accorded women suffrage rights on an equal basis with men and continued the practice following admission to statehood, did these advocates register a notable victory. Progress continued to be discouraging, only ten additional States having joined Wyoming by 1914, and, judicial efforts having failed,[1] a vigorous campaign brought congressional passage of a proposed Amendment and the necessary state ratifications.[2]

Following the Supreme Court's interpretation of the Fifteenth Amendment, the state courts which passed on the effect of the Amendment ruled that it did not confer upon women the right to vote but only the right not to be discriminated against on the basis of their sex in the setting of voting qualifications,[3] a formalistic distinction to be sure but one which has restrained the possible applications of the Amendment. In only one case has the Supreme Court itself dealt with the Amendment's effect, holding that a

[1] *Minor* v. *Happersett*, 21 Wall. (88 U.S.) 162 (1875), a challenge under the privileges of immunities clause of the Fourteenth Amendment.

[2] E. Flexner, *Century of Struggle—The Woman's Rights Movement in the United States* (Cambridge: 1959).

[3] *State* v. *Mittle*, 120 S.C. 526 (1922), *writ of error dism'd.*, 260 U.S. 705 (1922); *Graves* v. *Eubank*, 205 Ala. 174 (1921); *In re Cavelier*, 287 N.Y.S. 739 (1936).

Georgia poll tax statute which exempted from payment women who did not register to vote did not discriminate in any manner against the right of men to vote, although it did note that the Amendment "applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or State." [4]

[4] *Breedlove* v. *Suttles*, 302 U.S. 227, 283–284 (1937).

## COMMENCEMENT OF THE TERMS OF THE PRESIDENT, VICE PRESIDENT, AND MEMBERS OF CONGRESS, ETC.

### TWENTIETH AMENDMENT

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of

any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

**Purpose of the Amendment**

The Senate Committee on the Judiciary in its report suggested several reasons for the proposed Twentieth Amendment. It said in part:

". . . When our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual commencement of work by the new Congress. . . . Under present conditions [of communication and transportation] the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days' travel of the remotest portions of the country.

". . . Another effect of the amendment would be to abolish the so-called short session of Congress. . . . Every other year, under our Constitution, the terms of Members of the House and one-third of the Members of the Senate expire on the 4th day of March. . . . Experience has shown that this brings about a very undesirable legislative condition. It is a physical impossibility during such a short session for Congress to give attention to much general legislation for the reason that it requires practically all of the time to dispose of the regular appropriation bills. . . . The result is a congested condition that brings about either no legislation or illy considered legislation.

". . . If it should happen that in the general election in November in presidential years no candidate for President had received a majority of all the electoral votes, the election of a President would then be thrown into the House of Representatives and the memberships of the House of Representatives called upon to elect a President would be the old Congress and not the new one

just elected by the people. It might easily happen that the Members of the House of Representative, upon whom devolved the solemn duty of electing a Chief Magistrate for 4 years, had themselves been repudiated at the election that had just occurred, and the country would be confronted with the fact that a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President who would be in control of the country for the next 4 years. It is quite apparent that such a power ought not to exist, and that the people having expressed themselves at the ballot box should through the Representatives then selected, be able to select the President for the ensuing term.

". . . The question is sometimes asked, Why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution [before this amendment] does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at 6 years and of Members of the House of Representatives at 2 years. The commencement of the terms of the first President and Vice President and of Senators and Representatives composing the First Congress was fixed by an act of [the Continental] Congress adopted September 13, 1788, and that act provided 'that the first Wednesday in March next to be the time for commencing proceedings under the Constitution.' It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress began on the 4th day of March. Since the Constitution provides that the term of Senators shall be 6 years and the term of Members of the House of Representatives 2 years, it follows that this change cannot be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792) Congress provided that the terms of President and Vice President should commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions." [1]

As thus stated, the exact term of the President and Vice President was fixed by the Constitution, Art. II, § 1, cl. 1, at 4 years, and became actually effective, by resolution of the Continental Congress, on the 4th of March 1789. Since this amendment was declared adopted on February 6, 1933, § 1 in effect shortened, by the

[1] S. Rep. No. 26, 72d Cong., 1st Sess., 2, 4, 5, 6 (1932).

interval between January 20 and March 4, 1937, the terms of the President and Vice President elected in 1932.

Similarly, it shortened, by the intervals between January 3 and March 4, the terms of Senators elected for terms ending March 4, 1935, 1937, and 1939; and thus temporarily modified the Seventeenth Amendment, fixing the terms of Senators at 6 years. It also shortened the terms of Representatives elected to the Seventy-third Congress, by the interval between January 3 and March 4, 1935, and temporarily modified Article I, § 2, clause 1, fixing the terms of Representatives at 2 years.

Section 1 further modifies the Twelfth Amendment in its reference to March 4 as the date by which the House must exercise its choice of a President.

Section 2 supersedes clause 2 of § 4 of Article I. The setting of an exact hour for meeting constitutes a recognition of the long practice of Congress, which in 1867 was for the first time enacted into permanent law,[2] only to be repealed in 1871.[3]

When the 3d of January fell on Sunday (in 1937), Congress did by law appoint a different day for its assemblage.[4]

Pursuant to the authority conferred upon it by § 3 of this amendment, Congress shaped the Presidential Succession Act of 1948[5] to meet the situation which would arise from the failure of both President elect and Vice President elect to qualify on or before the time fixed for the beginning of the new Presidential term.

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[2] 14 Stat. 378.

[3] 17 Stat. 12. *See* 1 A. Hinds' *President of the House of Representatives* (Washington: 1907), § 11.

[4] 49 Stat. 1826.

[5] 62 Stat. 672, as amended, 3 U.S.C. § 19. *See also* the Twenty-fifth Amendment, *supra, pp.* 1877-1879.

## REPEAL OF THE EIGHTEENTH AMENDMENT

### TWENTY-FIRST AMENDMENT

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

#### Effect of Repeal

The operative effect of § 1, repealing the Eighteenth Amendment, is considered in the commentary dealing with that Amendment.

#### Scope of Regulatory Power Conferred upon the States

***Discrimination as Between Domestic and Imported Products.***— In a series of interpretive decisions rendered shortly after ratification of this Amendment, the Court established the proposition that States are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the commerce clause of Article I nor the equal protection and due process clauses of the Fourteenth Amendment. Thus, in *State Board of Equalization* v. *Young's Market Co.*,[1] a California statute was upheld which exacted a $500 annual license fee for the privilege of importing beer from other States and a $750 fee for the privilege of manufacturing beer; and in *Mahoney* v. *Triner Corp.*,[2] a Minnesota statute was

[1] 299 U.S. 59 (1936).
[2] 304 U.S. 401 (1938).

sustained which prohibited a licensed manufacturer or wholesaler from importing any brand of intoxicating liquor containing more than 25 percent of alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office. Also validated in *Brewing Co.* v. *Liquor Comm.*[3] and *Finch & Co.* v. *McKittrick*[4] were retaliation laws enacted by Michigan and Missouri, respectively, by the terms of which sales in each of these States of beer manufactured in a State already discriminating against beer produced in Michigan or Missouri were rendered unlawful.

Conceding, in *State Board of Equalization* v. *Young's Market Co.*,[5] that "prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for . . . the privilege of importation . . . even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the [seller's] place of business," the Court proclaimed that this Amendment "abrogated the right to import free, so far as concerns intoxicating liquors." Inasmuch as the States were viewed as having acquired therefrom an unconditioned authority to prohibit totally the importation of intoxicating beverages, it logically followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety or morals. As to the contention that the unequal treatment of imported beer would contravene the equal protection clause, the Court succinctly observed that a "classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[6]

In *Seagram & Sons* v. *Hostetter*[7] a case involving a state statute regulating the price of intoxicating liquors, the Court upheld the statute, asserting that the Twenty-first Amendment bestowed upon the States broad regulatory power over the liquor sales within their territories.[8] It was also noted that States are not total-

[3] 305 U.S. 391 (1939).
[4] 305 U.S. 395 (1939).
[5] 299 U.S. 59, 62 (1936).
[6] Id., 63–64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the due process clause was summarily rejected in *Brewing Co.* v. *Liquor Comm.*, 305 U.S. 391, 394 (1939).
[7] 384 U.S. 35 (1966).
[8] Id., 42. *See United States* v. *Frankfort Distilleries*, 324 U.S. 293, 299 (1945) and *Nippert* v. *Richmond*, 327 U.S. 416,425 (1946).

ly bound by traditional commerce clause limitations when they restrict the importation of toxicants destined for use, distribution, or consumption within their borders.[9] In such a situation, whereby liquor is destined for use, distribution, or consumption wholly within the State, the Twenty-first Amendment demands wide latitude for regulation by the State.[10] The Court added that there was nothing in the Twenty-first Amendment or any other part of the Constitution that required state laws regulating the liquor business to be motivated exclusively by a desire to promote temperance.[11]

***Regulation of Transportation and "Through" Shipments.***— Then, however, when passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices seemed disposed to by-pass the Twenty-first Amendment and to resolve the issue exclusively in terms of the commerce clause and state power. This trend toward devaluation of the Twenty-first Amendment was set in motion by *Ziffrin, Inc.* v. *Reeves*[12] wherein a Kentucky statute, forbidding the transportation of intoxicating liquors by carriers other than licensed common carriers, was enforced as to an Indiana corporation, engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that "the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause,"[13] the Court then proceeded to found its ruling largely upon decisions antedating the Amendment which sustained similar state regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In the light of the cases enumerated in the preceding paragraph, wherein the Twenty-first Amendment was construed as according a plenary power to the States, such extended emphasis on the police power and the commerce clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-first Amendment was recorded in *Duckworth* v. *Arkansas*[14] and *Carter* v. *Virginia*[15]

[9] Id., 384 U.S. 35. *See e.g. Hostetter* v. *Ildewild Liquor Corp.*, 377 U.S. 324, 330 (1964) and *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936).

[10] Id., 384 U.S. 35. The Court went on to assert that it was not deciding then whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the commerce clause. Id., 42-43.

[11] Id., 47.

[12] 308 U.S. 132 (1939).

[13] Id., 138.

[14] 314 U.S. 390 (1941).

[15] 321 U.S. 131 (1944). *See also Cartlidge* v. *Raincey*, 168 F.2d 841 (C.A.5, 1948), *cert. den.*, 335 U.S. 885 (1948).

wherein, without even considering that Amendment, a majority of the Court upheld, as not contravening the commerce clause, statutes regulating the transport through the State of liquor cargoes originating and ending outside the regulating State's boundaries.[16]

***Regulation of Imports Destined for a Federal Area.***—Intoxicating beverages brought into a State for ultimate delivery at a National Park located therein but over which the United States retained exclusive jurisdiction has been construed as not constituting "transportation . . . into [a] State for delivery and use therein" within the meaning of § 2 of the Amendment. The importation having had as its objective delivery and use in a federal area over which the State retained no jurisdiction, the increased powers which the latter acquired from the Twenty-first Amendment were declared to be inapplicable. California therefore could not extend the importation license and other regulatory requirements of its Alcoholic Beverage Control Act to a retail liquor dealer doing business in the Park.[17]

***Foreign Imports, Exports; Taxation, Regulation.***—The Twenty-first Amendment did not repeal the export-import clause, Art. I, § 10, cl. 2, nor obliterate the commerce clause, Art. I, § 8, cl. 3. Accordingly, a State cannot tax imported Scotch whiskey while it remains "in unbroken packages in the hands of the original importer and prior to [his] resale or use" thereof.[18] Likewise, New York is precluded from terminating the business of an airport dealer who, under sanction of federal customs laws, acquired "tax-free liquors for export" from out-of-state sources for resale exclusively to air-

[16] Arkansas required a permit for the transportation of liquor across its territory, but granted the same upon application and payment of a nominal fee. Virginia required carriers engaged in similar through-shipments to use the most direct route, carry a bill of lading describing that route, and post a $1000 bond conditioned on lawful transportation; and also stipulated that the true consignee be named in the bill of lading and be one having the legal right to receive the shipment at destination.

[17] *Collins* v. *Yosemite Park* [illegible]04 U.S. 518, 537-538 (1938).

The principle was reaffirmed in *United States* v. *Mississippi Tax Comm.*, 412 U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within the State and over which the United States had obtained exclusive jurisdiction. "Absent an appropriate express reservation . . . the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction." Id. 375. As to bases over which the United States exercises concurrent jurisdiction only, see *United States* v. *Mississippi Tax Comm.*, 421 U.S. 599 (1975).

[18] *Dept. of Revenue* v. *Beam Distillers*, 377 U.S. 341 (1964). The Court distinguished *Gordon* v. *Texas*, 355 U.S. 369 (1958) and *De Bary* v. *Louisiana*, 227 U.S. 108 (1913).

line passengers, with delivery deferred until the latter arrive at foreign destinations.[19]

***Effect of Section 2 upon Other Constitutional Provisions.***— Nothwithstanding the 1936 assertion that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth," [20] the Court has now in a series of cases acknowledged that § 2 of the Twenty-first Amendment did not repeal provisions of the Constitution adopted before ratification of the Twenty-first, save for the severe cabining of commerce clause application to the liquor traffic, but it has formulated no consistent rationale for a determination of the effect of the later provision upon earlier ones. In *Craig* v. *Boren*,[21] the Court invalidated a state law that prescribed different minimum drinking ages for men and women as violating the equal protection clause. To the State's Twenty-first Amendment argument, the Court replied that the Amendment "primarily created an exception to the normal operation of the Commerce Clause" and that its "relevance . . . to other constitutional provisions" is doubtful. " 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' " [22] The square holding on this point is "that the operation of the Twenty-first Amendment does not alter the application of the equal protection standards that would otherwise govern this case." [23] Other decisions reach the same result but without discussing the application of the Amendment.[24]

[19] *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324 (1964).

[20] *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 64 (1936). In *Craig* v. *Boren*, 429 U.S. 190, 206–207 (1976), this case and others like it are distinguished as involving the importation of intoxicants into a State, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted. For consideration of equal protection analysis in an analogous situation, the statutory exemption of state insurance regulations from commerce clause purview, *see Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 655–674 (1981).

[21] 429 U.S. 190 (1976).

[22] Id., 206 (quoting P. Brest, *Processes of Constitutional Decisionmaking—Cases and Materials* (1975), 258).

[23] Id., 209–210.

[24] E.g., *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178–197 (1972) (invalidating a state liquor regulation as an equal protection denial in a racial context); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (invalidating a state law authorizing the posting of someone as an "excessive drinker" and thus barring him from buying liquor, as reconstrued in *Paul* v. *Davis*, 424 U.S. 693, 707–709 (1976)).

That these cases do not draw a bright line between the commerce clause and other constitutional provisions is evident from *California* v. *LaRue*.[25] There, the Court sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities and motion picture portrayals of these activities in establishments licensed to sell liquor by the drink. In an action attacking the validity of the regulations as applied to ban nude dancing in bars, the Court considered at some length the material adduced at the public hearings which resulted in the rules demonstrating the anti-social consequences of the activities in the bars. It conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards,[1] but the Court thought that the constitutional protection of conduct that partakes "more of gross sexuality than of communication" was outweighed by the State's interest in maintaining order and decency. Moreover, the Court continued, the second section of the Twenty-first Amendment gave an "added presumption in favor of the validity" of the regulations as applied to prohibit questioned activities in places serving liquor by the drink.[2]

A much broader ruling was forthcoming when the Court considered the constitutionality of a state regulation banning topless dancing in bars. "Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." [3] This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years,[4] would if it were broadly

[25] 409 U.S. 109 (1972).

[1] *Cf. Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (ban on live nude dancing in Borough); *Doran* v. *Salem Inn*, 422 U.S. 922 (1975) (ban on nude dancing in "any public place" applied to topless dancing in bars).

[2] Id., 409 U.S., 114–119. In *Doran* v. *Salem Inn*, 422 U.S. 922, 932–933 (1975), the Court described its holding in *LaRue* more broadly, saying that "we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program."

[3] *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 719 (1981).

[4] For a rejection of the argument in another context, contemporaneously with *Bellanca*, *see Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 657–668 (1981).

applied give the States in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

**Effect on Federal Regulation**

The Twenty-first Amendment of itself did not, it was held, bar a prosecution under the Federal Sherman Antitrust Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado.[5] In a concurring opinion, supported by Justice Roberts, Justice Frankfurter took the position that if the State of Colorado had in fact "authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. . . . [Since] the Sherman Law . . . can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment." [6]

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. . . . competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' " [7] Invalidating under the Sherman Act a state fair trade scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Since the state courts had found the policy under attack promoted neither interest signficantly, the Supreme Court experienced no difficulty in concluding the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

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[5] *United States* v. *Frankfurt Distilleries*, 324 U.S. 293, 297–299 (1945).

[6] Id., 301–302. For application of federal laws, *see William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951); *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U.S. 35 (1966); *Burke* v. *Ford*, 389 U.S. 320 (1967).

[7] *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum*, 445 U.S. 97, 110 (1980).

## PRESIDENTIAL TENURE

### TWENTY-SECOND AMENDMENT

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

### LIMITATION OF PRESIDENTIAL TERMS

"By reason of the lack of a positive expression upon the subject of the tenure of the office of President, and by reason of a well-defined custom which has risen in the past that no President should have more than two terms in that office, much discussion has resulted upon this subject. Hence it is the purpose of this . . . [proposal] . . . to submit this question to the people so they, by and through the recognized processes, may express their views upon this question, and if they shall so elect, they may . . . thereby set at rest this problem." [1]

[1] H. Rep. No. 17, 80th Cong., 1st Sess., 2 (1947).

## PRESIDENTIAL ELECTORS FOR THE DISTRICT OF COLUMBIA

### TWENTY-THIRD AMENDMENT

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelth article of amendment.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

### ENFRANCHISEMENT OF RESIDENTS OF DISTRICT OF COLUMBIA

"The purpose of this . . . constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors who would be in addition to the electors from the States and who would participate in electing the President and Vice President.

"The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in na-

tional elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges will be removed by the proposed constitutional amendment . . .

"[This] . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government. . . . It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress." [1]

[1] H. Rep. No. 1698; 86th Cong. 2d Sess. 1,2 (1960).

## ABOLITION OF THE POLL TAX QUALIFICATION IN FEDERAL ELECTIONS

### TWENTY-FOURTH AMENDMENT

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

### EXPANSION OF THE RIGHT TO VOTE

Ratification of the Twenty-fourth Amendment marked the culmination of an endeavor begun in Congress in 1939 to effect elimination of the poll tax as a qualification for voting in federal elections. Property qualifications extend back to colonial days but the poll tax itself as a qualifications was instituted in eleven States of the South following the ending of Reconstruction, although at the time of the ratification of this Amendment only five States still retained it.[1] Congress viewed the qualification as "an obstacle to the proper exercise of a citizen's franchise" and expected its removal to "provide a more direct approach to participation by more of the people in their government." Congress similarly thought a constitutional amendment necessary,[2] inasmuch as the qualifications had previously escaped constitutional challenge on several grounds.[3] However, within a brief period from the date of ratification Congress by statute had impuned the continuing validity of the poll

[1] *Harman* v. *Forssenius*, 380 U.S. 528, 538-540, 543-544 (1965); *United States* v. *Texas*, 252 F. Supp. 234, 238-245 (D.C.W.D. Tex.) (three-judge court), *aff'd on other grounds*, 384 U.S. 155 (1966).

[2] H. Rept. No. 1821, 87th Cong., 2d sess. 3, 5 (1962).

[3] *Breedlove* v. *Suttles*, 302 U.S. 277 (1937); *Saunders* v. *Wilkins*, 152 F. 2d 235 (C.A. 4, 1945), *cert. den.*, 328 U.S. 870 (1946); *Butler* v. *Thompson*, 97 F. Supp. 17 (D.C.E.D. Va), *aff'd.*, 341 U.S. 937(1951).

tax as a qualification in state elections [4] and the Supreme Court had voided it as a violation of the equal protection clause.[5]

In *Harman* v. *Forssenius*,[6] the Court struck down a Virginia statute which eliminated the poll tax as an absolute qualification for voting in federal elections and gave federal voters the choice either of paying the tax or of filing a certificate of residence six months before the election. Viewing the latter requirement as imposing upon voters in federal elections an onerous procedural requirement which was not imposed on those on who continued to pay the tax, the Court unanimously held the law to conflict with the new Amendment by penalizing those who chose to exercise a right guaranteed them by the Amendment.

[4] Voting Rights Act of 1965, § 10, 79 Stat. 442, 42 U.S.C. § 1973h. For the results of actions instituted by the Attorney General under direction of this section, *see United States* v. *Texas*, 252 F. Supp. 234 (D.C.W.D. Tex.) (three-judge court) *aff'd. on other grounds*, 384 U.S. 155 (1966); *United States* v. *Alabama*, 252 F. Supp. 95 (D.C.M.D. Ala. 1966) (three-judge court).

[5] *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966).

[6] 380 U.S. 528 (1965).

## PRESIDENTIAL VACANCY, DISABILITY, AND INABILITY

### TWENTY-FIFTH AMENDMENT

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both House of Congress.

SECTION 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists,

he shall resume the powers and duties of his office unless the Vice President and a majority of either the principle officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

### PRESIDENTIAL SUCCESSION

The Twenty-fifth Amendment was an effort to resolve some of the continuing issues revolving about the office of the President; that is, what happens upon the death, removal, or resignation of the President and what is the course to follow if because of some reason the President becomes disabled to a degree that he cannot fulfill his responsibilities? The practice had been well established that the Vice President became President upon the death of the President, as had happened eight times in our history. Presumably, he would become President upon the removal from office of the President. Whether the Vice President would become acting President when the President became unable to carry on and whether the President could resume his office upon his recovering his ability were two questions that had divided scholars and experts. Again, seven Vice Presidents had died in office and one had resigned, so that for some twenty per cent of United States history there had been no Vice President to step up. But the seemingly most insolua-

ble, problem was that of presidential inability—Garfield lying in a coma for eighty days before succumbing to the effects of an assassin's bullet, Wilson an invalid for the last eighteen months of his term, the result of a stroke—with its unanswered questions: who was to determine the existence of an inability, how was the matter to be handled if the President sought to continue, in what manner should the Vice President act, would he be acting President or President, what was to happen if the President recovered. This Amendment, which Congress finally proposed to the States in the aftermath of President Kennedy's assassination, with the Vice Presidency vacant and a President who had previously had a heart attack.

This Amendment has seen multiple use in a period that resulted in the accession to the Presidency and Vice-Presidency for the first time in our history of two men who had not faced the voters in a national election. First, Vice President Spiro Agnew resigned on October 10, 1973, and President Nixon nominated Gerald R. Ford of Michigan to succeed him, following the procedures of § 2 of the Amendment for the first time. Hearings were held upon the nomination by the Senate Rules Committee and the House Judiciary Committee, both Houses thereafter confirmed the nomination, and the new Vice President took the oath of office December 6, 1973. Second, President Richard M. Nixon resigned his office August 9, 1974, and Vice President Ford immediately succeeded to the office and took the presidential oath of office at noon of the same day. Third, again following § 2 of the Amendment, President Ford nominated Nelson A. Rockefeller of New York to be Vice President on August 20, 1974, hearings were held in both Houses, confirmation voted and Mr. Rockefeller took the oath of office December 19, 1974.[1]

[1] For the legislative history, see S. Rept. No. 66, 89th Cong., 1st sess. (1965); H. Rept. No. 203, 89th Cong., 1st sess. (1965); H. Rept. No. 564, 89th Cong., 1st sess. (1965). For an account of the history of the problem, see R. Silva, *Presidential Succession* (Ann Arbor: 1951).

## REDUCTION OF VOTING AGE QUALIFICATION

### TWENTY-SIXTH AMENDMENT

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

### THE EIGHTEEN-YEAR-OLD VOTE

In extending the Voting Rights Act of 1965 in 1970 [1] Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to 18.[2] In a divided decision, the Supreme Court held that Congrss was empowered to lower the age qualification in federal elections but voided the application of the provision in all other elections as beyond congressional power.[3] Confronted thus with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems on the one hand for federal elections and on the other for all other elections, the States were receptive to the proposing of an Amendment by Congress to establish a minimum age qualification at 18 for all elections and ratified it promptly.[4]

[1] 79 Stat. 437, as extended and amended by 84 Stat. 314, 42 U.S.C. § 1971 et seq.

[2] Title 3, 84 Stat. 318, 42 U.S.C. § 1973bb.

[3] *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[4] S. Rept. No. 92-26, 92d Cong., 1st sess. (1971); H. Rept. No. 92-37, 92d Cong., 1st sess. (1971).

# ACTS OF CONGRESS
# HELD UNCONSTITUTIONAL IN WHOLE OR IN PART
# BY THE
# SUPREME COURT OF THE UNITED STATES

1883

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# ACTS OF CONGESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

1. Act of September 24, 1789 (1 Stat. 81, § 13, in part).

Provision that ". . . [the Supreme Court] shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any . . . persons holding office, under authority of the United States" as applied to the issue of mandamus to the Secretary of State requiring him to deliver to plaintiff a commission (duly signed by the President) as justice of the peace in the District of Columbia *held* an attempt to enlarge the original jurisdiction of the Supreme Court, fixed by Article III, § 2.

*Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803).

2. Act of February 20, 1812 (2 Stat. 677).

Provisions establishing board of revision to annul titles conferred many years previously by governors of the Northwest Territory were *held* violative of the due process clause of the Fifth Amendment.

*Reichart* v. *Felps*, 6 Wall. (73 U.S.) 160 (1868).

3. Act of March 6, 1820 (3 Stat. 548, § 8, proviso).

The Missouri Compromise, prohibiting slavery within the Louisiana Territory north of 36° 30′, except Missouri, *held* not warranted as a regulation of Territory belonging to the United States under Article IV, § 3, clause 2 (and *see* Fifth Amendment).

*Scott* v. *Sandford*, 19 How. (60 U.S.) 393 (1857).
Concurring: Chief Justice Taney.
Concurring specially: Justices Wayne, Nelson, Grier, Daniel, Campbell, and Catron.
Dissenting: Justices McLean, Curtis.

4. Act of February 25, 1862 (12 Stat. 345, § 1); July 11, 1862 (12 Stat. 532, § 1); March 3, 1863 (12 Stat. 711, § 3), each in part only.

"Legal tender clauses," making noninterest-bearing United States notes legal tender in payment of "all debts, public and private," so far as applied to debts contracted before passage of the act, *held* not within express or implied powers of Congress under Article I, § 8, and inconsistent with Article I, § 10, and Fifth Amendment.

*Hepburn* v. *Griswold*, 8 Wall. (75 U.S.) 603 (1870); overruled in *Knox* v. *Lee* (*Legal Tender Cases*), 12 Wall. (79 U.S.) 457 (1871).
Concurring: Chief Justice Chase, and Justices Nelson, Clifford, Grier, and Field.
Dissenting: Justices Miller, Swayne, and Davis.

5. Act of May 20, 1862 (§ 35, 12 Stat.); Act of May 21, 1862 (12 Stat. 407); Act of June 25, 1864 (13 Stat. 187); Act of July 23, 1866 (14 Stat. 216); Revised Statutes Relating to the District of Columbia, Act of June 22, 1874, (§§ 281, 282, 294, 304, 18 Stat. pt. 2).

Provisions of law requiring, or construed to require, racial separation in the schools of the District of Columbia, *held* to violate the equal protection component of the due process clause of the Fifth Amendment.

*Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

6. Act of March 3, 1863 (12 Stat. 756, § 5).

"So much of the fifth section . . . as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void" under the Seventh Amendment.

*The Justices* v. *Murray*, 9 Wall. (76 U.S.) 274 (1870).

7. Act of March 3, 1863 (12 Stat. 766, § 5).

Provision for an appeal from the Court of Claims to the Supreme Court—there being, at the time, a further provision (§ 14) requiring an estimate by the Secretary of the Treasury before payment of final judgment, *held* to contravene the judicial finality intended by the Constitution, Article III.

*Gordon* v. *United States*, 2 Wall. (69 U.S.) 561 (1865). (Case was dismissed without opinion; the grounds upon which this decision was made were stated in a posthumous opinion by Chief Justice Taney printed in the appendix to volume 117 U.S. 697.)

8. Act of June 30, 1864 (13 Stat. 311, § 13).

Provision that "any prize cause now pending in any circuit court shall, on the application of all parties in interest . . . be transferred by that court to the Supreme Court . . .," as applied in a case where no action had been taken in the Circuit Court on the appeal from the district court, *held* to propose an appeal procedure not within Article III, § 2.

*The Alicia*, 7 Wall. (74 U.S.) 571 (1869).

9. Act of January 24, 1865 (13 Stat. 424).

Requirement of a test oath (disavowing actions in hostility to the United States) before admission to appear as attorney in a federal court by virtue of any previous admission, *held* invalid as applied to an attorney who had been pardoned by the President for all offenses during the Rebellion—as *ex post facto* (Article I, § 9, clause 3) and an interference with the pardoning power (Article II, § 2, clause 1).

*Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1867).
Concurring: Justices Field, Wayne, Grier, Nelson, and Clifford.
Dissenting: Justices Miller, Swayne, and Davis, and Chief Justice Chase.

10. Act of March 2, 1867 (14 Stat. 484, § 29).

General prohibition on sale of naphtha, etc., for illuminating purposes, if inflammable at less temperature than 110° F., *held* invalid "except so far as the section named operates within the United States, but without the limits of any State," as being a mere police regulation.

*United States* v. *Dewitt*, 9 Wall. (78 U.S.) 41 (1870).

11. Act of May 31, 1870 (16 Stat. 140, §§ 3, 4).

Provisions penalizing (1) refusal of local election official to permit voting by persons offering to qualify under State laws, applicable to any citizens; and (2) hindering of any person from qualifying or voting, *held* invalid under Fifteenth Amendment.

*United States* v. *Reese*, 92 U.S. 214 (1876).
Concurring: Chief Justice Waite, and Justices Miller, Field, Bradley, Swayne, Davis, and Strong.
Dissenting: Justices Clifford, Hunt.

12. Act of July 12, 1870 (16 Stat. 235).

Provision making Presidential pardons inadmissible in evidence in Court of Claims, prohibiting their use by that court in deciding claims or appeals, and requiring dismissal of appeals by the Supreme Court in cases where proof of loyalty had been made otherwise than as prescribed by law, *held* an interference with judicial power under Article III, § 1, and with the pardoning power under Article II, § 2, clause 1.

*United States* v. *Klein*, 13 Wall. (80 U.S.) 128 (1872).
Concurring: Chief Justice Chase, and Justices Nelson, Swayne, Davis, Strong, Clifford, and Field.
Dissenting: Justices Miller, Bradley.

13. Act of June 22, 1874 (18 Stat. 1878, § 4).

Provision authorizing federal courts, in suits for forfeitures under revenue and custom laws, to require production of documents, with allegations expected to be proved therein to be taken as proved on failure to produce such documents, was *held* violative of the search and seizure provision of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment.

*Boyd* v. *United States*, 116 U.S. 616 (1886).
Concurring: Justices Bradley, Field, Harlan, Woods, Matthews, Gray, and Blatchford.
Concurring specially: Justice Miller and Chief Justice Waite.

14. Revised Statutes 1977 (Act of May 31, 1870, 16 Stat. 144).

Provision that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .," *held* invalid under the Thirteenth Amendment.

*Hodges* v. *United States*, 203 U.S. 1 (1906), overruled in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441–443 (1968).
Concurring: Justices Brewer, Brown, Fuller, Peckham, McKenna, Holmes, Moody, and Chief Justice White.
Dissenting: Justices Harlan, Day.

15. Revised Statutes 4937–4947 (Act of July 8, 1870, 16 Stat. 210), and Act of August 14, 1876 (19 Stat. 141).

Original trademark law, applying to marks "for exclusive use within the United States," and a penal act designed solely for the protection of rights defined in the earlier measure, *held* not supportable by Article I, § 8, clause 8 (copyright clause), nor Article I, § 8, clause 3, by reason of its application to intrastate as well as interstate commerce.

*Trade-Mark Cases*, 100 U.S. 82 (1879).

16. Revised Statutes 5132, subdivision 9 (Act of March 2, 1867, 14 Stat. 539).

Provision penalizing "any person respecting whom bankruptcy proceedings are commenced . . . who, within 3 months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud . . .," *held* a police regulation not within the bankruptcy power (Article I, § 4, clause 4).

*United States* v. *Fox*, 95 U.S. 670 (1878).

17. Revised Statutes 5507 (Act of May 31, 1870, 16 Stat. 141, § 4).

Provision penalizing "every person who prevents, hinders, controls, or intimidates another from exercising . . . the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery . . .," *held* not authorized by the Fifteenth Amendment.

*James* v. *Bowman*, 190 U.S. 127 (1903).
Concurring: Justices Brewer, Fuller, Peckham, Holmes, and Day, and Chief Justice White.
Dissenting: Justices Harlan and Brown.

18. Revised Statutes 5519 (Act of April 20, 1871, 17 Stat. 13, § 2).

Section providing punishment in case "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . or for the purpose

of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws . . .," *held* invalid as not being directed at state action proscribed by the Fourteenth Amendment.

*United States* v. *Harris*, 106 U.S. 629 (1883).
Concurring: Justices Woods, Miller, Bradley, Gray, Field, Matthews, and Blatchford, and Chief Justice White.
Dissenting: Justice Harlan.
In *Baldwin* v. *Franks*, 120 U.S. 678 (1887), an attempt was made to distinguish the *Harris* case and to apply the statute to a conspiracy directed at aliens within a State, but the provision was *held* not enforceable in such limited manner.

19. Revised Statutes of the District of Columbia, § 1064 (Act of June 17, 1870, 16 Stat. 154, § 3).

Provision that "prosecutions in the police court [of the District of Columbia] shall be by information under oath, without indictment by grand jury or trial by petit jury," as applied to punishment for conspiracy, *held* to contravene Article III, § 2, clause 3, requiring jury trial of all crimes.

*Callan* v. *Wilson*, 127 U.S. 540 (1888).

20. Act of March 1, 1875 (18 Stat. 336, §§ 1, 2).

Provision "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude"—subject to penalty, *held* not to be supported by the Thirteenth or Fourteenth Amendments.

*Civil Rights Cases*, 109 U.S. 3 (1883), as to operation within States.
Concurring: Justices Bradley, Miller, Field, Woods, Matthews, Gray, and Blatchford, and Chief Justice Waite.
Dissenting: Justice Harlan.

21. Act of March 3, 1875 (18 Stat. 479, § 2).

Provision that "if the party [i.e., a person stealing property from the United States] has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against [the] receiver that the property of the United States therein described has been embezzled, stolen, or purloined," *held* to contravene the Sixth Amendment.

*Kirby* v. *United States*, 174 U.S. 47 (1899).
Concurring: Justices Harlan, Gray, Shiras, White and Peckham, and Chief Justice Fuller.

Dissenting: Justices Brown and McKenna.

22. Act of July 12, 1876 (19 Stat. 80, sec. 6, in part).

Provision that "postmasters of the first, second, and third classes . . . may be removed by the President by and with the advice and consent of the Senate," *held* to infringe the executive power under Article II, § 1, clause 1.

*Myers* v. *United States*, 272 U.S. 52 (1926).
Concurring: Chief Justice Taft, and Justices Van Devanter, Sutherland, Butler, Sanford, and Stone.
Dissenting: Justices Holmes, McReynolds and Brandeis.

23. Act of August 11, 1888 (25 Stat. 411).

Clause, in a provision for the purchase or condemnation of a certain lock and dam in the Monongahela River, that ". . . in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated . . .," *held* to contravene the Fifth Amendment.

*Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893).

24. Act of May 5, 1892 (27 Stat. 25, § 4).

Provision of a Chinese exclusion act, that Chinese persons "convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding 1 year and thereafter removed from the United States . . . (such conviction and judgment being had before a justice, judge, or commissioner upon a summary hearing), *held* to contravene the Fifth and Sixth Amendments.

*Wong Wing* v. *United States*, 163 U.S. 228 (1896).
Concurring: Justices Shiras, Harlan, Gray, Brown, White, and Peckham, and Chief Justice Fuller.
Concurring in part and dissenting in part: Justice Field.

25. Joint Resolution of August 4, 1894 (28 Stat. 1018, No. 41).

Provision authorizing the Secretary of the Interior to approve a second lease of certain land by an Indian chief in Minnesota (granted to lessor's ancestor by art. 9 of a treaty with the Chippewa Indians), *held* an interference with judicial interpretation of treaties under Article III, § 2, clause 1 (and repugnant to the Fifth Amendment).

*Jones* v. *Meehan*, 175 U.S. 1 (1899).

26. Act of August 27, 1894 (28 Stat. 553–560, §§ 27–37).

Income tax provisions of the tariff act of 1894. "The tax imposed by §§ 27 and 37, inclusive . . . so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void be-

cause not apportioned according to representation [Article I, § 2, clause 3], all those sections, constituting one entire scheme of taxation, are necessarily invalid" (158 U.S. 601, 637).

*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), and rehearing, 158 U.S. 601 (1895).

Concurring: Chief Justice Fuller, and Justices Gray, Brewer, Brown, Shiras, Jackson.

Concurring specially: Justice Field.

Dissenting: Justices White and Harlan.

27. Act of January 30, 1897, (29 Stat. 506).

Prohibition on sale of liquor ". . . to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government . . .," *held* a police regulation infringing state powers, and not warranted by the commerce clause, Article I, § 8, clause 3.

*Matter of Heff*, 197 U.S. 488 (1905), overruled in *United States* v. *Nice*, 241 U.S. 591 (1916).

Concurring: Justices Brewer, Brown, White, Peckham, McKenna, Holmes, and Day, and Chief Justice Fuller.

Dissenting: Justice Harlan.

28. Act of June 1, 1898 (30 Stat. 428).

Section 10, penalizing "any employer subject to the provisions of this act" who should "threaten any employee with loss of employment . . . because of his membership in . . . a labor corporation, association, or organization" (the act being applicable "to any common carrier . . . engaged in the transportation of passengers or property . . . from one State . . . to another State . . .," etc.), *held* an infringement of the Fifth Amendment and not supported by the commerce clause.

*Adair* v. *United States*, 208 U.S. 161 (1908).

Concurring: Justices Harlan, Brewer, White, Peckham, and Day, and Chief Justice Fuller.

Dissenting: Justices McKenna and Holmes.

29. Act of June 13, 1898 (30 Stat. 448, 459).

Stamp tax on foreign bills of lading, *held* a tax on exports in violation of Article I, § 9.

*Fairbank* v. *United States*, 181 U.S. 283 (1901).

Concurring: Justices Brewer, Brown, Shiras, Peckham, and Chief Justice Fuller.

Dissenting: Justices Harlan, Gray, White, and McKenna.

30. Same (30 Stat. 448, 460).

Tax on charter parties, as applied to shipments exclusively from ports in United States to foreign ports, *held* a tax on exports in violation of Article I, § 9.

*United States* v. *Hvoslef*, 237 U.S. 1 (1915).

31. Same (30 Stat. 448, 461).

Stamp tax on policies of marine insurance on exports, *held* a tax on exports in violation of Article I, § 9.

*Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915).

32. Act of June 6, 1900 (31 Stat. 359, § 171).

Section of the Alaska Code providing for a six-person jury in trials for misdemeanors, *held* repugnant to the Sixth Amendment, requiring "jury" trial of crimes.

*Rassmussen* v. *United States*, 197 U.S. 516 (1905).

Concurring: Justices White, Brewer, Peckham, McKenna, Holmes, and Day, and Chief Justice Fuller.

Concurring specially: Justices Harlan and Brown.

33. Act of March 3, 1901 (31 Stat. 1341, § 935).

Section of the District of Columbia Code granting the same right of appeal, in criminal cases, to the United States or the District of Columbia as to the defendant, but providing that a verdict was not to be set aside for error found in rulings during trial, *held* an attempt to take an advisory opinion, contrary to Article III, § 2.

*United States* v. *Evans*, 213 U.S. 297 (1909).

34. Act of June 11, 1906 (34 Stat. 232).

Act providing that "every common carrier engaged in trade or commerce in the District of Columbia . . . or between the several States . . . shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers . . . or by reason of any defect . . . due to its negligence in its cars, engines . . . roadbed," etc., *held* not supportable under Article I, § 8, clause 3 because it extended to intrastate as well as interstate commercial activities.

*The Employers' Liability Cases*, 207 U.S. 463 (1908). (The act was upheld as to the District of Columbia in *Hyde* v. *Southern R. Co.*, 31 App. D.C. 466 (1908); and as to the Territories, In *El Paso & N.E. Ry.* v. *Gutierrez*, 215 U.S. 87 (1909).)

Concurring: Justices White and Day.

Concurring specially: Justices Peckham and Brewer and Chief Justice Fuller.

Dissenting: Justices Moody, Harlan, McKenna, and Holmes.

35. Act of June 16, 1906 (34 Stat. 269, § 2).

Provision of Oklahoma Enabling Act restricting relocation of the State capital prior to 1913, *held* not supportable by Article IV, § 3, authorizing admission of new States.

*Coyle* v. *Smith*, 221 U.S. 559 (1911).
Concurring: Justices Lurton, White, Harlan, Day, Hughes, Van Devanter, and Lamar.
Dissenting: Justices McKenna and Holmes.

36. Act of February 20, 1907 (34 Stat. 889, § 3).

Provision in the Immigration Act of 1907 penalizing "whoever . . . shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution . . . any alien woman or girl, within 3 years after she shall have entered the United States," *held* an exercise of police power not within the control of Congress over immigration (whether drawn from the commerce clause or based on inherent sovereignty).

*Keller* v. *United States*, 213 U.S. 138 (1909).
Concurring: Justices Brewer, White, Peckham, McKenna, and Day, and Chief Justice Fuller.
Dissenting: Justices Holmes, Harlan, and Moody.

37. Act of March 1, 1907 (34 Stat. 1028).

Provisions authorizing certain Indians "to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since . . . 1902, insofar as said acts . . . attempt to increase or extend the restrictions upon alienation . . . of allotments of lands of Cherokee citizens . . .," and giving a right of appeal to the Supreme Court, *held* an attempt to enlarge the judicial power restricted by Article III, § 2, to cases and controversies.

*Muskrat* v. *United States*, 219 U.S. 346 (1911).

38. Act of May 27, 1908 (35 Stat. 313, § 4).

Provision making locally taxable "all land [of Indians of the Five Civilized Tribes] from which restrictions have been or shall be removed," *held* a violation of the Fifth Amendment, in view of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, providing tax-exemption for allotted lands while title in original allottee, not exceeding 21 years.

*Choate* v. *Trapp*, 224 U.S. 665 (1912).

39. Act of February 9, 1909, § 2, 35 Stat. 614, as amended.

Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of cocaine knew of its illegal importation into the United States *held*, in light of the fact that more cocaine is

produced domestically than is brought into the country and in absence of any showing that defendant could have known his cocaine was imported, if it was, inapplicable to support conviction from mere possession of cocaine.

*Turner* v. *United States*, 396 U.S. 398 (1970).
Concurring specially: Justices Black and Douglas.

40. Act of August 19, 1911 (37 Stat. 28).

A proviso in § 8 of the Federal Corrupt Practices Act fixing a maximum authorized expenditure by a candidate for Senator "in any campaign for his nomination and election," as applied to a primary election, *held* not supported by Article I, § 4, giving Congress power to regulate the manner of holding elections for Senators and Representatives.

*Newberry* v. *United States*, 256 U.S. 232 (1921), overruled in *United States* v. *Classic*, 313 U.S. 299 (1941).
Concurring: Justices McReynolds, McKenna, Holmes, Day, and Van Devanter.
Concurring specially: Justices Pitney, Brandeis, and Clarke.
Dissenting: Chief Justice White (concurring in part).

41. Act of June 18, 1912 (37 Stat. 136, § 8).

Part of § 8 giving Juvenile Court of the District of Columbia (proceeding upon information) concurrent jurisdiction of desertion cases (which were, by law, punishable by fine or imprisonment in the workhouse at hard labor for 1 year), *held* invalid under the Fifth Amendment which gives right to presentment by a grand jury in case of infamous crimes.

*United States* v. *Moreland*, 258 U.S. 433 (1922).
Concurring: Justices McKenna, Day, Van Devanter, Pitney, and McReynolds.
Dissenting: Justices Brandeis, Holmes, and Chief Justice Taft.

42. Act of March 4, 1913 (37 Stat. 988, part of par. 64).

Provision of the District of Columbia Public Utility Commission Act authorizing appeal to the United States Supreme Court from decrees of the District of Columbia Court Appeals modifying valuation decisions of the Utilities Commission, *held* an attempt to extend the appellate jurisdiction of the Supreme Court to cases not strictly judicial within the meaning of Article III, § 2.

*Keller* v. *Potomac Elec. Co.*, 261 U.S. 428 (1923).

43. Act of September 1, 1916 (39 Stat. 675).

The original Child Labor Law, providing "that no producer . . . shall ship . . . in interstate commerce . . . any article or commodity the product of any mill . . . in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work than 8 hours in any day or

more than 6 days in any week . . .," *held* not within the commerce power of Congress.

*Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).
Concurring: Justices Day, Van Devanter, Pitney, and McReynolds, and Chief Justice White.
Dissenting: Justices Holmes, McKenna, Brandeis, and Clarke.

44. Act of September 8, 1916 (39 Stat. 757, § 2(a), in part).

Provision of the income tax law of 1916, that a "stock dividend shall be considered income, to the amount of its cash value," *held* invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under Article I, § 2, clause 3.

*Eisner* v. *Macomber*, 256 U.S. 189 (1920).
Concurring: Justices Pitney, McKenna, Van Devanter, and McReynolds, and Chief Justice White.
Dissenting: Justices Holmes, Day, Brandeis, Clarke.

45. Act of October 6, 1917 (40 Stat. 395).

The amendment of §§ 24 and 256 of the Judicial Code (which prescribe in jurisdiction of district courts) "saving . . . to claimants the rights and remedies under the workmen's compensation law of any State," *held* an attempt to transfer federal legislative powers to the States—the Constitution, by Article III, § 2, and Article I, § 8, having adopted rules of general maritime law.

*Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920).
Concurring: Justices McReynolds, McKenna, Day and Van Devanter, and Chief Justice White.
Dissenting: Justices Holmes, Pitney, Brandeis, and Clarke.

46. Act of September 19, 1918 (40 Stat. 960).

Specifically, that part of the Minimum Wage Law of the District of Columbia which authorized the Wage Board "to ascertain and declare . . . (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals . . .," *held* to interfere with freedom of contract under the Fifth Amendment.

*Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), overruled in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937).
Concurring: Justices Sutherland, McKenna, Van Devanter, McReynolds, and Butler.
Dissenting: Chief Justice Taft, and Justices Sanford, and Holmes.

47. Act of February 24, 1919 (40 Stat. 1065, § 213, in part).

That part of § 213 of the of Revenue Act of 1919 which provided that ". . . for the purposes of the title . . . the term 'gross income'

. . . includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of . . . judges of the Supreme and inferior courts of the United States . . . the compensation received as such) . . ." as applied to a judge in office when the act was passed, *held* a violation of the guaranty of judges' salaries, in Article III, § 1.

*Evans* v. *Gore*, 253 U.S. 245 (1920).

*Miles* v. *Graham*, 268 U.S. 501 (1925), held it invalid as applied to a judge taking office subsequent to the date of the act. Both cases were overruled by *O'Malley* v. *Woodrough*, 307 U.S. 227 (1939).

Concurring: Justices Van Devanter, McKenna, Day, Pitney, McReynolds, and Clarke, and Chief Justice White.

Dissenting: Justices Holmes and Brandeis.

48. Act of February 24, 1919 (40 Stat. 1097, § 402(c)).

That part of the estate tax law providing that "gross estate" of a decedent should include value of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he had at any time created a trust, in comtemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a *bona fide* sale . . ." as applied to a transfer of property made prior to the act and intended to take effect "in possession or enjoyment" at death of grantor, but not in fact testamentary or designed to evade taxation, *held* confiscatory, contrary to Fifth Amendment.

*Nicholds* v. *Coolidge*, 274 U.S. 531 (1927).

Concurring: Justices McReynolds, Van Devanter, Sutherland, and Butler, and Chief Justice Taft.

Concurring specially (only in the result): Justices Holmes, Brandeis, Sanford, and Stone.

49. Act of February 24, 1919, title XII (40 Stat. 1138, entire title).

The Child Labor Tax Act, providing that "every person . . . operating . . . any . . . factory . . . in which children under the age of 14 years have been employed or permitted to work . . . shall pay . . . in addition to all other taxes imposed by law, an excise tax equivalent to 10 percent of the entire net profits received . . . for such year from the sale . . . of the product of such . . . factory . . .," *held* beyond the taxing power under Article I, § 8, clause 1, and an infringement of state authority.

*Bailey* v. *Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20 (1922).

Concurring: Chief Justice Taft, and Justices McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, and Brandeis.

Dissenting: Justice Clarke.

50. Act of October 22, 1919 (41 Stat. 298, § 2), amending Act of August 10, 1917 (40 Stat. 277, § 4).

(a) § 4 of the Lever Act, providing in part "that it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . . and fixing a penalty, *held* invalid to support an indictment for charging an unreasonable price on sale—as not setting up an ascertainable standard of guilt within the requirement of the Sixth Amendment.

*United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

Concurring: Chief Justice White, and Justices McKenna, Holmes, Van Devanter, McReynolds, and Clarke.

Concurring specifically: Justices Pitney and Brandeis.

(b) That provision of § 4 making it unlawful "to conspire, combine, agree, or arrange with any other person to . . . exact excessive prices for any necessaries" and fixing a penalty, *held* invalid to support an indictment, on the reasoning of the *Cohen Grocery* case.

*Weeds, Inc.* v. *United States*, 255 U.S. 109 (1921).

Concurring: Chief Justice White, and Justices McKenna, Holmes, Van Devanter, McReynolds, and Clarke.

Concurring specially: Justices Pitney and Brandeis.

51. Act of August 24, 1921 (42 Stat. 187, Future Trading Act).

(a) § 4 (and interwoven regulations) providing a "tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery, except . . . where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market' . . .," *held* not within the taxing power under Article I, § 8.

*Hill* v. *Wallace*, 259 U.S. 44 (1922).

(b) § 3, providing "That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each . . . option for a contract either of purchase or sale of grain . . .," *held* invalid on the same reasoning.

*Trusler* v. *Crooks*, 269 U.S. 475 (1926).

52. Act of November 23, 1921 (42 Stat. 261, § 245, in part).

Provision of Revenue Act of 1921 abating the deduction (4 percent of mean reserves) allowed from taxable income of life insurance companies in general by the amount of interest on their tax-exempts, and

so according no relative advantage to the owners of the tax-exempt securities, *held* to destroy a guaranteed exemption.

*National Life Ins.* v. *United States*, 277 U.S. 508 (1928).
Concurring: Justices McReynolds, Van Devanter, Sutherland, Butler, and Sanford, and Chief Justice Taft.
Dissenting: Justices Brandeis, Holmes, and Stone.

53. Act of June 10, 1922 (42 Stat. 634).

A second attempt to amend §§ 24 and 256 of the Judicial Code, relating to jurisdiction of district courts, by saving "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State . . ." *held* invalid on authority of *Knickerbocker Ice Co.* v. *Stewart.*

*Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924).
Concurring: Justices McReynolds, McKenna, Holmes, Van Devanter, Sutherland, Butler, and Sanford, and Chief Justice Taft.
Dissenting: Justice Brandeis.

54. Act of June 2, 1924 (43 Stat. 313).

The gift tax provisions of the Revenue Act of 1924, applicable to gifts made during the calendar year, were *held* invalid under the Fifth Amendment insofar as they applied to gifts made before passage of the act.

*Untermeyer* v. *Anderson*, 276 U.S. 440 (1928).
Concurring: Justices McReynolds, Sanford, Van Devanter, Sutherland, and Butler, and Chief Justice Taft.
Dissenting: Justices Holmes, Brandeis, and Stone.

55. Act of February 26, 1926 (44 Stat. 70, § 302, in part).

Stipulation creating a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death of donor and requiring the value thereof to be included in computing the death transfer tax on decedent's estate was *held* to effect an invalid deprivation of property without due process.

*Heiner* v. *Donnan*, 258 U.S. 312 (1932).
Concurring: Justices Sutherland, Van Devanter, McReynolds, Butler, and Roberts, and Chief Justice Hughes.
Dissenting: Justices Stone and Brandeis.

56. Act of February 26, 1926 (44 Stat. 95, § 701).

Provision imposing a special excise tax of $1,000 on liquor dealers operating in States where such business is illegal, was *held* a penalty, without constitutional support following repeal of the Eighteenth Amendment.

*United States* v. *Constantine*, 296 U.S. 287 (1935).

Concurring: Justices Roberts, Van Devanter, McReynolds, Sutherland, and Butler, and Chief Justice Hughes.
Dissenting: Justices Cardozo, Brandeis, and Stone.

57. Act of March 20, 1933 (48 Stat. 11, § 17, in part).

Clause in the Economy Act of 1933 providing ". . . all laws granting or pertaining to yearly renewable term war risk insurance are hereby repealed," *held* invalid to abrogate an outstanding contract of insurance, which is a vested right protected by the Fifth Amendment.

*Lynch* v. *United States*, 292 U.S. 571 (1934).

58. Act of May 12, 1933 (48 Stat. 31).

Agricultural Adjustment Act providing for processing taxes on agricultural commodities and benefit payments therefore to farmers, *held* not within the taxing power under Article I, § 8, clause 1.

*United States* v. *Butler*, 297 U.S. 1 (1936).
Concurring: Justices Roberts, Van Devanter, McReynolds, Sutherland, and Butler, and Chief Justice Hughes.
Dissenting: Justices Stone, Brandeis, and Cardozo.

59. Act of Joint Resolution of June 5, 1933 (48 Stat. 113, § 1).

Abrogation of gold clause in Government obligations, *held* a repudiation of the pledge implicit in the power to borrow money (Article I, § 8, clause 2), and within the prohibition of the Fourteenth Amendment, against questioning the validity of the public debt. (The majority of the Court, however, held plaintiff not entitled to recover under the circumstances.)

*Perry* v. *United States*, 294 U.S. 330 (1935).
Concurring: Chief Justice Hughes, and Justices Brandeis, Roberts, and Cardozo.
Concurring specially: Justice Stone.
Dissenting: Justices McReynolds, Van Devanter, Sutherland, and Butler.

60. Act of June 16, 1933 (48 Stat. 195, the National Industrial Recovery Act).
(a) Title I, except § 9.

Provisions relating to codes of fair competition, authorized to be approved by the President in his discretion "to effectuate the policy" of the act, *held* invalid as a delegation of legislative power (Article I, § 1) and not within the commerce power (Article I, § 8, clause 3).

*Schechter Corp.* v. *United States*, 295 U.S. 495 (1935).
Concurring: Chief Justice Hughes, and Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, and Roberts.
Concurring specially: Justices Cardozo and Stone.

(b) § 9(c).

Clause of the oil regulation section authorizing the President "to prohibit the transportation in interstate . . . commerce of petroleum

. . . produced or withdrawn from storage in excess of the amount permitted . . . by any State law . . ." and prescribing a penalty for violation of orders issued thereunder, *held* invalid as a delegation of legislative power.

*Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).
Concurring: Chief Justice Hughes, and Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, and Roberts.
Dissenting: Justice Cardozo.

61. Act of June 16, 1933 (48 Stat. 307, § 13).

Temporary reduction of 15 percent in retired pay of judges, retired from service but subject to performance of judicial duties under the Act of March 1, 1929 (45 Stat. 1422), was *held* a violation of the guaranty of judges' salaries in Article III, § 1.

*Booth* v. *United States*, 291 U.S. 339 (1934).

62. Act of April 27, 1934 (48 Stat. 646 § 6), amending § 5(i) of Home Owners' Loan Act of 1933.

Provision for conversion of state building and loan associations into federal associations, upon vote of 51 percent of the votes cast at a meeting of stockholders called to consider such action, *held* an encroachment on reserved powers of State.

*Hopkins Savings Assn.* v. *Cleary*, 296 U.S. 315 (1935).

63. Act of May 24, 1934 (48 Stat. 798).

Provision for readjustment of municipal indebtedness, though "adequately related" to the bankruptcy power, was *held* invalid as an interference with state sovereignty.

*Ashton* v. *Cameron County Dist.*, 298 U.S. 513 (1936).
Concurring: Justices McReynolds, Van Devanter, Sutherland, Butler, and Roberts.
Dissenting: Justices Cardozo, Brandeis, and Stone, and Chief Justice Hughes.

64. Act of June 27, 1934 (48 Stat. 1283).

The Railroad Retirement Act, establishing a detailed compulsory retirement system for employees of carriers subject to the Interstate Commerce Act, *held*, not a regulation of commerce within the meaning of Article I, § 8, clause 3, and violative of the due process clause (Fifth Amendment).

*Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935).
Concurring: Justices Roberts, Van Devanter, McReynolds, Sutherland, and Butler.
Dissenting: Chief Justice Hughes, and Justices Brandeis, Stone, and Cardozo.

65. Act of June 28, 1934 (48 Stat. 1289, ch. 869).

The Frazier-Lemke Act, adding subsection (s) to § 75 of the Bankruptcy Act, designed to preserve to mortgagors the ownership and en-

joyment of their farm property and providing specifically, in paragraph 7, that a bankrupt left in possession has the option at any time within 5 years of buying at the appraised value—subject meanwhile to no monetary obligation other than payment of reasonable rental, *held* a violation of property rights, under the Fifth Amendment.

*Louisville Bank* v. *Radford*, 295 U.S. 555 (1935).

66. Act of August 24, 1935 (48 Stat. 750).

Amendments of Agricultural Adjustment Act *held* not within the taxing power.

*Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110 (1936).

67. Act of August 30, 1935 (49 Stat. 991).

Bituminous Coal Conservation Act of 1935, *held* to impose, not a tax within Article I, § 8, but a penalty not sustained by the commerce clause (Article I, § 8, clause 3).

*Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).
Concurring: Justices Sutherland, Van Devanter, McReynolds, Butler, and Roberts.
Concurring specially: Chief Justice Hughes.
Concurring in part and dissenting in part: Justices Cardozo, Brandeis, and Stone.

68. Act of June 25, 1938 (52 Stat. 1040).

Federal Food, Drug, and Cosmetic Act of 1938, § 301(f), prohibiting the refusal to permit entry or inspection of premises by federal officers *held* void for vagueness and as violative of the due process clause of the Fifth Amendment.

*United States* v. *Cardiff*, 344 U.S. 174 (1952).
Concurring: Justices Douglas, Black, Reed, Frankfurter, Jackson, Clark, and Minton, and Chief Justice Vinson.
Dissenting: Justice Burton.

69. Act of June 30, 1938 (52 Stat. 1251).

Federal Firearms Act, § 2(f), establishing a presumption of guilt based on a prior conviction and present possession of a firearm, *held* to violate the test of due process under the Fifth Amendment.

*Tot* v. *United States*, 319 U.S. 463 (1943).
Concurring: Justices Roberts, Reed, Frankfurter, Jackson, and Rutledge, and Chief Justice Stone.
Concurring specially: Justices Black and Douglas.

70. Act of August 10, 1939 (§ 201(d), 53 Stat. 1362, as amended, 42 U.S.C. § 402(g)).

Provision of Social Security Act that grants survivors' benefits based on the earnings of a deceased husband and father covered by

the Act to his widow and to the couple's children in her care but that grants benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower *held* violative of the right to equal protection secured by the Fifth Amendment's due process clause, since it unjustifiably discriminates against female wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for male wage earners.

*Weinberger* v. *Wisenfeld*, 420 U.S. 636 (1975).

71. Act of October 14, 1940 (54 Stat. 1169 § 401(g)); as amended by Act of January 20, 1944 (58 Stat. 4, § 1).

Provision of Aliens and Nationality Code (8 U.S.C. § 1481(a)(8)), derived from the Nationality Act of 1940, as amended, that citizenship shall be lost upon conviction by court martial and dishonorable discharge for deserting the armed services in time of war, *held* invalid as imposing a cruel and unusual punishment barred by the Eighth Amendment and not authorized by the war powers conferred by Article I, § 8, clauses 11 to 14.

*Trop* v. *Dulles*, 356 U.S. 86 (1958).
Concurring: Chief Justice Warren and Justice Whittaker.
Concurring specially: Justices Black, Douglas, and Brennan.
Dissenting: Justices Frankfurter, Burton, Clark, and Harlan.

72. Act of November 15, 1943 (57 Stat. 450).

Urgent Deficiency Appropriation Act of 1943, § 304, providing that no salary should be paid to certain named federal employees out of moneys appropriated, *held* to violate Article I, § 9, clause 3, forbidding enactment of bill of attainder or *ex post facto* law.

*United States* v. *Lovett*, 328 U.S. 303 (1946).
Concurring: Justices Black, Douglas, Murphy, Rutledge, and Burton, and Chief Justice Stone.
Concurring specially: Justices Frankfurter and Reed.

73. Act of September 27, 1944 (58 Stat. 746, § 401(J)); and Act of June 27, 1952 (66 Stat. 163, 267–268, § 349(a)(10)).

§ 401(J) of Immigration and Nationality Act of 1940, added in 1944, and § 49(a)(10) of the Immigration and Nationality Act of 1952 depriving one of citizenship, without the procedural safeguards guaranteed by the Fifth and Sixth Amendments, for the offense of leaving or remaining outside the country, in time of war or national emergency, to evade military service *held* invalid.

*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963).
Concurring: Justices Goldberg, Black, Douglas, and Chief Justice Warren.
Concurring specially: Justice Brennan.

Dissenting: Justices Harlan, Clark, Stewart, and White.

74. Act of July 31, 1946 (ch. 707, § 7, 60 Stat. 719).

District court decision *holding* invalid under First and Fifth Amendments statute prohibiting parades or assemblages on United States Capitol grounds is summarily affirmed.

*Chief of Capitol Police* v. *Jeanette Rankin Brigade*, 409 U.S. 972 (1972).

75. Act of June 25, 1948 (62 Stat. 760).

Provision of Lindberg Kidnapping Act which provided for the imposition of the death penalty only if recommended by the jury *held* unconstitutional inasmuch as it penalized the assertion of a defendant's Sixth Amendment right to jury trial.

*United States* v. *Jackson*, 390 U.S. 570 (1968).

Concurring: Justices Stewart, Douglas, Harlan, Brennan, Fortas, and Chief Justice Warren.

Dissenting: Justices White and Black.

76. Act of August 18, 1949 (63 Stat. 617, 40 U.S.C. § 13k).

Provision, insofar as it applies to the public sidewalks surrounding the Supreme Court building, which bars the display of any flag, banner, or device designed to bring into public notice any party, organization, or movement *held* violative of the free speech clause of the First Amendment.

*United States* v. *Grace*, 461 U.S. 171 (1983).

Concurring: Justices White, Brennan, Blackmun, Powell, Rehnquist, O'Connor, and Chief Justice Burger.

Concurring in part and dissenting in part: Justices Marshall and Stevens.

77. Act of May 5, 1950 (64 Stat. 107).

Article 3(a) of the Uniform Code of Military Justice subjecting civilian ex-servicemen to court martial for crime committed while in military service *held* to violate Article III, § 2, and the Fifth and Sixth Amendments.

*Toth* v. *Quarles*, 350 U.S. 11 (1955).

Concurring: Justices Black, Frankfurter, Douglas, Clark, Harlan, and Chief Justice Warren.

Dissenting: Justices Reed, Burton, and Minton.

78. Act of May 5, 1950 (64 Stat. 107).

Insofar as Article 2(11) of the Uniform Code of Military Justice subjects civilian dependents accompanying members of the armed forces overseas in time of peace to trial, in capital cases, by court martial, it is violative of Article III, § 2, and the Fifth and Sixth Amendments.

*Reid* v. *Covert*, 354 U.S. 1 (1957).

Concurring: Justices Black, Douglas, and Chief Justice Warren.
Concurring specifically: Justices Frankfurter and Harlan.
Dissenting: Justices Clark and Burton.

Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed on land bases overseas by employees of the armed forces who have not been inducted or who have not voluntarily enlisted therein, it is violative of the Sixth Amendment.

*McElroy* v. *United States*, 361 U.S. 281 (1960).
Concurring: Justices Clark, Black, Douglas, and Brennan, and Chief Justice Warren.
Dissenting: Justices Harlan and Frankfurter.
Concurring in Part and dissenting in Part: Justices Whittaker and Stewart.

Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed by civilian dependents accompanying members of the armed forces overseas, it is violative of Article III, § 2, and the Fifth and Sixth Amendments.

*Kinsella* v. *United States*, 361 U.S. 234 (1960).
Concurring: Justices Clark, Black, Douglas, and Brennan, and Chief Justice Warren.
Dissenting: Justices Harlan and Frankfurter.
Concurring in part and dissenting in part: Justices Whittaker and Stewart.

Insofar as the aforementioned provision is invoked in time of peace for the trial of a capital offense committed by a civilian employee of the armed forces overseas, it is violative of Article III, § 2, and the Fifth and Sixth Amendments.

*Grisham* v. *Hagan*, 361 U.S. 278 (1960).
Concurring: Justices Clark, Black, Douglas, and Brennan, and Chief Justice Warren.
Dissenting: Justices Harlan and Frankfurter.
Concurring in part and dissenting in part: Justices Whittaker and Stewart.

79. Act of August 16, 1950 (64 Stat. 451, as amended).

Statutory scheme authorizing the Postmaster General to close the mails to distributors of obscene materials *held* unconstitutional in the absence of procedural provisions which would assure prompt judicial determination that protected materials were not being restrained.

*Blount* v. *Rizzi*, 400 U.S. 410 (1971).

80. Act of August 28, 1950 (§ 202(c)(1)(D), 64 Stat. 483, 42 U.S.C. § 402(c)(1)(C)).

District court decision *holding* invalid as a violation of the equal protection component of the Fifth Amendment's due process clause a Social Security provision entitling a husband to insurance benefits

through his wife's benefits, provided he received at least one-half of his support from her at the time she became entitled, but requiring no such showing of support for the wife to qualify for benefits through her husband, is summarily affirmed.

*Califano* v. *Silbowitz*, 430 U.S. 934 (1977).

81. Act of August 28, 1950 (§ 202(f)(1)(E), 64 Stat. 485, 42 U.S.C. § 402(f)(1)(D)).

Social Security Act provision awarding survivor's benefits based on earnings of a deceased wife to widower only if he was receiving at least half of his support from her at the time of her death, whereas widow receives benefits regardless of dependency, *held* violative of equal protection element of Fifth Amendment's due process clause because of its impermissible sex classification.

*Califano* v. *Goldfarb*, 430 U.S. 199 (1977).
Concurring: Justices Brennan, White, Marshall, and Powell.
Concurring specially: Justice Stevens.
Dissenting: Justices Rehnquist, Stewart, Blackmun, and Chief Justice Burger.

82. Act of September 23, 1950 (Title I, § 5, 64 Stat. 992).

Provision of Subversive Activities Control Act making it unlawful for member of Communist front organization to work in a defense plant *held* to be an overbroad infringement of the right of association protected by the First Amendment.

*United States* v. *Robel*, 389 U.S. 258 (1967).
Concurring: Chief Justice Warren and Justices Black, Douglas, Stewart, and Fortas.
Concurring specially: Justice Brennan.
Dissenting: Justices White and Harlan.

83. Act of September 23, 1950 (64 Stat. 993, § 6).

Subversive Activities Control Act of 1950, § 6, providing that any member of a Communist organization, which has registered or has been ordered to register, commits a crime if he attempts to obtain or use a passport, *held* violative of due process under the Fifth Amendment.

*Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).
Concurring: Justices Goldberg, Brennan, and Stewart, and Chief Justice Warren.
Concurring specially: Justices Black and Douglas.
Dissenting: Justices Clark, Harlan, and White.

84. Act of September 28, 1950 (Title I, §§ 7, 8, 64 Stat. 993).

Provisions of Subversive Activities Control Act of 1950 requiring in lieu of registration by the Communist Party registration by Party members may not be applied to compel registration or to prosecute for refusal to register of alleged members who have asserted their

privilege against self-incrimination inasmuch as registration would expose such persons to criminal prosecution under other laws.

*Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965).

85. Act of October 30, 1951 (§ 5(f)(ii), 65 Stat. 683, 45 U.S.C. § 231a(c)(3)(ii)).

Provision of Railroad Retirement Act similar to section voided in *Goldfarb* (ns. 81).

*Railroad Retirement Bd.* v. *Kalina*, 431 U.S. 909 (1977).

86. Act of June 27, 1952 (Title III, § 349, 66 Stat. 267).

Provision of Immigration and Nationality Act of 1952 providing for revocation of United States citizenship of one who votes in a foreign election *held* unconstitutional under § 1 of the Fourteenth Amendment.

*Afroyim* v. *Rusk*, 387 U.S. 253 (1967).

Concurring: Justices Black, Douglas, Brennan, and Fortas, and Chief Justice Warren.

Dissenting: Justices Harlan, Clark, Stewart, and White.

87. Act of June 27, 1952 (66 Stat. 163, 269, § 352(a)(1)).

§ 352(a)(1) of the Immigration and Nationality Act of 1952 depriving a naturalized person of citizenship for "having a continuous residence for three years" in state of his birth or prior nationality *held* violative of the due process clause of the Fifth Amendment.

*Schneider* v. *Rusk*, 377 U.S. 163 (1964).

Concurring: Justices Douglas, Black, Stewart, and Goldberg, and Chief Justice Warren.

Dissenting: Justices Clark, Harlan, and White.

88. Act of August 16, 1954 (68A Stat. 525, Int. Rev. Code of 1954, §§ 4401–4423).

Provisions of tax laws requiring gamblers to pay occupational and excise taxes may not be used over an assertion of one's privilege against self-incrimination either to compel extensive reporting of activities, leaving the registrant subject to prosecution under the laws of all the States with the possible exception of Nevada, or to prosecute for failure to register and report, because the scheme abridged the Fifth Amendment privilege.

*Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968).

Concurring: Justices Harlan, Black, Douglas, White, and Fortas.

Concurring specially: Justices Brennan and Stewart.

Dissenting: Chief Justice Warren.

89. Act of August 16, 1954 (68A Stat. 560, Marijuana Tax Act, §§ 4741, 4744, 4751, 4753).

Provisions of tax laws requiring possessors of marijuana to register and to pay a transfer tax may not be used over an assertion of the privilege against self-incrimination to compel registration or to prosecute for failure to register.

*Leary* v. *United States*, 395 U.S. 6 (1969).
Concurring specially: Chief Justice Warren and Justice Stewart.

90. Act of August 16, 1954 (68A Stat. 728, Int. Rev. Code of 1954, §§ 5841, 5851).

Provisions of tax laws requiring the possessor of certain firearms, which it is made illegal to receive or to possess, to register with the Treasury Department may not be used over an assertion of the privilege against self-incrimination to prosecute one for failure to register or for possession of an unregistered firearm since the statutory scheme abridges the Fifth Amendment privilege.

*Haynes* v. *United States*, 390 U.S. 85 (1968).
Concurring: Justices Harlan, Black, Douglas, Brennan, Stewart, White, and Fortas.
Dissenting: Chief Justice Warren.

91. Act of August 16, 1954 (68A Stat. 867, Int. Rev. Code of 1954, § 7302).

Provision of tax laws providing for forfeiture of property used in violating internal revenue laws may not be constitutionally used in face of invocation of privilege against self-incrimination to condemn money in possession of gambler who had failed to comply with the registration and reporting scheme held void in *Marchetti* v. *United States*, 390 U.S. 39 (1968).

*United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971).
Concurring: Justices Harlan, Black, Douglas, Brennan, and Marshall.
Dissenting: Justices White, Stewart, Blackmun, and Chief Justice Burger.

92. Act of July 18, 1956 (§ 106, Stat. 570).

Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of marijuana knew of its illegal importation into the United States *held*, in absence of showing that all marijuana in United States was of foreign origin and that domestic users could know that their marijuana was more likely than not of foreign origin, unconstitutional under the due process clause of the Fifth Amendment.

*Leary* v. *United States*, 395 U.S. 6 (1969).
Concurring specially: Justice Black.

93. Act of August 10, 1956 (70A Stat. 65, Uniform Code of Military Justice, Articles 80, 130, 134).

Servicemen may not be charged under the Act and tried in military courts because of the commission of non-service connected crimes committed off-post and off-duty which are subject to civilian court jurisdiction where the guarantees of the Bill of Rights are applicable.

*O'Callahan* v. *Parker*, 395 U.S. 258 (1969).
Concurring: Justices Douglas, Black Brennan, Fortas, and Marshall, and Chief Justice Warren.
Dissenting: Justices Harlan, Stewart, and White.

94. Act of August 10, 1956 (70A Stat. 35, § 772(f)).

Proviso of statute permitting the wearing of United States military apparel in theatrical productions only if the portrayal does not tend to discredit the armed force imposes an unconstitutional restraint upon First Amendment freedoms and precludes a prosecution under 18 U.S.C. § 702 for unauthorized wearing of uniform in a street skit disrespectful of the military.

*Schacht* v. *United States*, 398 U.S. 58 (1970).

95. Act of September 2, 1958 (§ 5601(b)(1), 72 Stat. 1399).

Provision of Internal Revenue Code creating a presumption that one's presence at the site of an unregistered still shall be sufficient for conviction under a statute punishing possession, custody, or control of an unregistered still unless defendant otherwise explained his presence at the site to the jury *held* unconstitutional because the presumption is not a legitimate, rational, or reasonable inference that defendant was engaged in one of the specialized functions proscribed by the statute.

*United States* v. *Romano*, 382 U.S. 136 (1965).

96. Act of September 2, 1958 (§ 1(25)(B), 72 Stat. 1446), and Act of September 7, 1962 (§ 401, 76 Stat. 469).

Federal statutes providing that spouses of female members of the Armed Forces must be dependent in fact in order to qualify for certain dependent's benefits, whereas spouses of male members are statutorily deemed dependent and automatically qualified for allowances, whatever their actual status, *held* an invalid sex classification under the equal protection principles of the Fifth Amendment's due process clause.

*Frontiero* v. *Richardson*, 411 U.S. 677 (1973).
Concurring: Justices Brennan, Douglas, White, and Marshall.
Concurring specially: Justices Powell and Blackmun and Chief Justice Burger, Justice Stewart.
Dissenting: Justice Rehnquist.

97. Act of September 14, 1959 (§ 504, 73 Stat. 536).

Provision of Labor-Management Reporting and Disclosure Act of 1959 making it a crime for a member of the Communist Party to serve as an officer or, with the exception of clerical or custodial positions, as an employee of a labor union *held* to be a bill of attainder and unconstitutional.

*United States* v. *Brown*, 381 U.S. 437 (1965).
Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, and Goldberg.
Dissenting: Justices White, Clark, Harlan, and Stewart.

98. Act of October 11, 1962 (§ 305, 76 Stat. 840).

Provision of Postal Services and Federal Employees Salary Act of 1962 authorizing Post Office Department to detain material determined to be "communist political propaganda" and to forward it to the addressee only if he requested it after notification by the Department, the material to be destroyed otherwise, *held* to impose on the addressee an affirmative obligation which amounted to an abridgment of First Amendment rights.

*Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).

99. Act of October 15, 1962 (76 Stat. 914).

Provision of District of Columbia laws requiring that a person to be eligible to receive welfare assistance must have resided in the District for at least one year impermissibly classified persons on the basis of an assertion of the right to travel interstate and therefore *held* to violate the due process clause of the Fifth Amendment.

*Shapiro* v. *Thompson*, 394 U.S. 618 (1969).
Concurring: Justices Brennan, Douglas, Stewart, White, Fortas, and Marshall.
Dissenting: Chief Justice Warren and Justices Black and Harlan.

100. Act of December 16, 1963 (77 Stat. 378, 20 U.S.C. § 754).

Provision of Higher Education Facilities Act of 1963 which in effect removed restriction against religious use of facilities constructed with federal funds after 20 years *held* to violate the establishment clause of the First Amendment inasmuch as the property will still be of considerable value at the end of the period and removal of the restriction would constitute a substantial governmental contribution to religion.

*Tilton* v. *Richardson*, 403 U.S. 672 (1971).

101. Act of July 30, 1965 (§ 339, 79 Stat. 409).

Section of Social Security Act qualifying certain illegitimate children for disability insurance benefits by presuming dependence but disqualifying other illegitimate children, regardless of dependency, if

the disabled wage earner parent did not contribute to the child's support before the onset of the disability or if the child did not live with the parent before the onset of disability held to deny latter class of children equal protection as guaranteed by the due process clause of the Fifth Amendment.

*Jiminez* v. *Weinberger*, 417 U.S. 628 (1974).
Concurring: Chief Justice Burger and Justices Douglas, Brennan, Stewart White, Marshall, Blackmun, and Powell.
Dissenting: Justice Rehnquist.

102. Act of September 3, 1966 (§ 102(b), 80 Stat. 831), and Act of April 8, 1974 (§§ 6(a)(1) amending § 3(d) of Act, 6(a)(2) amending 3 (e)(2)(C), 6(a)(5) amending § 3(s)(5), and 6(a)(6) amending § 3(x)).

Those sections of the Fair Labor Standards Act extending wage and hour coverage to the employees of state and local governments *held* invalid because Congress lacks the authority under the commerce clause to regulate employee activities in areas of traditional governmental functions of the States.

*National League of Cities* v. *Usery*, 426 U.S. 833 (1976).
Concurring: Justices Rehnquist, Stewart, Blackmun, Powell, and Chief Justice Burger.
Dissenting: Justices Brennan, White, and Marshall; Justice Stevens.

103. Act of January 2, 1968 (§ 163(a)(2), 81 Stat. 872).

District court decisions *holding* unconstitutional under Fifth Amendment's due process clause section of Social Security Act that reduced, perhaps to zero, benefits coming to illegitimate children upon death of parent in order to satisfy the maximum payment due the wife and legitimate children are summarily affirmed.

*Richardson* v. *Davis*, 409 U.S. 1069 (1972).

104. Act of January 2, 1968 (§ 203, 81 Stat. 882).

Provision of Social Security Act extending benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not giving benefits when the mother becomes unemployed *held* to impermissibly classify on the basis of sex and violate the Fifth Amendment's due process clause.

*Califano* v. *Westcott*, 443 U.S. 76 (1979).

105. Act of June 22, 1970 (ch. III, 84 Stat. 318).

Provision of Voting Rights Act Amendments of 1970 which set a minimum voting age qualification of 18 in state and local elections *held* to be unconstitutional because beyond the powers of Congress to legislate.

*Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

Concurring: Justices Harlan, Stewart, Blackmun, and Chief Justice Burger.
Concurring specially: Justice Black.
Dissenting: Justices Douglas, Brennan, White, and Marshall.

106. Act of December 29, 1970 (§ 8(a), 84 Stat. 1598, 29 U.S.C. § 637(a)).

Provision of Occupational Safety and Health Act authorizing inspections of covered work places in industry without warrants *held* to violate Fourth Amendment.

*Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978).
Concurring: Justices White, Stewart, Marshall, Powell, and Chief Justice Burger.
Dissenting: Justices Stevens, Blackmun, and Rehnquist.

107. Act of January 11, 1971, (§ 2, 84 Stat. 2048).

Provision of Food Stamp Act disqualifying from participation in program any household containing an individual unrelated by birth, marriage, or adoption to any other member of the household violates the due process clause of the Fifth Amendment.

*Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).
Concurring: Justices Brennan, Douglas, Stewart, White, Marshall, Blackmun, and Powell.
Dissenting: Justice Rehnquist and Chief Justice Burger.

108. Act of January 11, 1971 (§ 4, 84 Stat. 2049).

Provision of Food Stamp Act disqualifying from participation in program any household containing a person 18 years or older who had been claimed as a dependent child for income tax purposes in the present or preceding tax year by a taxpayer not a member of the household violates the due process clause of the Fifth Amendment.

*Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973).
Concurring: Justices Douglas, Brennan, Stewart, White, and Marshall.
Dissenting: Justices Blackmun, Rehnquist, Powell, and Chief Justice Burger.

109. Federal Election Campaign Act of February 7, 1972 (86 Stat. 3), as amended by the Federal Campaign Act Amendments of 1974 (88 Stat. 1263), adding or amending 18 U.S.C. §§ 608(a), 608(e), and 2 U.S.C. § 437c.

Provisions of election law that forbid a candidate or the members of his immediate family from expending personal funds in excess of specified amounts, that limit to $1,000 the independent expenditures of any person relative to an identified candidate, and that forbid expenditures by candidates for federal office in excess of specified amounts violate the First Amendment speech guarantees; provisions of the law creating a commission to oversee enforcement of the Act are an invalid infringement of constitutional separation of powers in that they devolve responsibilities upon a commission four of whose six members are appointed by Congress and all six of whom are con-

firmed by the House of Representatives as well as by the Senate, not in compliance with the appointments clause.

*Buckley* v. *Valeo*, 424 U.S. 1 (1986).
Concurring: Justices Brennan, Stewart, Blackmun, Powell, and Rehnquist, and Chief Justice Burger.
Dissenting (expenditure provisions only): Justice White.
Dissenting (candidate's personal funds only): Justice Marshall.

110. Act of October 1, 1976 (title II, 90 Stat. 1446); Act of October 12, 1979 (101(c), 93 Stat. 657)).

Provisions of appropriations laws rolling back automatic pay increases for federal officers and employees is unconstitutional as to Article III judges because, the increases having gone into effect, they violate the security of compensation clause of Article III, § 1.

*United States* v. *Will*, 449 U.S. 200 (1980).

111. Act of November 6, 1978 (§ 241(a), 92 Stat. 2668, 28 U.S.C. § 1471)

Assignment to judges who do not have tenure and guarantee of compensation protections afforded Article III judges of jurisdiction over all proceedings arising under or in the bankruptcy act and over all cases relating to proceedings under the bankruptcy act is invalid, inasmuch as judges without Article III protection may not receive at least some of this jurisdiction.

*Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
Concurring: Justices Brennan, Marshall, Blackmun, and Stevens.
Concurring specially: Justices Rehnquist and O'Connor.
Dissenting: Justices White and Powell and Chief Justice Burger.

112. Act of May 30, 1980 (94 Stat. 399, 45 U.S.C. § 1001 et seq.) as amended by the Act of October 14, 1980 (94 Stat. 1959).

Acts of Congress applying to bankruptcy reorganization of one railroad and guaranteeing employee benefits is repugnant to the requirement of Article I, § 8, cl. 4, that bankruptcy legislation be "uniform."

*Railroad Labor Executives Assn.* v. *Gibbons*, 455 U.S. 457 (1982).

# STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL ON THEIR FACE OR AS ADMINISTERED

## (1789–1982)

# STATE ACTS HELD UNCONSTITUTIONAL

Hereinafter presented are brief summaries of Supreme Court decisions in which provisions of state constitutions, statutes, and municipal ordinances were found to be unconstitutional either in substance or as enforced, including provisions which conflicted with federal legislative acts and were therefore void because of the supremacy clause. Appended thereto are the names of the Justices who concurred in, and dissented from, such rulings. The names of the Justices have not been set forth when their decisions were unanimous.

## I. STATE CONSTITUTIONAL PROVISIONS AND STATUTES

1. *United States* v. *Peters*, 5 Cr. (9 U.S.) 115 (1809)

A Pennsylvania statute prohibiting the execution of any process issued to enforce a certain sentence of a federal court, on the ground that the federal court lacked jurisdiction in the cause, could not oust the federal court of jurisdiction. A state statute purporting to annul the judgment of a court of the United States and to destroy rights acquired thereunder is without legal foundation.

2. *Fletcher* v. *Peck*, 6 Cr. (10 U.S.) 87 (1810)

A Georgia statute annulling conveyance of public lands authorized by a prior enactment was violative of the obligation of contracts clause (Art. I, § 10) of the Constitution.

Justices Concurring: Marshall, C.J., Washington, Livingston, Todd.
Justice Dissenting: Johnson (in part).

3. *New Jersey* v. *Wilson*, 7 Cr. (11 U.S.) 164 (1812).

A New Jersey law purporting to repeal an exemption from taxation contained in a prior enactment conveying certain lands was violative of the obligation of contracts clause (Art. I, § 10).

4. *Terrett* v. *Taylor*, 9 Cr. (13 U.S.) 43 (1815).

Although subsequently cited as a contract clause case (*Piqua Branch Bank* v. *Knoop*, 16 How. (57 U.S.) 369, 389 (1853)), the Court in the instant decision, without referring to the obligation of contracts clause (Art. I, § 10), voided, as contrary to the principles of natural justice, two Virginia acts which purported to divest the Episcopal Church of title to property "acquired under the faith of previous laws."



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5. *Sturges* v. *Crowninshield*, 4 Wheat. (117 U.S.) 122 (1819).

Retroactive operation of a New York insolvency law to discharge the obligation of a debtor on a promissory note negotiated prior to its adoption violated the obligation of contracts clause (Art. I, § 10).

6. *McMillan* v. *McNeil*, 4 Wheat. (17 U.S.) 209 (1819).

A Louisiana insolvency law had no extraterritorial operation, and although adopted in 1808, its invocation to relieve a debtor of an obligation contracted by him in 1811, while a resident of South Carolina, offended the obligation of contracts clause (Art. I, § 10).

7. *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819).

Under the principle of national supremacy (Art. VI) whereunder instrumentalities of the Federal Government are immune for state taxation, a Maryland law imposing a tax on notes issued by a branch of the Bank of United States was held unconstitutional.

8. *Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518 (1819).

A New Hampshire law which altered a charter granted to a private eleemosynary corporation by the British Crown prior to the Revolution was deemed violative of the obligation of contracts clause (Art. I, § 10).

Justices Concurring: Marshall, C.J., Washington, Johnson, Livingston, Story.
Justice Dissenting: Duvall.

9. *Farmers' and Mechanics' Bank* v. *Smith*, 6 Wheat. (19 U.S.) 131 (1821).

A state insolvency law, insofar as it purported to discharge a debtor from obligations contracted prior to its passage, was violative of the obligation of contracts clause (Art. I, § 10).

10. *Green* v. *Biddle*, 8 Wheat. (21 U.S.) 1 (1823).

Inasmuch as the compact between Virginia and Kentucky negotiated on the occasion of the separation of the latter from the former stipulated that rights in lands within the ceded area should remain valid and secure under the laws of Kentucky, and should be determined by Virginia law as of the time of separation, a subsequent Kentucky law which diminished the rights of a lawful owner by reducing the scope of his remedies against an adverse possessor violated the obligation of contracts clause (Art. I, § 10)

Justice Concurring: Johnson (separately).

11. *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. (21 U.S.) 464 (1823).

The property of a charitable corporation chartered by the Crown, being specifically protected by the treaty of peace of 1783, an act of Vermont adopted in 1794 and purporting to convey such property to local subdivisions was void.

12. *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

By reason of conflict with the federal licensing act of 1793 authorizing vessels to navigate coastal waters, a New York statute granting to certain persons an exclusive right to navigate New York waters was void.

13. *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824).

An Ohio statute levying a tax on the Bank of the United States, a federal instrumentality, was unenforceable (Art VI).

Justices Concurring: Marshall, C.J., Washington, Todd, Duvall, Story, Thompson.
Justice Dissenting: Johnson.

14. *Ogden* v. *Saunders*, 12 Wheat. (25 U.S.) 213 (1827).

(1) Although a state insolvency law may be applied to discharge a debt contracted subsequently to the passage of such law, (2) the statute could not be accorded extraterritorial enforcement to the extent of discharging a claim sought to be collected by a citizen of another State either in a federal court or in the courts of other States.

(1) Justices Concurring: Johnson, Thompson, Washington, Trimble.
Justices Dissenting: Marshall, C.J., Duvall, Story.
(2) Justices Concurring: Johnson, Marshall, C.J., Duvall, Story.
Justices Dissenting: Washington, Thompson, Trimble.

15. *Brown* v. *Maryland*, 12 Wheat. (25 U.S.) 419 (1827).

A Maryland statute which required an importer to obtain a license before reselling in the original package articles imported from abroad was in conflict with the federal power to regulate foreign commerce (Art. I, § 8, cl. 3) and with the constitutional provision (Art. I, § 10, cl. 2) prohibiting States from levying import duties.

Justices Concurring: Marshall, C.J., Washington, Johnson, Duvall, Story, Trimble.
Justice Dissenting: Thompson.

16. *Craig* v. *Missouri*, 4 Pet. (29 U.S.) 410 (1830).

A Missouri act, under the authority of which certificates in denominations of 50¢ to $10 were issued, payable in discharge of taxes

or debts owned to the State and of salaries due public officers violated the constitutional prohibition (Art. I, § 10, cl. 10) against emission of "bills of credit" by States.

Justices Concurring: Marshall, C.J., Duvall, Story, Baldwin.
Justices Dissenting: Johnson, Thompson, McLean.

17. *Worcester* v. *Georgia*, 6 Pet. (31 U.S.) 515 (1832).

A Georgia law which imposed penalties on white persons who, without first obtaining a license therefor, established a residence within the limits of the Cherokee Nation was unenforceable by reason of conflict with treaties negotiated by the United States with such Indian tribes and by virtue of extending to an area beyond the jurisdiction of the State.

18. *Boyle* v. *Zacharie and Turner*, 6 Pet. (31 U.S.) 635 (1832).

Consistently with the principle of *Ogden* v. *Saunders*, a Maryland insolvency law could not be invoked to effect discharge of an obligation contracted in Louisiana subsequently to its passage.

19. *Dobbins* v. *The Commissioners of Erie County*, 16 Pet. (41 U.S.) 435 (1842).

A Pennsylvania law which diminished the compensation of a federal officer by subjecting him to county taxes imposed an invalid burden on a federal instrumentality (Art. VI).

20. *Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539 (1842).

A Pennsylvania statute (1826) which penalized owner's recovery of a runaway slave was violative of Art. IV, § 2, cl. 3, and federal legislation implementing the latter provision.

Justices Concurring: Story, Catron, McKinley, Taney, C.J. (separately), Thompson (separately), Baldwin (separately), Wayne (separately), Daniel (separately), McLean (separately).

21. *Bronson* v. *Kinzie*, 1 How. (42 U.S.) 311 (1843).

Illinois mortgage moratorium law which, when applied to a mortgage negotiated prior to its passage, reduced the remedies of the mortgage lender by conferring a new right of redemption upon a defaulting borrower, impaired an obligation of contract contrary to Art. I, § 10, of the Constitution.

Justices Concurring: Taney, C.J., Baldwin, Wayne, Catron, Daniel.
Justice Dissenting: McLean.

22. *McCracken* v. *Hayward*, 2 How. (43 U.S.) 608 (1844).

Illinois mortgage moratorium law, which, when applied to a mortgage executed prior to its passage, diminished remedies of the mortgage lender by prohibiting consummation of a foreclosure unless the foreclosure price equaled two-thirds of the value of the mortgaged property impaired the lender's obligation of contract contrary to Art. I, § 10, of the Constitution.

23. *Gordon* v. *Appeal Tax Court*, 3 How. (44 U.S.) 133 (1845).

As to stockholders of Maryland state banks afforded an exemption under prior act of 1821, Maryland statute of 1841 taxing these stockholders impaired the obligation of contract.

24. *Searight* v. *Stokes*, 3 How. (44 U.S.) 151 (1845).

Inasmuch as under federal acts ceding to Pennsylvania that part of the Cumberland Road within its limits, and Pennsylvania laws accepting the same, the carriage of mail over said road was to be free from toll, later Pennsylvania law imposing tolls on coaches transporting passengers could not extend to the mail carried therein.

Justices Concurring: Taney, C.J., Story, Wayne, Catron, McKinley, Nelson.
Justices Dissenting: McLean, Daniel.

25. *Neil, Moore & Co.* v. *Ohio*, 3 How. (44 U.S.) 720 (1845).

Ohio toll levied on passengers transported on mail coaches traversing Cumberland Road in that State, but which exempted passengers traveling on other coaches was void by reason of conflict with the terms of federal and Ohio acts adopted in relation to transfer and acceptance of said part of the road by Ohio.

Justices Concurring: Taney, C.J., Story, McLean, Wayne, Catron, McKinley, Nelson.
Justice Dissenting: Daniel.

26. *Planters' Bank* v. *Sharp*, 6 How. (47 U.S.) 301 (1848).

Mississippi law which nullified the power of a bank under a previously issued charter to discount bills of exchange and promissory notes and to institute actions for collection of the same was void by reason of imparing an obligation of contract (Art. I, § 10).

Justices Concurring: McLean, Wayne, Catron, Nelson, Woodbury, Grier.
Justices Dissenting: Taney, C.J., Daniel.

27. *Passenger Cases*, 7 How. (48 U.S.) 283 (1849).

Collection by New York and Massachusetts of per capita taxes on alien and domestic passengers arriving in the ports of these States

was violative of the federal power to regulate foreign and interstate commerce (Art. I, § 8, Cl. 3).

Justices Concurring: McLean (separately), Wayne (separately), Catron (separately), McKinley (separately), Grier (separately).
Justices Dissenting: Taney, C.J. (separately), Daniel (separately), Woodbury (separately), Nelson.

28. *Woodruff* v. *Trapnall,* 10 How. (51 U.S.) 190 (1851).

A judgment debtor of the State of Arkansas tendered, in satisfaction of the judgment, banknotes in circulation at the time of the repeal by the State of that section of the said bank's charter providing that such notes should be received in discharge of public debts. By reason of the inhibition of the contract clause of the Constitution, the legislative repeal could neither affect such notes nor the pledge of the State to receive them in payment of debts due thereto.

Justices Concurring: Taney, C.J., McLean, Wayne, McKinley, Woodbury.
Justices Dissenting: Catron, Daniel, Nelson, Grier.

29. *Achison* v. *Huddleson,* 12 How. (53 U.S.) 293 (1852).

Inasmuch as by the terms of a Maryland statute, assented to by Congress, no toll was to be levied by that State on passenger coaches carrying mails over the Cumberland Road, later Maryland law imposing tolls on passengers in such coaches was void by reason of conflict with earlier compact between Maryland and the Federal Government and also by virtue of imposing a burden on federal carriage of the mails (Art. VI).

30. *Trustees for Vincennes University* v. *Indiana,* 14 How. (55 U.S.) 268 (1853).

Inasmuch as the incorporation by the territorial legislature of the University in 1806 operated to vest in the latter certain federal lands reserved for educational purposes, subsequent enactment by Indiana ordering the sale of such lands and use of the proceeds for other purposes was invalid because of impairment of the contractual rights of the University.

Justices Concurring: McLean, Wayne, Nelson, Grier, Curtis.
Justices Dissenting: Taney, C.J., Catron, Daniel.

31. *Curran* v. *Arkansas,* 15 How. (56 U.S.) 304 (1854).

Retroactive laws which vested all property of the state bank in Arkansas and thereby prevented it from honoring its outstanding bills payable on demand to the holders thereof impaired the contractual rights of the latter and were void.

Justices Concurring: Taney, C.J., McLean, Wayne, Grier, Curtis, Campbell.

Justices Dissenting: Catron, Daniel, Nelson.

32. *State Bank of Ohio* v. *Knoop*, 16 How. (57 U.S.) 369 (1854).

Inasmuch as state banks, on acceptance of a charter under the Ohio banking law of 1845, were directed, in lieu of all taxes, to pay six percent of annual dividends to the States, a later statute which exposed these banks to higher taxes effected an invalid impairment of the obligation of contract.

Justices Concurring: Taney, C.J., McLean, Wayne, Nelson, Grier, Curtis.
Justices Dissenting: Catron, Daniel, Campbell.

33. *Hays* v. *The Pacific Mail Steamship Co.*, 17 How. (58 U.S.) 596 (1855).

California lacked jurisdiction to impose property taxes on vessels owned by a New York company and registered in New York as their home port which engaged in the coastwise trade entailing calls at California ports which were too brief to establish a tax situs.

Justices Concurring: Taney, C.J., McLean, Wayne, Catron, Nelson, Grier, Curtis, Campbell.
Justice Dissenting: Daniel.

34. *Dodge* v. *Woolsey*, 18 How. (59 U.S.) 331 (1856).

Levy under an 1851 Ohio law of a bank tax at a higher rate than that specified in the bank's charter in 1845 was invalid by reason of impairment of the obligation of contract.

Justices Concurring: Taney, C.J., McLean, Wayne, Nelson, Grier, Curtis.
Justices Dissenting: Catron, Daniel, Campbell.

35. *Sinnot* v. *Davenport*, 22 How. (63 U.S.) 227 (1860).

An Alabama statute requiring owners of steamboats navigating the waters of that State to register under the penalty of a $500 fine for each offense was in conflict with the act of Congress providing for the enrollment and license of vessels engaged in the coastwise trade and therefore inoperative.

*Accord: Foster* v. *Davenport*, 22 How. (63 U.S.) 244 (1860), which held that this statute also was inoperative when applied to a lighter and a towboat assisting the movement wholly within Alabama territorial waters of vessels engaged in foreign and interstate commerce.

36. *Almy* v. *California*, 24 How. (65 U.S.) 169 (1861).

A California stamp tax imposed on bills of lading for gold or silver transported from California to any place outside the State was void as a tax on exports forbidden by Art. I, § 10, cl. 2 of the Constitution.

37. *Howard* v. *Bugbee*, 24 How. (65 U.S.) 461 (1861).

An Alabama statute authorizing redemption of mortgaged property in two years after sale under a foreclosure decree, by *bona fide* creditors of the mortgagor could not be applied to sales under mortgages executed prior to the enactment without invalid impairment of the obligation of contracts (Art. I, § 10).

38. *Bank of Commerce* v. *New York City*, 2 Bl. (67 U.S.) 620 (1863).

Securities of the United States being exempt from state taxation, inclusion of the value thereof in the capital of a bank subjected to taxation by the terms of a New York law rendered the latter void.

*Accord: Bank Tax Case*, 2 Wall. (69 U.S.) 200 (1865).

39. *Hawthorne* v. *Calef*, 2 Wall. (69 U.S.) 10 (1865).

A Maine statute terminating the liability of corporate stock for the debts of the corporation impaired the obligation of contracts as respects claims of creditors outstanding at the time of such termination.

40. *The Binghamton Bridge*, 3 Wall. (70 U.S.) 51 (1866).

An obligation of contract was impaired when a state legislature, after having issued a charter to a bridge company containing assurances that erection of other bridges within two miles of said bridge would not be authorized, subsequently chartered a second company to construct a bridge within a few rods of the first.

41. *Van Allen* v. *The Assessors*, 3 Wall. (70 U.S.) 573 (1866).

A New York law authorizing localities to tax as personal property national bank stock held by residents, but which imposed no comparable tax on shares of state banks, was violative of federal legislation authorizing state taxation of national bank stock at rates no higher than those imposed on state bank shares. Taxation of the capital of state banks did not provide such equality, for that part of the capital of state banks invested in federal securities was exempt.

Justices Concurring: Grier, Davis, Nelson, Clifford, Miller, Field.
Justices Dissenting: Chase, C.J., Wayne, Swayne.

42. *Accord: Bradley* v. *Illinois*, 4 Wall. (71 U.S.) 459 (1867), voiding a similar Illinois tax law on the ground that a tax on the capital of state banks was not the equivalent of the state tax on shares of national banks and accordingly the tax on the latter was in conflict with federal law consenting to taxation of national bank shares at rates not in excess of those imposed on shares of state banks.

43. *McGee* v. *Mathis*, 4 Wall. (71 U.S.) 143 (1867).

Arkansas statute of 1855 repealing an 1851 grant of tax exemption applicable to swamp lands, paid for either before or after repeal with scrip issued before the repeal, impaired a contract of the State with holders of such scrip (Art. I, § 10).

44. *Cummings* v. *Missouri*, 4 Wall. (71 U.S.) 277 (1867).

Missouri constitutional provisions which required clergymen, as a prerequisite to the practice of their profession, to take an oath that they had never been guilty of hostility to the United States, or of certain other acts which were lawful when committed, was void as a bill of attainder and as an *ex post facto* law.

Justices Concurring: Wayne, Grier, Nelson, Clifford, Field.
Justices Dissenting: Swayne, Davis, Miller.

45. *The Moses Taylor*, 4 Wall. (71 U.S.) 411 (1867).

A California statute vesting state courts with *in rem* jurisdiction over vessels for causes of action cognizable in admiralty invalidly infringed the admiralty jurisdiction exclusively conferred upon federal courts by § 9 of the Judiciary Act.

46. *Von Hoffman* v. *Quincy*, 4 Wall. (71 U.S.) 535 (1867).

Illinois law limiting taxing powers granted to a municipality under a prior law authorizing it to issue bonds and amortize the same by levy of taxes impaired the obligation of contract (Art. I, § 10).

47. *The Hine* v. *Trevor*, 4 Wall. (71 U.S.) 555 (1867).

Iowa statute providing an *in rem* remedy in state courts for maritime causes of action was void by reason of conflict with § 9 of the Judiciary Act of 1789 which vested admiralty jurisdiction exclusively in the federal courts.

48. *Christmas* v. *Russell*, 5 Wall. (72 U.S.) 290 (1867).

A Mississippi statute which prohibited enforcement of a judgment of a sister State against a resident of Mississippi whenever barred by the Mississippi statute of limitations was violative of the full faith and credit clause of Art. IV.

49. *The Kansas Indians*, 5 Wall. (72 U.S.) 737 (1867).

When a treaty with Indian tribes exempted their lands from levy, sale, and forefeiture, a State could not validly collect its tax on lands held in severalty by members of such tribes under patents issued them pursuant to such treaty. Tribal Indians thus recognized by the National Government are exempt from the jurisdiction of the State.

50. *The New York Indians*, 5 Wall. (72 U.S.) 761 (1867).

A New York statute imposing a tax on lands reserved to an Indian tribe by treaty was void, notwithstanding provision therein that sale of land for nonpayment of the tax would not affect the right of occupancy by the Indians.

51. *Steamship Company* v. *Portwardens*, 6 Wall. (73 U.S.) 31 (1867).

A Louisiana statute which provided that port wardens might collect, in addition to other fees, a tax of five dollars from every ship entering the port of New Orleans, whether any service was performed or not, was in conflict with the commerce clause of the Constitution (Art. I, § 8, cl. 3).

52. *Crandall* v. *Nevada*, 6 Wall. (73 U.S.) 35 (1868).

A Nevada tax collected from every person leaving the State by rail or stage coach abridged the privileges of United States citizens to move freely across state lines in fulfillment of their relations with the National Government.

53. *Bank* v. *Supervisors*, 7 Wall. (74 U.S.) 26 (1868).

New York tax could not be collected on United States notes expressly exempted from state taxation by federal law authorizing their issuance as legal tender.

54. *Northern Central Ry. Co.* v. *Jackson*, 7 Wall. (74 U.S.) 262 (1869).

Pennsylvania was without jurisdiction to enforce its law taxing interest on railway bonds secured by a mortgage applicable to railway property part of which was located in another State.

Justices Concurring: Chase, C.J., Nelson, Davis, Field, Miller, Grier.
Justices Dissenting: Clifford, Swayne.

55. *The Belfast*, 7 Wall. (74 U.S.) 624 (1869).

Inasmuch as a shipper's lien under a contract of carriage between ports within the same State is a maritime lien enforceable by *in rem* proceedings exclusively within the admiralty jurisdiction of federal court, an Alabama law creating a maritime lien enforceable by *in rem* proceedings in its own courts was void.

56. *Furman* v. *Nichol*, 8 Wall. (75 U.S.) 44 (1869).

Tennessee statute repealing prior law making notes of the Banks of Tennessee receivable in payment of taxes impaired the obligation of contract as to the notes already in circulation (Art. I, § 10).

57. *Home of the Friendless* v. *Rouse*, 8 Wall. (75 U.S.) 430 (1869); *The Washington University* v. *Rouse*, 8 Wall. (75 U.S.) 439 (1869).

Missouri statute taxing corporations afforded tax exemption by their charter impaired the obligation of contract (Art. I, § 10).

Justices Concurring: Nelson, Clifford, Grier, Swayne, Davis.
Justices Dissenting: Chase, C.J., Miller, Field.

58. *State Tonnage Tax Cases*, 12 Wall. (79 U.S.) 204 (1871).

Alabama taxes levied on vessels owned by its citizens and employed in intrastate commerce "at so much per ton of the registered tonnage" were violative of the constitutional prohibition against the levy of tonnage duties by States.

59. *Ward* v. *Maryland*, 12 Wall. (79 U.S.) 418 (1871).

Maryland law which exacted a traders' license from nonresidents at a higher rate than was collected from residents was violative of the privileges and immunities clause of Art. IV, § 2.

60. *Gibson* v. *Chouteau*, 13 Wall. (80 U.S.) 92 (1872).

State legislation cannot interfere with the disposition of the public domain by Congress, and therefore a Missouri statute of limitations, which was inapplicable to the United States, could not be applied so as to accord title to an adverse possessor as against a grantee from the United States, notwithstanding that the adverse possession preceded the federal conveyance.

Justices Concurring: Field, Nelson, Swayne, Clifford, Miller, Bradley, Chase, C.J.
Justices Dissenting: Davis, Strong.

61. *Wilmington Railroad* v. *Reid*, 13 Wall. (80 U.S.) 264 (1872).

North Carolina statute which levied a tax on the franchise and property of a railroad which had been accorded tax exemption by the terms of its charter impaired the obligation of contract.

62. *White* v. *Hart*, 13 Wall. (80 U.S.) 646 (1872).

Obligations of contracts clause (Art. I, § 10) precluded reliance on a Georgia constitutional provision of 1868, prohibiting enforcement of any contract, the consideration for which was a slave, to defeat en-

forcement of a note based on such consideration and negotiated prior to adoption of said provision.

Justices Concurring: Swayne, Nelson, Davis, Strong, Clifford, Miller, Field, Bradley.
Justice Dissenting: Chase, C.J.

63. *Accord: Osborne* v. *Nicholson,* 13 Wall. (80 U.S.) 654 (1872), invalidating a similar Arkansas constitutional provision adopted in 1868.

Justices Concurring: Swayne, Nelson, Davis, Strong, Clifford, Miller, Field, Bradley.
Justice Dissenting: Chase, C.J.

64. *Delmas* v. *Insurance Company,* 14 Wall. (81 U.S.) 661 (1872).

A Louisiana constitutional provision rendering unenforceable contracts, the consideration for which was Confederate money, was inapplicable, by reason of the obligation of contracts clause of the Federal Constitution (Art. I, § 10) to contracts consummated before adoption of the former provision.

65. *Case of the State Freight Tax,* 15 Wall. (82 U.S.) 232 (1873).

A Pennsylvania law which imposed a tax on freight transported interstate, into and out of Pennsylvania, was an invalid regulation of interstate commerce.

Justices Concurring: Story, Chase, C.J., Clifford, Miller, Field, Bradley, Hunt.
Justices Dissenting: Swayne, Davis.

66. *State Tax on Foreign-Held Bonds,* 15 Wall. (82 U.S.) 300 (1873).

Pennsylvania law, so far as it directed domestic corporations to withhold on behalf of the State a portion of interest due on bonds owned by nonresidents, impaired the obligation of contract and denied due process by taxing property beyond its jurisdiction.

Justices Concurring: Field, Chase, C.J., Bradley, Swayne, Strong.
Justices Dissenting: Davis, Clifford, Miller, Hunt.

67. *Gunn* v. *Barry,* 15 Wall. (82 U.S.) 610 (1873).

Georgia constitutional provision increasing amount of homestead exemption impaired the obligation of contract, insofar as it applied to a judgment obtained under a less liberal exemption provision.

68. *Pierce* v. *Carskadon,* 16 Wall. (83 U.S.) 234 (1873).

A West Virginia Act of 1865, depriving defendants of right to rehearing on a judgment obtained under an earlier law unless they made oath that they had not committed certain offenses, constituted an invalid bill of attainder and *ex post facto* law.

Justices Concurring: Field, Chase, C.J., Clifford, Miller, Swayne, Davis, Strong, Hunt.

Justice Dissenting: Bradley.

69. *Humphrey* v. *Pegues*, 16 Wall. (83 U.S.) 244 (1873).

South Carolina taxing laws, as applied to a railroad whose charter exempted it from taxation, impaired the obligation of contract.

70. *Walker* v. *Whitehead*, 16 Wall. (83 U.S.) 314 (1873).

Georgia law restricting remedies for obtaining a judgment, so far as it affected prior contracts, impaired the obligation of contract.

71. *Barings* v. *Dabney*, 19 Wall. (86 U.S.) 1 (1873).

South Carolina act appropriating for payment of state debts the assets of an insolvent bank, in which the State owned all the stock, disadvantaged private creditors of the bank and thereby impaired the obligation of contract.

72. *Peete* v. *Morgan*, 19 Wall. (86 U.S.) 581 (1874).

Texas act of 1870 imposing a tonnage tax on foreign vessels to defray quarantine expenses held violative of Art I, § 10, prohibiting levy without consent of Congress.

73. *Pacific Railroad Company* v. *Maguire*, 20 Wall. (87 U.S.) 36 (1874).

Missouri law which levied a tax on railroad prior to expiration of a grant of exemption impaired obligation of contract.

Justices Concurring: Waite, C.J., Field, Bradley, Swayne, Davis, Hunt.

Justices Dissenting: Clifford, Miller.

74. *Insurance Company* v. *Morse*, 20 Wall. (87 U.S.) 445 (1874).

Wisconsin act admitting foreign insurance companies to transact business within the State, upon their agreement not to remove suits to federal courts, exacted an unconstitutional condition.

Justices Concurring: Clifford, Miller, Field, Bradley, Swayne, Strong, Hunt.

Justices Dissenting: Waite, C.J., Davis.

75. *Loan Association* v. *Topeka*, 20 Wall. (87 U.S.) 655 (1875).

Kansas act of 1872, authorizing municipalities to issue bonds repayable out of tax revenues in support of private enterprise, amounted to collection of money in aid of a private, rather than public purpose, and was violative of due process.

Justices Concurring: Strong, Swayne, Davis, Waite, C.J., Miller, Field, Bradley.

Justice Dissenting: Clifford.

76. *Wilmington & Weldon R. Co.* v. *King*, 91 U.S. 3 (1875).

North Carolina statute, insofar as it authorized a jury in suits on contracts—negotiated previously during the Civil War—to place their own estimates upon the value of the contract instead of taking the value stipulated by the parties, impaired the obligation of such contracts.

Justices Concurring: Waite, C.J., Clifford, Miller, Field, Swayne, Davis, Strong, Hunt.
Justice Dissenting: Bradley.

77. *Welton* v. *Missouri*, 91 U.S. 275 (1876).

Missouri act which required payment of a license fee by peddlers of merchandise produced outside the State, but exempted peddlers of State-produced merchandise, imposed an unconstitutional burden on interstate commerce.

78. *Morrill* v. *Wisconsin*, 154 U.S. 626 [appendix] (1877).

Wisconsin statute void on basis of *Welton* v. *Missouri*.

79. *Henderson et al.* v. *Mayor of New York*, 92 U.S. 259 (1876).

New York act of 1849, which required owner of ocean-going passenger vessel to post bond of $300 for each passenger as surety against their becoming public charges, or, in lieu thereof, to pay a tax of $1.50 for each, contravened exclusive federal power to regulate foreign commerce.

80. *Chy Lung* v. *Freeman*, 92 U.S. 275 (1876).

California law, which required master of vessel to post $500 bond for each alien "lewd and debauched female" passenger landed, contravened the federal power to regulate foreign commerce.

81. *Inman Steamship Co.* v. *Tinker*, 94 U.S. 238 (1877).

New York act of 1865, providing for collection from docking vessels of a fee measured by tonnage, imposed tonnage duty in violation of Art. I, § 10.

82. *Foster* v. *Masters of New Orleans*, 94 U.S. 246 (1877).

Louisiana statute requiring survey of hatches of every sea-going vessel arriving at New Orleans, contravened the federal power to regulate foreign and interstate commerce.

83. *New Jersey* v. *Yard*, 95 U.S. 104 (1877).

Statute increasing tax above rate stipulated in contract with railroad corporations impaired the obligation of contract.

84. *Hannibal & St. Joseph R. Co.* v. *Husen*, 95 U.S. 465 (1878).

Missouri act prohibiting the bringing of cattle into the State between March and November contravened the power of Congress over interstate commerce.

85. *Hall* v. *DeCuir*, 95 U.S. 485 (1878).

Louisiana Reconstruction Act, prohibiting interstate common carriers of passengers from making any discrimination on the basis of race or color, held invalid as a regulation of interstate commerce.

86. *Farrington* v. *Tennessee*, 95 U.S. 679 (1878).

Tennessee law increasing the tax on a bank above the rate specified in its charter, held to impair the obligation of that contract.

Justices Concurring: Swayne, Waite, C.J., Miller, Hunt, Bradley, Harlan.
Justices Dissenting: Strong, Clifford, Field.

87. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U.S. 1 (1878).

Florida legislative grant of a telegraphic monopoly held "inoperative" as in conflict with a congressional act dealing with the construction of telegraph lines and based on its commerce and postal power.

Justices Concurring: Waite, C.J., Clifford, Strong, Bradley, Swayne, Miller.
Justices Dissenting: Field, Hunt.

88. *Edwards* v. *Kearzey*, 96 U.S. 595 (1878).

North Carolina constitutional provision increasing amount of debtor's property exempt from sale under execution of a judgment impaired the obligation of contracts negotiated prior to its adoption.

Justices Concurring: Waite, C.J., Swayne, Bradley, Strong, Miller, Field (separately), Hunt (separately).
Justice Dissenting: Harlan.

89. *Keith* v. *Clark*, 97 U.S. 454 (1878).

Provision of the Tennessee constitution of 1865, forbidding the receipt for taxes of the bills of the Bank of Tennessee and declaring the issues of the bank during the insurrectionary period void, held to impair the obligation of contract.

Justices Concurring: Miller, Clifford, Strong, Hunt, Swayne, Field.
Justices Dissenting: Waite, C.J., Bradley, Harlan.

90. *Cook* v. *Pennsylvania*, 97 U.S. 566 (1878).

Pennsylvania act taxing auction sales, when applied to sales of imported goods in the original packages, was void as a duty on imports and a regulation of foreign commerce.

91. *Northwestern University* v. *Illinois ex rel. Miller*, 99 U.S. 309 (1878).

Revenue law of Illinois, so far as it modified tax exemptions granted to Northwestern University by an earlier statute, impaired the obligation of contract.

92. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).

West Virginia law barring Negroes from jury service violated the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Strong, Waite, C.J., Miller, Hunt, Swayne, Bradley, Harlan.
Justices Dissenting: Field, Clifford.

93. *Guy* v. *Baltimore*, 100 U.S. 434 (1880).

Maryland statute and Baltimore ordinance, levying tax solely on products of other States, held to impose an invalid burden upon foreign and interstate commerce.

Justices Concurring: Harlan, Hunt, Clifford, Strong, Miller, Swayne, Field, Bradley.
Justice Dissenting: Waite, C.J.

94. *Tiernan* v. *Rinker*, 102 U.S. 123 (1880).

Texas statute, insofar as it levied occupational tax only upon sale of out-of-state beer and wine, was violative of the federal power to regulate foreign and interstate commerce.

95. *Hartman* v. *Greenhow*, 102 U.S. 672 (1880).

Virginia act, adopted subsequently to law providing for issuance of bonds and acceptance of interest coupons thereon in full payment of taxes, which levied a new property tax collectible by way of deduction from such interest coupons, impaired the obligation of contract.

Justices Concurring: Field, Waite, C.J., Clifford, Harlan, Strong, Hunt, Swayne, Bradley.
Justice Dissenting: Miller.

96. *Hall* v. *Wisconsin*, 103 U.S. 5 (1880).

Wisconsin act which repealed prior statute authorizing payment of fixed sum for performance of a contract to complete a geological survey, impaired the obligation of contract, notwithstanding that the second act was enacted prior to total fulfillment of the contract.

97. *Webber* v. *Virginia*, 103 U.S. 344 (1881).

Virginia license acts, requiring a license for sale of goods made outside the State but not within the State, held in conflict with the commerce clause.

98. *United States ex rel. Wolff* v. *New Orleans*, 103 U.S. 358 (1881).

Louisiana act withdrawing from New Orleans the power to levy taxes adequate to amortize previously issued bonds impaired the obligation of contract.

*Accord: Louisiana* v. *Pilsbury*, 105 U.S. 278 (1881).

99. *Asylum* v. *New Orleans*, 105 U.S. 362 (1881).

The general taxing laws for New Orleans when applied to the property of an asylum, whose charter exempted it from taxation, impaired the obligation of contract.

Justices Concurring: Bradley, Waite, C.J., Woods, Gray, Harlan, Matthews, Blatchford.
Justices Dissenting: Miller, Field.

100. *Western Union Telegraph Co.* v. *Texas*, 105 U.S. 460 (1881).

Texas tax collected on private telegraph messages sent out of the State imposed an invalid burden on foreign and interstate commerce; and insofar as it was imposed on official messages sent by federal officers amounted to an unconstitutional burden on a federal instrumentality.

101. *Ralls County Court* v. *United States*, 105 U.S. 733 (1881).

Missouri law which deprived a county of the taxing power requisite to meet interest payments on previously issued bonds impaired the obligation of contract.

102. *Parkersburg* v. *Brown*, 106 U.S. 487 (1882).

West Virginia law authorizing a city to issue its bonds in aid of manufacturers was void by reason of sanctioning an expenditure of public funds for a private purpose contrary to the requirements of due process.

103. *New York* v. *Compagnie Gén. Transatlantique*, 107 U.S. 59 (1882).

New York law imposing a tax on every alien arriving from a foreign country, and holding the vessel liable for payment of the tax was an invalid regulation of foreign commerce.

104. *Kring* v. *Missouri*, 107 U.S. 221 (1883).

A Missouri law which abolished a rule existing at the time the crime was committed, whereunder subsequent prosecution for first degree murder was precluded after conviction for second degree murder has been set aside on appeal, was void as an *ex post facto* law.

Justices Concurring: Miller, Harlan, Field, Blatchford, Woods.
Justices Dissenting: Matthews, Waite, C.J., Bradley, Gray.

105. *Nelson* v. *St. Martin's Parish*, 111 U.S. 716 (1884).

Louisiana act repealing taxing authority of a municipality to pay judgments hitherto rendered against it impaired the obligation of contract.

106. *Cole* v. *La Grange*, 113 U.S. 1 (1885).

Missouri act authorizing city to issue bonds in aid of manufacturing corporations was void by reason of sanctioning defrayment of public moneys for other than public purpose and depriving taxpayers of property without due process.

107. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196 (1885).

Pennsylvania taxing laws, when applied to the capital stock of a New Jersey ferry corporation carrying on no business in the State except the landing and receiving of passengers and freight, was void as a tax on interstate commerce.

108. *Virginia Coupon Cases*, 114 U.S. 269 (1885).

Virginia act which terminated privilege accorded bondholders under prior law of tendering coupons from said bonds in payment of taxes impaired the obligation of contract (Art. I, § 10).

Justices Concurring: Matthews, Field, Harlan, Woods, Blatchford.
Justices Dissenting: Bradley, Miller, Gray, Waite, C.J.

109. *Effinger* v. *Kenney*, 115 U.S. 566 (1885).

Virginia Act of 1867, which provided that in suits to enforce contracts for the sale of property negotiated during the Civil War and payable in Confederate notes, the measure of recovery was to be the value of the land at the time of sale rather than the value of such notes at that time, impaired the obligation of contract (Art. I, § 10).

110. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U.S. 683 (1885).

Act of 1872 chartering and authorizing a corporation to supply gas in Louisville, Kentucky, impaired the obligation of contract resulting from the grant of an exclusive privilege to an older company in 1869.

111. *Fiske* v. *Jefferson Police Jury*, 116 U.S. 131 (1885).

When a public officer has completed services (1871–1874), for which the compensation was fixed by law, an implied obligation to pay him at such rate arises, and such contract was impaired by a Louisiana constitutional provision of 1880 which reduced the taxing power of a parish to such extent as to deprive the officer of any effective means of collecting the sum due him.

112. *Mobile* v. *Watson*, 116 U.S. 289 (1886).

Alabama law which deprived Mobile and its successor of the power to levy taxes sufficient to amortize previously issued bonds impaired the obligation of contract.

113. *Walling* v. *Michigan*, 116 U.S. 446 (1886).

Michigan law taxing nonresidents soliciting sale of foreign liquors to be shipped into the State imposed an invalid restraint on interstate commerce.

114. *Royall* v. *Virginia*, 116 U.S. 572 (1886).

When a Virginia law provided that coupons on state bonds were acceptable in payment of state fees, subsequent law requiring legal tender in payment of a professional license fee impaired the obligation of contract between the coupon holder and the State and also voided invocation of another law imposing penalty for practice without a license (refused for want of payment in legal tender).

115. *Pickard* v. *Pullman Southern Car Co.*, 117 U.S. 34 (1886).

Tennessee privilege tax on railway sleeping cars was void insofar as it applied to cars moving in interstate commerce.

116. *Van Brocklin* v. *Tennessee*, 117 U.S. 151 (1886).

A State cannot validly sell for taxes lands which the United States owned at the time the taxes were levied, but in which it ceased to have an interest at the time of sale (Art. VI).

117. *Sprague* v. *Thompson*, 118 U.S. 90 (1886).

Georgia law requiring out-of-state coastal vessels, subject to certain discriminating exemptions, to take on a pilot upon entering Georgia ports, was void by reason of conflict with federal pilotage law.

118. *Wabash, St. L. & P. Ry. Co.* v. *Illinois*, 118 U.S. 557 (1886).

Illinois law, prohibiting long-short haul rate discrimination, when applied to interstate transportation, encroached upon the federal commerce power.

Justices Concurring: Miller, Field, Harlan, Woods, Matthews, Blatchford.
Justices Dissenting: Bradley, Waite, C.J., Gray.

119. *Robbins* v. *Shelby Taxing District*, 120 U.S. 489 (1887).

Tennessee law taxing drummers not operating from a domestic licensed place of business, insofar as it applied to drummers soliciting sales of goods on behalf of out-of-state business firms, was an invalid regulation of interstate commerce.

Justices Concurring: Bradley, Miller, Harlan, Woods, Matthews, Blatchford.
Justices Dissenting: Waite, C.J., Gray, Field.

120. *Corson* v. *Maryland*, 120 U.S. 502 (1887).

Maryland law licensing salesmen, insofar as it was applied to a New York resident soliciting orders on behalf of a New York firm, was an invalid regulation of interstate commerce.

121. *Barron* v. *Burnside*, 121 U.S. 186 (1887).

Iowa law, conditioning admission of a foreign corporation to do local business on surrender of right to invoke the diversity of citizenship jurisdiction of federal courts exacted an invalid forfeiture of a constitutional right.

122. *Fargo* v. *Michigan*, 121 U.S. 230 (1887).

Michigan act, insofar as it taxed the gross receipts of companies and corporations engaged in interstate commerce, was held to be in conflict with the commerce powers of Congress.

123. *Seibert* v. *Lewis*, 122 U.S. 284 (1887).

Missouri law requiring certain petitions, not exacted when county bonds were issued, before taxes could be levied to amortize said bonds, impaired the obligation of contract.

124. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U.S. 326 (1887).

Pennsylvania gross receipts tax on public utilities, insofar as it was applied to the gross receipts of a domestic corporation derived from transportation of persons and property on the high seas, was in conflict with the exclusive federal power to regulate foreign and interstate commerce.

125. *Western Union Telegraph Co.* v. *Pendleton*, 122 U.S. 347 (1887).

Indiana statute concerning the delivery of telegrams, so far as applied to deliveries sent from Indiana to other States was an invalid regulation of commerce.

126. *Bowman* v. *Chicago & Nw. Ry. Co.*, 125 U.S. 465 (1888).

Iowa liquor statute requiring interstate carriers to procure a certificate from the auditor of the county of destination before bringing liquor into the State, was violative of the commerce clause.

Justices Concurring: Matthews, Field (separately), Miller, Bradley, Blatchford.
Justices Dissenting: Harlan, Gray, Waite, C.J.

127. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U.S. 530 (1888).

Massachusetts law, authorizing an injunction to restrain tax delinquents from doing business until payments are made, could not be

validly invoked to restrain a telegraph company operating lines over United States military and post roads pursuant to federal authorization.

128. *California* v. *Pacific Railroad Co.*, 127 U.S. 1 (1888).

Unless Congress consents, a state tax, levied on the franchise of interstate railway corporations chartered by Congress pursuant to its commerce power is void.

129. *Ratterman* v. *Western Union Tel. Co.*, 127 U.S. 411 (1888).

An Ohio law which levied a tax on the receipts of a telegraph company was invalid to the extent that part of such receipts levied on were derived from interstate commerce.

130. *Asher* v. *Texas*, 128 U.S. 129 (1888).

By reason of conflict with the federal power to regulate interstate commerce, a Texas law which imposed a license tax on drummers could not validly be enforced against one who solicited orders for the purchase of merchandise from out-of-state sellers.

131. *Stoutenburgh* v. *Hennick*, 129 U.S. 141 (1889).

Clause of the District act requiring commercial agents selling by sample to pay a license tax, held a regulation of interstate commerce when applied to agents soliciting purchases on behalf of principals outside of the District of Columbia.

Justices Concurring: Fuller, C.J., Field, Bradley, Harlan, Matthews, Gray, Blatchford, Lamar.
Justice Dissenting: Miller.

132. *Western Union Telegraph Co.* v. *Alabama*, 132 U.S. 472 (1889).

Alabama tax law, as applied to revenue of telegraph company made by sending messages outside the State, was held to be an invalid regulation of commerce.

133. *Medley, Petitioner*, 134 U.S. 160 (1890).

Colorado law, when applied to a person convicted of a murder committed prior to the enactment and which increased the penalty to be imposed, was void as an *ex post facto* law.

Justices Concurring: Miller, Fuller, C.J., Field, Harlan, Gray, Blatchford, Lamar.
Justices Dissenting: Brewer, Bradley.

134. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134 U.S. 418 (1890).

State rate regulatory law which empowered a commission to establish rate schedules that were final and not subject to judicial

review as to their reasonableness was violative of the due process and equal protection clauses of the Fourteenth Amendment.

Justices Concurring: Blatchford, Fuller, C.J., Miller, Field, Harlan, Brewer.
Justices Dissenting: Bradley, Gray, Lamar.

135. *Leisy* v. *Hardin*, 135 U.S. 100 (1890).

Iowa prohibition law, enforced as to an interstate shipment of liquor in the original packages or kegs, was violative of the federal power to regulate interstate commerce.

Justices Concurring: Fuller, C.J., Miller, Field, Bradley, Blatchford, Lamar.
Justices Dissenting: Gray, Harlan, Brewer.

136. *Lyng* v. *Michigan*, 135 U.S. 161 (1890).

Michigan statute taxing sale of imported liquor in original package, held invalid regulation of interstate commerce.

Justices Concurring: Fuller, C.J., Miller, Field, Bradley, Blatchford, Lamar.
Justices Dissenting: Gray, Harlan, Brewer.

137. *McGahey* v. *Virginia*, 135 U.S. 662 (1890).

Virginia acts which stipulated that if the genuineness of coupons tendered in payment of taxes was in issue, the bond from which the coupon was cut must be produced, which precluded use of expert testimony to establish the genuineness of the coupons, and which, in suits for payment of taxes, imposed on the defendant tendering coupons as payment the burden of establishing the validity of said coupons were deemed to abridge the remedies available to the bondholders so materially as to impair the obligation of contract.

138. *Norfolk & Western R. Co.* v. *Pennsylvania*, 136 U.S. 114 (1890).

Pennsylvania act, imposing a license tax on foreign corporation common carrier doing business in the State, was held to be invalid as a tax on interstate commerce.

Justices Concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford.
Justices Dissenting: Fuller, C.J., Gray, Brewer.

139. *Minnesota* v. *Barber*, 136 U.S. 313 (1890).

Minnesota statute, which made it illegal to offer for sale any meat other than that taken from animals passed by state inspectors, held to discriminate against meat producers from other States and to place an undue burden upon interstate commerce.

140. *Brimmer* v. *Rebman*, 138 U.S. 78 (1891).

Virginia statute prohibiting sale of meat killed 100 miles or more from place of sale, unless it was first inspected in Virginia, held void

as interference with interstate commerce and imposing a discriminatory tax.

141. *Pennoyer* v. *McConnaughy*, 140 U.S. 1 (1891).

Oregon act of 1887 which voided all certificates for the sale of public land unless 20% of the purchase price had been paid prior to 1879 altered the terms of purchase provided under preexisting law and therefore impaired the obligations of the contract.

142. *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891).

Kentucky law, which required license from foreign express corporation agents before doing business in the State, was held invalid under the commerce clause.

Justices Concurring: Bradley, Field, Harlan, Blatchford, Lamar, Brewer.
Justices Dissenting: Fuller, C.J., Gray.

143. *Voight* v. *Wright*, 141 U.S. 62 (1891).

Virginia statute which required state inspection of all but domestic flour held invalid under commerce clause.

144. *Mobile & Ohio Railroad* v. *Tennessee*, 153 U.S. 486 (1894).

Tennessee statutes which levied taxes on a railroad company enjoying tax exemption under an earlier charter impaired the obligation of contract.

Justices Concurring: Jackson, Field, Harlan, Brown, White.
Justices Dissenting: Fuller, C.J., Gray, Brewer, Shiras.

145. *New York, L. E. & W. R.* v. *Pennsylvania, Co.* 153 U.S. 628 (1894).

Pennsylvania act of 1885 which required a New York corporation, when paying interest in New York City on its outstanding securities, to withhold a Pennsylvania tax levied on resident owners of such securities was violative of due process by reason of its application to property beyond the jurisdiction of Pennsylvania. The act also impaired the obligation of contract by increasing the conditions originally exacted of the railroad in return for permission to construct and operate over trackage in Pennsylvania.

146. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U.S. 204 (1894).

Kentucky act regulating toll rates on bridge across the Ohio River held unconstitutional regulation of interstate commerce.

Justices Concurring: Brown, Harlan, Brewer, Shiras, Jackson.
Justices Dissenting: Fuller, C.J., Field, Gray, White.

147. *Gulf, C. & S. F. Ry. Co.* v. *Hefley*, 158 U.S. 98 (1895).

Texas statute regulating railroad rates, when applied to interstate freight transportation, was held to conflict with congressional Interstate Commerce Act.

148. *Bank of Commerce* v. *Tennessee*, 161 U.S. 134 (1896).

Tennessee revenue laws which imposed a tax on stock beyond that stipulated under the provision of a state charter held to impair the obligation of contract.

149. *Barnitz* v. *Beverly*, 163 U.S. 118 (1896).

Kansas law granting to mortgagor a right, not existent when the mortgage was negotiated, namely, a right to redeem foreclosed property, impaired the obligation of contract.

150. *Illinois Central R.* v. *Illinois*, 163 U.S. 142 (1896).

Illinois statute required railroad to run New Orleans train into Cairo and back to mail line, although there was already adequate service to Cairo. This requirement was held to be an unconstitutional obstruction of interstate commerce and of passage of United States mails.

151. *Missouri Pacific Railway* v. *Nebraska*, 164 U.S. 403 (1896).

A railroad was deprived of property without due process of law by a Nebraska statute which compelled it to permit a third party to erect a grain elevator on its right of way.

152. *Scott* v. *Donald*, 165 U.S. 58 (1897).

South Carolina act regulating sale of alcoholic beverages exclusively at state dispensaries, when enforced against a resident importing out-of-state liquor, constituted an invalid discriminatory regulation of interstate commerce.

Justices Concurring: Shiras, Fuller, C.J., Field, Harlan, Gray, White, Peckham.

Justice Dissenting: Brown.

153. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U.S. 150 (1897).

Texas law which required railroads to pay court costs and attorneys' fees to litigants successfully prosecuting claims against them deprived the railroads of due process and equal protection of the law.

Justices Concurring: Brewer, Field, Harlan, Brown, Shiras, Peckham.

Justices Dissenting: Gray, Fuller, C.J., White.

154. *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897).

Louisiana law imposing penalty for soliciting contract of insurance on behalf of insurers which have not complied with Louisiana law effected a denial of liberty of contract contrary to due process when applied to an insurance contract negotiated in New York with a New York company and with premiums and losses to be paid in New York.

155. *Smyth* v. *Ames*, 169 U.S. 466 (1898).

Nebraska statute setting intrastate freight rates held to impose rates so low as to be unreasonable and to amount to a deprivation of property without due process of law.

156. *Houston & Texas Central Ry.* v. *Texas*, 170 U.S. 243 (1898).

Texas constitutional provision, as enforced to recover certain sections of land held by a railroad company under a previous legislative grant, judged an impairment of obligation of contract.

157. *Thompson* v. *Utah*, 170 U.S. 343 (1898).

Provision in Utah constitution, providing for the trial of non-capital criminal cases in courts of general jurisdiction by a jury of eight persons, held an *ex post facto* law applied to felonies committed before the territory became a State.

Justices Concurring: Harlan, Fuller, C.J., Gray, Brown, Shiras, White, McKenna.

Justices Dissenting: Brewer, Peckham.

158. *Schollenberger* v. *Pennsylvania*, 171 U.S. 1 (1898).

Pennsylvania law which prohibited the manufacture and sale of oleomargarine was invalid to the extent that it prohibited interstate importation and resale of oleomargarine in original packages.

Justices Concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna.

Justices Dissenting: Gray, Harlan.

159. *Collins* v. *New Hampshire*, 171 U.S. 30 (1898).

New Hampshire law which prohibited the sale of oleomargarine unless it was pink in color, was invalid as an arbitrary means of rendering the product unmarketable and also could not be enforced to prevent the interstate transportation and resale of oleomargarine produced in another State and not colored pink.

Justices Concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna.

Justices Dissenting: Harlan, Gray.

160. *Blake* v. *McClung*, 172 U.S. 239 (1898).

Tennessee acts which granted Tennessee creditors priority over non-resident creditors having claims against foreign corporations admitted to do local business infringed the privileges and immunities clause of Art. IV, § 2.

Justices Concurring: Harlan, Gray, Brown, Shiras, White, McKenna, Peckham.
Justices Dissenting: Brewer, Fuller, C.J.

161. *Norwood* v. *Baker*, 172 U.S. 269 (1898).

The exaction, as authorized by Ohio law, from the owner of property, via special assessment, of the cost of a public improvement in substantial excess of the benefits accruing to him amounted to a taking of property for public use without compensation and was violative of due process.

Justices Concurring: Harlan, Fuller, C.J., Brown, White, Peckham, McKenna.
Justices Dissenting: Brewer, Gray, Shiras.

162. *Dewey* v. *Des Moines*, 173 U.S. 193 (1899).

Nonresident owner of property in Iowa was deprived of property without due process when the State, without having acquired personal jurisdiction via service of process, subjected him to a personal liability to pay a special assessment in conformity with a statute invalidly authorizing imposition of liability in such manner.

163. *Ohio* v. *Thomas*, 173 U.S. 276 (1899).

Ohio statute which regulated the use of oleomargarine in the State held void as applied to a soldiers' home in Ohio created by Congress and administered as a federal institution.

164. *Lake Shore & Mich. S. Ry. Co.* v. *Smith*, 173 U.S. 684 (1899).

Michigan act which required railroads to sell 1000-mile tickets at a fixed price in favor of the purchaser, his wife, and children, with provisions for forfeiture if presented by any other person in payment of fare, and for expiration within two years, subject to redemption of unused portion and collection of 3¢ per mile already traveled, effected a taking of property without due process and a denial of equal protection.

Justices Concurring: Peckham, Harlan, Brewer, Brown, Shiras, White.
Justices Dissenting: Fuller, C.J., Gray, McKenna.

165. *Houston and Texas Central R. Co.* v. *Texas*, 177 U.S. 66 (1900).

Subsequent repeal of a Texas statute which permitted treasury warrants to be given to the State for payment of interest on bonds

issued by a railroad and held by the State, with accompanying endeavor to hold the railroad liable for back interest paid on the warrants, was invalid by reason of impairment of the obligation of contract.

166. *Cleveland, C. C. & St. L. Ry. Co.* v. *Illinois*, 177 U.S. 514 (1900).

Illinois law which required all regular passenger trains to stop at county seats for receipt and discharge of passengers imposed an invalid burden on interstate commerce when applied to an express train serving only through passengers between New York and St. Louis.

167. *Stearns* v. *Minnesota*, 179 U.S. 223 (1900).

State statute repealing all former tax exemption laws and providing for the taxation of lands granted to railroads *held* to impair the obligation of contract.

*Duluth & I. R. R. Co.* v. *St. Louis County*, 179 U.S. 302 (1900).

Act of Minnesota legislature providing ways in which railroad corporations could discharge property taxes *held* void under the ruling in *Stearns* v. *Minnesota*.

168. *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79 (1901).

Kansas statute, regulating public stock yards, *held* to violate the equal protection clause of the Fourteenth Amendment in that it applied only to one stockyard company in the State.

169. *Louisville & Nashville R. Co.* v. *Eubank*, 184 U.S. 27 (1902).

Section of Kentucky constitution on long and short haul railroad rates held invalid where interstate shipments were involved.

Justices Concurring: Peckham, Fuller, C.J., Harlan, Brown, Shiras, White, McKenna.

Justices Dissenting: Brewer, Gray.

170. *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

Act of Illinois, which regulated monopolies but exempted agricultural products and livestock in the hands of the producer from the operation of the law, held to deny the equal protection of the laws.

Justices Concurring: Harlan, Fuller, C.J., Brewer, Brown, Shiras, White, Peckham.

Justice Dissenting: McKenna.

171. *Stockard* v. *Morgan*, 185 U.S. 27 (1902).

Tennessee license tax on agent soliciting and selling by sample for company in another State held invalid regulation of commerce.

172. *Louisville & J. Ferry Co.* v. *Kentucky,* 188 U.S. 385 (1903).

An Indiana franchise granted to a Kentucky corporation for operating a ferry from the Indiana to the Kentucky shore had its tax situs in Indiana; and, accordingly, Kentucky lacked jurisdiction with the result that its law which authorized a levy thereon effected a deprivation of property without due process of law.

Justices Concurring: Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes.
Justices Dissenting: Fuller, C.J., Shiras.

173. *The Roanoke,* 189 U.S. 185 (1903).

Washington law which accorded contractor or subcontractor a lien on a foreign vessel for work done and which made no provision for protection of owner in event contractor was fully paid before notice of subcontractor's lien was received deprived the owner of normal defenses and constituted an invalid interference with admiralty jurisdiction exclusively vested in federal courts by Art. III.

174. *The Robert W. Parsons,* 191 U.S. 17 (1903).

New York statutes giving a lien for repairs upon vessels and providing for the enforcement of such liens by proceedings *in rem, held* void as in conflict with the inclusive admiralty and maritime jurisdiction of the federal courts.

Justices Concurring: Brown, White, McKenna, Holmes, Day.
Justices Dissenting: Brewer, Fuller, C.J., Peckham, Harlan.

175. *Allen* v. *Pullman Company,* 191 U.S. 171 (1903).

Tennessee tax of $500 per year per pullman car, when applied to cars moving in interstate as well as intrastate commerce, imposed an invalid burden on interstate commerce.

176. *Bradley* v. *Lightcap,* 195 U.S. 1 (1904).

Illinois law, passed after a mortgage was executed, which provided that if a mortgagee did not obtain a deed within five years after the period of redemption had lapsed, he lost the estate (whereas under the law existing when the mortgage was executed, failure by the mortgagee to take out a deed had no effect on the title of the mortgagee against the mortgagor) was *held* void as impairing the obligation of contract and depriving the mortgagee of property rights without due process.

177. *Central of Georgia Ry. Co.* v. *Murphey,* 196 U.S. 194 (1905).

Sections of Georgia code, imposing the duty on common carriers of reporting on the shipment of freight to the shipper, *held* void when applied to interstate shipments.

178. *Lochner* v. *New York,* 198 U.S. 45 (1905).

New York law establishing 10-hour day in bakeries was violative of due process by reason of interfering with the employees' freedom to contract in relation to their labor.

Justices Concurring: Peckham, Fuller, C.J., Brewer, Brown, McKenna.
Justices Dissenting: Harlan, White, Day, Holmes (separately).

179. *Union Transit Co.* v. *Kentucky,* 199 U.S. 194 (1905).

Inasmuch as tangible personal property acquires a tax situs in the State where it is permanently located, attempt by Kentucky, in which the owner was domiciled, to tax railway cars located in Indiana, was void and amounted to a deprivation of property without due process.

Justices Concurring: Brown, Harlan, Brewer, Peckham, McKenna, Day.
Justices Dissenting: Holmes, Fuller, C.J., White.

180. *Houston & Texas Central Railroad* v. *Mayes,* 201 U.S. 321 (1906).

Texas statute exacting of an interstate railroad an absolute requirement that it furnish a certain number of cars on a given day to transport merchandise to another State imposed an invalid, unreasonable burden on interstate commerce.

Justices Concurring: Brewer, Brown, Peckham, Holmes, Day.
Justices Dissenting: Fuller, C.J., Harlan, McKenna.

181. *Powers* v. *Detroit & Grand Haven Ry.,* 201 U.S. 543 (1906).

When a railroad is reorganized under a special act but no new corporation is chartered, tax concession granted by such act amounted to a contract which could not be impaired by subsequent enactment which purported to alter the rate of the tax.

Justices Concurring: Brewer, Fuller, C.J., Harlan, Brown, Peckham, McKenna, Holmes, Day.
Justice Dissenting: White.

182. *Vicksburg* v. *Waterworks Co.,* 202 U.S. 453 (1906).

A water company owning an exclusive franchise to supply a city with water was entitled to an injunction restraining impairment of such contract by attempted erection by city of its own water system pursuant to Mississippi statutory authorization.

Justices Concurring: Day, Fuller, C.J., Brewer, Brown, White, Peckham, McKenna, Holmes.
Justice Dissenting: Harlan.

183. *American Smelting Co.* v. *Colorado*, 204 U.S. 103 (1907).

A statute stipulating that foreign corporations, as a condition for admission to do business, pay a fee based on their capital stock whereupon they would be subjected to all the liabilities and restrictions imposed upon domestic corporations amounted to a contract, the obligation of which was invalidly impaired by a later statute which imposed higher annual license fees on foreign corporations admitted under the preceding terms than were levied on domestic corporations, whose corporate existence had not expired.

Justices Concurring: Peckham, Brewer, White, McKenna, Day.
Justices Dissenting: Fuller, C.J., Harlan, Holmes, Moody.

184. *Home Savings Bank* v. *Des Moines*, 205 U.S. 503 (1907).

A state law levying a tax on a state bank, assessed on its shares measured by the value of its capital, surplus, and individual earnings, was void insofar as the assessment embraced federal bonds owned by the bank and was in conflict with a federal enactment exempting such bonds from state taxes.

Justices Concurring: Moody, Brewer, White, McKenna, Holmes, Day.
Justices Dissenting: Fuller, C.J., Harlan, Peckham.

185. *Adams Express Co.* v. *Kentucky*, 206 U.S. 129 (1907).

Kentucky law proscribing C.O.D. shipments of liquor, providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale, and making the carrier jointly liable with the vendor was, as applied to interstate shipments, an invalid regulation of interstate commerce.

Justices Concurring: Brewer, Holmes, Peckham, Moody, Fuller, C.J., White, Day, McKenna.
Justice Dissenting: Harlan.

*Accord: American Express Co.* v. *Kentucky*, 206 U.S. 139 (1907).

186. *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127 (1907).

Georgia statutory assessment procedure which afforded taxpayer no opportunity to be heard as to valuation of property not returned by him under hon st belief that it was not taxable and which permitted him to challenge the assessment only for fraud and corruption was violative of the due process requirements of the Fourteenth Amendment.

187. *Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908).

Tennessee tax law which exempted domestic crops and manufactured products while extending the levy to like products of out-of-state origin imposed an invalid burden on interstate commerce.

188. *Ex parte Young*, 209 U.S. 123 (1908).

Minnesota railroad rate statute which imposed such excessive penalties that parties affected were deterred from testing its validity in the courts denied a railroad the equal protection of the laws.

189. *Galveston, H. & S.A. Ry. Co.* v. *Texas*, 210 U.S. 217 (1908).

Texas gross receipts tax insofar as it was levied on railroad receipts which included income derived from interstate commerce was invalid by reason of imposing a burden on interstate commerce.

Justices Concurring: Holmes, Brewer, Peckham, Day, Moody.
Justices Dissenting: Harlan, Fuller, C.J., White, McKenna.

190. *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19 (1909).

New York law which required a public utility to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained under the rates fixed unconstitutionally deprived the utility of its property without due process.

191. *Louisville & Nashville R. Co.* v. *Stock Yards Co.*, 212 U.S. 132 (1909).

Kentucky constitutional provision which required a carrier to deliver its cars to connecting carriers without providing adequate protection for their return or compensation for their use effected an invalid taking of property without due process of law.

Justices Concurring: Holmes, Fuller, C.J., Brewer, White, Peckham, Day.
Justices Dissenting: McKenna, Harlan, Moody.

192. *Nielson* v. *Oregon*, 212 U.S. 315 (1909).

For want of jurisdiction, Oregon could not validly prosecute as a violator of its law prohibiting the use of purse nets one who, pursuant to a license from Washington, used such a net on the Washington side of the Columbia River.

193. *Adams Express Co.* v. *Kentucky*, 214 U.S. 218 (1909).

Kentucky law proscribing the sale of liquor to an inebriate, as applied to a carrier delivering liquor to such person from another State, was void by reason of conflict with the commerce clause.

Justices Concurring: Brewer, Holmes, Peckham, Moody, Fuller, C.J., White, Day, McKenna.

Justice Dissenting: Harlan.

194. *Louisiana ex rel. Hubert* v. *New Orleans*, 215 U.S. 170 (1909).

Louisiana act of 1870 providing for registration and collection of judgments against New Orleans, so far as it delayed payment, or collection of taxes for payment, of contract claims existing before its passage, effected an invalid impairment of the obligation of such contracts.

195. *North Dakota ex rel. Flaherty* v. *Hanson*, 215 U.S. 515 (1910).

North Dakota statute which required the recipient of a federal retail liquor license, solely because of payment therefor and without reference to the doing of any act within North Dakota, to publish official notices of the terms of such license and of the place where it is posted, to display on his premises an affidavit confirming such publication, and to file an authenticated copy of such federal license together with a $10 fee was void for imposing a burden on the federal taxing power.

Justices Concurring: White, Harlan, Brewer, Day.
Justices Dissenting: Fuller, C.J., McKenna, Holmes.

196. *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1 (1910).

Kansas statute imposing a charter fee, computed as a percentage of authorized capital stock, on corporations for the privilege of doing business in Kansas could not validly be collected from a foreign corporation engaged in interstate commerce, and also was violative of due process insofar as it was imposed on property, part of which was located beyond the limits of that State.

Justices Concurring: Harlan, Brewer, White (separately), Day, Moody.
Justices Dissenting: Holmes, Fuller, C.J., McKenna, Peckham.

197. *Ludwig* v. *Western Union Tel. Co.*, 216 U.S. 146 (1910).

Arkansas law which required a foreign corporation engaged in interstate commerce to pay, as a license fee for doing an intrastate business, a given amount of its entire capital stock, whether employed in Arkansas or elsewhere, was void by reason of imposing a burden on interstate commerce and embracing property outside the jurisdiction of the State.

Justices Concurring: Harlan, Moody, Lurton, White, Day, Brewer.
Justices Dissenting: Fuller, C.J., McKenna, Holmes.

198. *Southern Railway Co.* v. *Greene*, 216 U.S. 400 (1910).

Alabama law which imposed on foreign corporations already admitted to do business an additional franchise or privilege tax not

levied on domestic corporations exposed the foreign corporations to denial of equal protection of the laws.

Justices Concurring: Day, Harlan, Brewer, White.
Justices Dissenting: Fuller, C.J., McKenna, Holmes.

199. *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910).

Kansas which by law exacted of foreign corporations engaged in interstate commerce the following conditions for admission and retention of the right to do business in that State, namely, procurement of a license, submission of an annual financial statement, and which prohibited them from filing actions in Kansas courts unless such conditions were met, imposed an unconstitutional burden on interstate commerce.

Justices Concurring: Harlan, White, Holmes, Day, Lurton.
Justices Dissenting: Fuller, C.J., McKenna.

200. *St. Louis S.W. Ry* v. *Arkansas*, 217 U.S. 136 (1910).

Arkansas law, and commission order issued under the authority thereof, which required an interstate carrier, upon application of a local shipper, to deliver promptly the number of freight cars requested for loading purposes and which, without regard to the effect of such demand on its interstate traffic, exposed it to severe penalties for noncompliance, imposed an invalid, unreasonable burden on interstate commerce. The rules of the American Railway Association as to availability of a member carrier's cars for interstate shipments being a matter of federal regulation, it was beyond the power of a state court to pass on their sufficiency.

Justices Concurring: White, Harlan, McKenna, Holmes, Day, Lurton.
Justice Dissenting: Fuller, C.J.

201. *Missouri Pacific Ry.* v. *Nebraska*, 217 U.S. 196 (1910).

Nebraska law compelling railroad, at its own expense, and upon request of grain elevator operators, to install switches connecting such elevators with its right of way deprived the carrier of property without due process of law.

Justices Concurring: Holmes, Fuller, C.J., White, Day, Lurton.
Justices Dissenting: Harlan, McKenna.

202. *Dozier* v. *Alabama*, 218 U.S. 124 (1910).

Alabama law which imposed license tax on agents, not having a permanent place of business in that State and soliciting orders for the purchase and delivery of pictures and frames manufactured in, and delivered from, another State, with the title remaining in the vendor

until the agent collected the purchase price, imposed an invalid burden on interstate commercial transactions.

203. *Herndon* v. *Chicago, R.I. & P. Ry. Co.*, 218 U.S. 135 (1910).

When a railroad already has provided adequate accommodations at any point, a Missouri regulation which required interstate trains to stop at such point imposed an invalid, unreasonable burden on interstate commerce. Also, a Missouri law which forfeited the right of an admitted foreign carrier to do a local business upon its instituting a right of action in a federal court extracted an unconstitutional condition.

204. *Bailey* v. *Alabama*, 219 U.S. 219 (1911).

Alabama law which made a refusal to perform labor contracted for, without return of money or property advanced under the contract, *prima facie* evidence of fraud and which was enforced under local rules of evidence which precluded one accused thereof from testifying as to uncommunicated motives was an invalid peonage law proscribed by the Thirteenth Amendment.

Justices Concurring: Hughes, White, C.J., Lamar, Harlan, Day, Van Devanter, McKenna.

Justices Dissenting: Holmes, Lurton.

205. *Oklahoma* v. *Kansas Nat. Gas. Co.*, 221 U.S. 229 (1911).

Oklahoma law which withheld from foreign corporations engaged in interstate commerce a privilege afforded domestic corporations engaged in local commerce, namely, of building pipe lines across its highways and transporting to points outside its boundaries natural gas extracted and reduced to possession therein, was invalid as a restraint on interstate commerce and as a deprivation of property without due process of law.

Justices Concurring: McKenna, White, C.J., Harlan, Day, Van Devanter, Lamar.

Justices Dissenting: Holmes, Lurton, Hughes.

206. *Berryman* v. *Whitman College*, 222 U.S. 334 (1912).

Although the federal organic act of 1867 forbade the Washington territorial legislature from granting tax exemption privileges to private corporations, the territorial acts of 1859, as amended by an act of 1883 which accorded a tax exemption to Whitman College, gave rise to a contract which was impaired by the act of the state legislature, enacted in 1905, subjecting the college to taxation.

207. *Northern Pacific Ry. Co.* v. *Washington*, 222 U.S. 370 (1912).

Consistent with doctrine of national supremacy and preemption, state laws, including one of the State of Washington, regulating hours of service embracing employees of interstate carriers became inoperative immediately upon the adoption of the Federal Hours of Service Law notwithstanding that the latter did not go into effect until a year after its passage.

208. *Southern Ry. Co.* v. *Reid*, 222 U.S. 424 (1912).

Inasmuch as it conflicted with § 2 of the Hepburn Act of 1906 (34 Stat. 584) forbidding interstate railway carriers to make shipments until rates had been fixed and published by the Interstate Commerce Commission, which in this matter had not yet acted, a North Carolina statute requiring carriers, under penalty for refusal, to transport interstate freight as soon as it was received was unenforceable.

Justices Concurring: McKenna, White, C.J., Holmes, Hughes, Van Devanter, Lamar.

Justice Dissenting: Lurton.

*Accord: Southern Ry. Co* v. *Reil & Beam*, 222 U.S. 444 (1912).

*Accord: Southern Ry. Co.* v. *Burlington Lumber Co.*, 225 U.S. 99 (1912).

209. *Louisville & Nashville R.* v. *Cook Brewing Co.*, 223 U.S. 70 (1912).

Kentucky statute prohibiting common carriers from transporting intoxicating liquors to "dry" points in Kentucky was constitutionally inapplicable to interstate shipments of such liquor to consignees in Kentucky.

210. *Atchison T. & S. F. Ry. Co.* v. *O'Connor*, 223 U.S. 280 (1912).

Colorado law levying tax of 2¢ on each $1000 of a corporation's capital stock could not constitutionally be collected from a Kansas corporation engaged in interstate commerce, the greater part of whose property and business were located and conducted outside Colorado.

211. *Oklahoma* v. *Wells, Fargo & Co.*, 223 U.S. 298 (1912).

Oklahoma law which purported to be an *ad valorem* tax on the property of corporations, levied in the form of a three per cent gross receipts tax, and computed, in the case of express companies doing an interstate business, as a percentage of gross receipts from all sources, interstate as well as intrastate, which is equal to the proportion which its business in Oklahoma bears to its total business was void as applied to such express companies; the tax burdened interstate com-

merce and was levied, contrary to due process, on property in the form of income from investments and bonds located outside the State.

212. *Haskell* v. *Kansas Natural Gas Co.*, 224 U.S. 217 (1912).

Oklahoma conservation law, insofar as it withheld from foreign corporations the right to lay pipe lines across highways for purposes of transporting natural gas in interstate commerce, imposed an invalid burden on interstate commerce.

213. *St. Louis, I. M. & S. Ry. Co.* v. *Wynne*, 224 U.S. 354 (1912).

Arkansas law compelling railroads to pay claimants within 30 days after notice of injury to livestock caused by their trains, and, upon default thereof, authorizing claimants to recover double the damages awarded by a jury plus an attorney's fee, notwithstanding that the amount sued for was less than the amount originally claimed, in effect penalized the railroads for their refusal to pay excessive claims, and accordingly effected an arbitrary deprivation of property without due process of law.

214. *Bucks Stove Co.* v. *Vickers*, 226 U.S. 205 (1912).

Kansas law which exacted certain requirements, such as obtaining permission of the State Charter Board, paying filing and license fees, and submitting annual statements listing all stockholders, as a condition prerequisite to doing business in Kansas and suing in its courts could not constitutionally be applied to foreign corporations engaged in interstate commerce; a State cannot exact a franchise for the privilege of engaging in such commerce.

215. *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U.S. 426 (1913).

Congress, by enactment of the Hepburn Act (34 Stat. 584 (1906)) having preempted the field of regulation pertaining to the duty of carriers to deliver cars in interstate commerce, a Minnesota Reciprocal Demurrage Law imposing like regulations was void.

216. *Accord: St. Louis, Iron Mt. & S. Ry.* v. *Edwards*, 227 U.S. 265 (1913).

Arkansas Demurrage Law of 1907 penalizing carriers for failure to notify consignees of arrival of shipments was similarly held void.

217. *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913).

Congress through adoption of the Carmack Amendment having preempted the field of regulation pertaining to the liability of interstate carriers for loss and damage to interstate shipments, a Kentucky law in conflict therewith which precluded an interstate carrier

from contracting to limit its liability to an agreed or declared value was void.

218. *Accord: Chicago, B. & Q. Ry.* v. *Miller,* 226 U.S. 513 (1913).

An Iowa law and a provision of the Nebraska constitution were held to have been superseded by the Carmack Amendment.

219. *Accord: Chicago, St. P., M. & O. Ry. Co.* v. *Latta,* 226 U.S. 519 (1913).

Nebraska constitutional provision was held to have been superseded.

220. *Crenshaw* v. *Arkansas,* 227 U.S. 389 (1913).

Arkansas statute, exacting license and fee from peddlers of lightning rods and other articles, as applied to representatives of a Missouri corporation soliciting orders for the sale and subsequent delivery of stoves by said corporation, imposed an invalid burden on interstate commerce.

*Accord: Rogers* v. *Arkansas,* 227 U.S. 401 (1913).

221. *Accord: Stewart* v. *Michigan,* 232 U.S. 665 (1914), voiding application of a similar Michigan law.

222. *McDermott* v. *Wisconsin,* 228 U.S. 115 (1913).

Wisconsin food labeling law, insofar as it exacted labelling requirements as to articles in interstate commerce which were in conflict with those required under the Federal Pure Food and Drug Act, imposed an invalid burden on interstate commerce.

223. *Missouri, K. & T. Ry.* v. *Harriman Bros.* 227 U.S. 657 (1913).

Inasmuch as the federal Carmack Amendment preempted the field of regulation pertaining to determination of an interstate railroad's liability for loss or damages to goods in transit, Texas law outlawing contractual stipulations specifying a period of limitations for filing of claims by a shipper which was briefer than that sanctioned by the federal law was unenforceable.

Justices Concurring: Lurton, McKenna, Holmes, Hughes (separately), Day, Van Devanter, Lamar, White, C.J.
Justice Dissenting: Pitney.

224. *Ettor* v. *Tacoma,* 228 U.S. 148 (1913).

Washington statute of 1907 repealing a prior act of 1893 with the result that rights to consequential damages for a change of street grade that had already accrued under the earlier act were destroyed amounted to an invalid deprivation of property without due process of law.

225. *St. Louis, S. F. & T. Ry. Co.* v. *Seale*, 229 U.S. 156 (1913).

When the Federal Employers' Liability Act was applicable, by reason that the injured employee was engaged in interstate commerce, a Texas law affording a remedy for said injuries was superseded by reason of the supremacy of the former.

Justices Concurring: Van Devanter, McKenna, Holmes, Day, Lurton, Hughes, Pitney, White, C.J.

Justice Dissenting: Lamar.

226. *Chicago, B. & Q. R.* v. *Hall*, 229 U.S. 511 (1913).

Iowa law pertaining to attachment of wages of a railroad worker adjudicated bankrupt within less than four months thereafter was in conflict with federal bankruptcy law nullifying liens obtained within four months prior to the filing of a petition in bankruptcy and hence was not entitled to full faith and credit in Nebraska courts.

227. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U.S. 340 (1913).

Kansas statute which did not permit a carrier to have the sufficiency of rates established thereunder determined by judicial review and which exposed the carrier, when sued for charging rates in excess thereof, to a liability for liquidated damages in the sum of $500, which was unrelated to actual damages, effected an unconstitutional deprivation of property without due process of law.

228. *Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U.S. 165 (1914).

North Dakota law which made railroads liable for double damages in case of failure to pay a claim, within 60 days after notice, or to offer to pay a sum equal to what a jury found the claimant entitled to was arbitrary and deprived the carriers of property without due process of law.

*Accord: Chicago, M. & St. P. Ry. Co.* v. *Kennedy*, 232 U.S. 626 (1914).

229. *Harrison* v. *St. Louis, S. F. & T. R. Co.*, 232 U.S. 318 (1914).

Oklahoma law which prohibited foreign corporation, upon penalty of forfeiting their license to do business in that State, from invoking the diversity of citizenship jurisdiction of federal courts and instituting actions therein exacted an unconstitutional condition.

230. *Foote* v. *Maryland*, 232 U.S. 495 (1914).

Maryland Oyster Inspection tax of 1910, levied on oysters coming from other States, the proceeds from which were used partly for inspection and partly for other purposes, such as the policing of state

waters, was void as imposing a burden on interstate commerce in excess of the expenses absolutely necessary for inspection.

231. *Farmers Bank* v. *Minnesota*, 232 U.S. 516 (1914).

Minnesota tax on bonds issued by a municipality of the Territory of Oklahoma and held by Minnesota corporations was void as a tax on a federal instrumentality (Art. VI).

232. *Russell* v. *Sebastian*, 233 U.S. 195 (1914).

Amendment in 1911 of California constitution of 1879, and municipal ordinances of Los Angeles adopted in pursuance of the amendment were ineffectual by reason of the prohibition against impairment of contracts contained in Art. I, § 10, of the Federal Constitution, to deprive a utility of rights acquired before said amendment, which embraced the privilege of laying gas pipes under the streets of Los Angeles.

233. *Singer Sewing Machine Co.* v. *Brickell*, 233 U.S. 304 (1914).

Alabama sewing machine license tax could not be collected from those agencies of a foreign corporation engaged wholly in an interstate business, that is, in soliciting orders for machines to be accepted and fulfilled at the Georgia office of the seller.

234. *Tennessee Coal Co.* v. *George*, 233 U.S. 354 (1914).

Since venue is not part of a transitory cause of action, Alabama law which created such cause of action by making the employer liable to the employee for injuries attributable to defective machinery was inoperative insofar as it sought to withhold from such employee the right to sue on such action in courts of any State other than Alabama; the full faith and credit clause of Art. IV does not preclude a court in another State which acquired jurisdiction from enforcing such right of action.

235. *Carondelet Canal Co.* v. *Louisiana*, 233 U.S. 362 (1914).

Louisiana act of 1906 repealing prior act of 1858 and sequestering with compensation certain property acquired by a canal company under the repealed enactment impaired an obligation of contact.

236. *Smith* v. *Texas*, 233 U.S. 630 (1914).

Texas act of 1914 stipulating that only those who have previously served two years as freight train conductors or brakemen shall be eligible to serve as railroad train conductors was arbitrary and effected a denial of the equal protection of the laws.

237. *Erie R. R. Co.* v. *New York*, 233 U.S. 671 (1914).

Congress having completely preempted the field by its Hours of Service Act of 1907, notwithstanding that it did not take effect until 1908, a New York labor law of 1907 regulating hours of service of railroad telegraph operators engaged in interstate commerce effected an invalid regulation of such commerce.

238. *International Harvester Co.* v. *Kentucky*, 234 U.S. 216 (1914).

Kentucky criminal and antitrust provisions, both constitutional and statutory, were void for vagueness and hence violative of due process because a prohibition of combinations which establish prices that are greater or lower than the "real market value" of an article as established by "fair competition" and "under normal market conditions" afforded no standard that was possible to know in advance and to obey.

Justices Concurring: Holmes, Hughes, White, C.J., Lamar, Day, Lurton, Van Devanter.
Justices Dissenting: McKenna, Pitney.

*Accord: International Harvester* v. *Kentucky*, 234 U.S. 579 (1914); *Collins* v. *Kentucky*, 234 U.S. 634 (1914); *American Machine Co.* v. *Kentucky*, 236 U.S. 660 (1915).

239. *Missouri Pacific Ry. Co.* v. *Larabee*, 234 U.S. 459 (1914).

Kansas statute empowering a Kansas court to award against a litigant attorney's fees attributable to the presentation before the United States Supreme Court of an appeal in a mandamus proceeding was inoperative consistently with the principle of national supremacy, for a state court cannot be empowered by state law to assess fees for services rendered in a federal court when such assessment is sanctioned neither by federal law nor by the rules of the Supreme Court.

240. *Western Union Telegraph Co.* v. *Brown*, 234 U.S. 542 (1914).

South Carolina law making mental anguish resulting from negligent non-delivery of a telegram a cause of action could not be invoked to support an action for negligent non-delivery in the District of Columbia, an area beyond the jurisdiction of South Carolina and, consistent with due process, removed from the scope of its legislative power. The statute, as applied to messages sent from South Carolina to another jurisdiction, also was an invalid regulation of interstate commerce.

241. *United States* v. *Reynolds*, 235 U.S. 133 (1914).

Alabama law which permitted person convicted of an offense to contract with another whereby, in consideration of the latter becom-

ing surety for the convicted person's fine, the convicted person agreed to perform certain services, and which further stipulated that if such contract was breached, the convicted person would become subject to a fine equal to the damages sustained by the other contracting party and payment of which would be remitted to said contracting party imposed a form of peonage proscribed by the Thirteenth Amendment.

Justice Concurring: Holmes (separately).

242. *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151 (1914).

Oklahoma Separate Coach Law violated the equal protection clause of the Fourteenth Amendment by permitting carriers to provide sleeping, dining, and chair cars for whites but not for Negroes.

Justices Concurring: White, C.J. (separately), Holmes (separately), Lamar (separately), McReynolds (separately).

243. *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914).

South Dakota law which required a foreign corporation to appoint a local agent to accept service of process as a condition precedent to suing in state courts to collect a claim arising out of interstate commerce imposed an invalid burden on said commerce.

244. *Choctaw & Gulf R. R.* v. *Harrison*, 235 U.S. 292 (1914).

Oklahoma privilege tax, insofar as it was levied on sale of coal extracted from lands owned by Indian tribes and leased on their behalf by the Federal Government was invalid as a tax on federal instrumentality.

245. *Coppage* v. *Kansas*, 236 U.S. 1 (1915).

Kansas law proscribing "yellow dog" contracts whereby the employer exacted of employees an agreement not to join or remain a member of a union as a condition of acquiring and retaining employment deprived employees of liberty of contract contrary to due process.

Justices Concurring: Pitney, White, C.J., McKenna, Van Devanter, Lamar, McReynolds.

Justices Dissenting: Day, Hughes, Holmes (separately).

246. *Heyman* v. *Hays*, 236 U.S. 178 (1915).

Tennessee county privilege tax law, insofar as it was enforced as to a liquor dealer doing a strictly mail-order business confined to shipments to out-of-state destinations was void as a burden on interstate commerce.

*Accord: Southern Operating Co.* v. *Hayes*, 236 U.S. 188 (1915).

247. *Globe Bank* v. *Martin*, 236 U.S. 288 (1915).

Consistently with the principle of national supremacy, attachments and liens on real estate of a bankrupt, acquired pursuant to Kentucky laws within four months prior to the filing of a petition in bankruptcy under federal law, were null and void, and distribution of the proceeds from the sale of such real estate was governed by federal rather than by state law.

248. *Southern Ry. Co.* v. *R. R. Comm.*, 236 U.S. 439 (1915).

An Indiana statute requiring railway companies to place grab-irons and hand-holds on the sides and ends of every car having been superseded by the Federal Safety Appliance Act, penalties imposed under the former could not be recovered as to cars operated on interstate railroads, although engaged only in intrastate traffic.

249. *Kirmeyer* v. *Kansas*, 236 U.S. 568 (1915).

Kansas prohibition law could not be validly enforced to prevent Kansas dealer from accepting orders for alcoholic beverages which were to be completed by interstate delivery to Kansas purchasers from a point in Missouri; under the federal Wilson Act the interstate transportation did not end until delivery to the consignee was completed.

250. *Northern Pac. Ry.* v. *North Dakota ex rel McCue*, 236 U.S. 585 (1915).

North Dakota law compelling carriers to haul certain commodities at less than compensatory rates deprived them of property without due process.

Justices Concurring: Hughes, White, C.J., McKenna, Holmes, Day, Van Devanter, Lamar, McReynolds.
Justice Dissenting: Pitney

251. *Norfolk & West. Ry.* v. *Conley*, 236 U.S. 605 (1915).

West Virginia law which compelled carriers to haul passengers at noncompensatory rates deprived them of property without due process.

Justices Concurring: Hughes, White, C.J., McKenna, Holmes, Day, Van Devanter, Lamar, McReynolds.
Justice Dissenting: Pitney

252. *Wright* v. *Central of Georgia Ry.*, 236 U.S. 674 (1915).

Since the lessee of two railroads, built under special charters containing irrepealable contracts exempting the railway property from taxation in excess of a given rate was to be viewed as in the same position as the owners, levy of an *ad valorem* tax on the lessee in

excess of the charter rate impaired the obligation of contract (Art. I, § 10).

Justices Concurring: Holmes, White, C.J., McKenna, Day, Van Devanter.
Justices Dissenting: Hughes, Pitney, McReynolds.

*Accord: Wright* v. *Louisville & Nashville R.*, 236 U.S. 687 (1915).

Justices Concurring: Holmes, White, C.J., McKenna, Day, Van Devanter.
Justices Dissenting: Hughes, Pitney, McReynolds.

253. *Davis* v. *Virginia*, 236 U.S. 697 (1915).

Solicitation by a peddler in Virginia of orders for portraits made in another State, with an option to the purchaser to select frames upon delivery of the portrait by the peddler, amounted to a single transaction in interstate commerce, and Virginia therefore could not validly impose a peddler's license tax on the solicitor of such orders.

242. *Chicago B. & Q. Ry.* v. *Wisconsin R. R. Com.*, 237 U.S. 220 (1915).

Wisconsin statute requiring interstate trains to stop at villages of a specified number of inhabitants, without regard to the volume of business done there, was void as imposing an unreasonable burden on interstate commerce.

255. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915).

Florida statute denied due process insofar as it provided, after execution against a corporation had been returned "no property," a second execution to issue against a stockholder for the same debt to be enforced against his property to the extent of any unpaid subscription owing on his stock and without notice to such stockholder.

256. *Charleston & W. C. Ry.* v. *Varnville Co.*, 237 U.S. 597 (1915).

South Carolina law which imposed a penalty on carriers for their failure to adjust claims within 40 days imposed an invalid burden on interstate commerce and also was in conflict with the federal Carmack Amendment.

257. *Atchison, T. & S. F. Ry. Co.* v. *Vosburg*, 238 U.S. 56 (1915).

Kansas Reciprocal Demurrage Law of 1905 which allowed recovery of an attorney's fee by the shipper in case of delinquency by the carrier but which accorded the carrier no like privilege in case of delinquency on the part of the shipper denied the carrier equal protection of the law.

258. *Rossi* v. *Pennsylvania*, 238 U.S. 62 (1915).

Pennsylvania liquor law could not be enforced against one who solicited orders for the delivery of alcoholic beverages to be shipped to

the consignee from another State; under the federal Wilson Act of 1890 liquor shipped in interstate commerce did not become subject to State regulation until after delivery to the consignee.

259. *Guinn* v. *United States*, 238 U.S. 347 (1915).

Oklahoma grandfather clause, in its 1910 constitution, exempting from a literacy requirement and automatically enfranchising all entitled to vote as of January 1, 1866, or who were descendants of those entitled to vote on the latter date, was violative of the Fifteenth Amendment protecting Negroes from discriminatory denial of the right to vote based on race.

260. *Accord: Mayers* v. *Anderson*, 238 U.S. 368 (1915) wherein a similar Maryland grandfather clause was voided.

261. *Southwestern Tel. Co.* v. *Danaher*, 238 U.S. 482 (1915).

Arkansas statute was held to be unreasonable and violative of due process for the reason that, as enforced, it subjected a telephone company to a $6300 penalty for discriminatory refusal to serve when, pursuant to company regulations known to the State and uniformly enforced for economical collection of its approved rates, it suspended services to a delinquent and refused to resume services, while the delinquency remained unpaid, at the reduced rate afforded to those who paid the monthly service charge in advance.

262. *Chicago, M. & St. P. R.* v. *Wisconsin*, 238 U.S. 491 (1915).

Wisconsin statute which compelled sleeping car companies, if upper berth was not sold, to accord use of the space thereof to purchaser of a lower berth took salable property from the owner without compensation and therefore effected a deprivation of property without due process of law.

Justices Concurring: Lamar, White, C.J., Day, Hughes, Van Devanter, Pitney, McReynolds.

Justices Dissenting: McKenna, Holmes.

263. *Traux* v. *Raich*, 239 U.S. 33 (1915).

Arizona statute which compelled establishments hiring five or more workers to reserve 80 per cent of the employment opportunities to citizens denied aliens the equal protection of the laws.

Justices Concurring: Hughes, Holmes, Pitney, White, C.J., Lamar, Day, Van Devanter, McKenna.

Justice Dissenting: McReynolds.

264. *Provident Savings Assn.* v. *Kentucky*, 239 U.S. 103 (1915).

Kentucky statute levying tax, in the nature of a license tax for the doing of local business, on premiums collected in New York by a foreign insurance company after it had ceased to do business in that State was violative of due process by reason of affecting activities beyond the jurisdiction of the State.

265. *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522 (1916).

Oklahoma tax on lessee's interest in Indian lands, acquired pursuant to federal statutory authorization, was void as a tax on a federal instrumentality.

266. *Rosenberger* v. *Pacific Express Co.*, 241 U.S. 48 (1916).

Texas statute imposing special licenses on express companies maintaining offices for C.O.D. delivery of interstate shipments of alcoholic beverages imposed an invalid burden on interstate commerce under the terms of the Wilson Act of 1890 (26 Stat. 313).

267. *McFarland* v. *American Sugar Co.*, 241 U.S. 79 (1916).

Louisiana law which established a rebuttable presumption that any person systematically purchasing sugar in Louisiana at a price below that which he paid in any other State was a party to a monopoly or conspiracy in restraint of trade was violative of both the due process and equal protection clauses of the Fourteenth Amendment in that it declared an individual presumptively guilty of a crime and exempted countless others paying the same price.

268. *Wisconsin* v. *Philadelphia & Reading Coal Co.*, 241 U.S. 329 (1916).

Wisconsin law which revoked the license of any foreign corporation which removed to a federal court a suit instituted against it by a Wisconsin citizen imposed an unconstitutional condition.

269. *Detroit United Ry.* v. *Michigan*, 242 U.S. 238 (1916).

Construction of acts of 1905 and 1907 as compelling a Detroit City Railway to extend its lines to suburban areas annexed by Detroit only on the same terms as were contained in its initial franchise as authorized by the Detroit ordinance of 1889, wherein its fare was fixed, operated to impair the obligation of contract.

Justices Concurring: Pitney, White, C.J., Holmes, Day, Van Devanter, McReynolds.

Justices Dissenting: Clarke, Brandeis.

270. *Rowland* v. *Boyle*, 244 U.S. 106 (1917).

The two-cent passenger rate fixed by act of the Arkansas legislature was confiscatory and accordingly deprived the railroad of its property without due process.

271. *New York Central R. Co.* v. *Winfield*, 244 U.S. 147 (1917).

Congress, by enactment of the Federal Employees' Liability Act, having preempted the field as to determination of the liability of interstate railroad carriers to compensate employees for injuries sustained while engaged in interstate commerce, award under New York Workmen's Compensation Act for injuries sustained in interstate commerce by railway employee could not be upheld.

Justices Concurring: Van Devanter, Holmes, Pitney, White, C.J., McReynolds, Day, McKenna.
Justices Dissenting: Brandeis, Clarke.

272. *Accord: Erie R. R. Co.* v. *Winfield*, 244 U.S. 170 (1917).

For the same reason, a New Jersey Workmen's Compensation Act was held inapplicable to a railway worker injured while engaged in interstate commerce.

Justices Concurring: Van Devanter, Holmes, Day, Pitney, McKenna, White, C.J., McReynolds.
Justices Dissenting: Brandeis, Clarke.

273. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

New York Workmen's Compensation Act was unconstitutional as applied to employees engaged in maritime work, for it afforded a remedy unknown to common law, and hence was not among the common law remedies saved to suitors from exclusive federal admiralty jurisdiction by the Judiciary Act of 1789.

Justices Concurring: McReynolds, White, C.J., Day, Van Devanter, McKenna.
Justices Dissenting: Holmes (separately), Pitney (separately), Brandeis, Clarke.

*Accord: Clyde S.S. Co.* v. *Walker*, 244 U.S. 255 (1917).

Justices Concurring: McReynolds, White, C.J., Day, Van Devanter, McKenna.
Justices Dissenting: Holmes, Pitney, Brandeis, Clarke.

274. *Accord: Steamship Bowdoin Co.* v. *Industrial Accident Commission of California*, 246 U.S. 648 (1918), as to the inoperative effect of a California Workmen's Compensation Act.

275. *Seaboard Air Line Ry.* v. *Blackwell*, 244 U.S. 310 (1917).

Georgia "Blow-Post" law imposed an unconstitutional burden on interstate commerce insofar as compliance with it would have required an interstate train to come practically to a stop at each of 124

ordinary grade crossings within a distance of 123 miles in Georgia and would have added more than six hours to the running time of the train.

Justices Concurring: McKenna, Holmes, McReynolds, Day, Clarke, Van Devanter.
Justices Dissenting: White, C.J., Pitney, Brandeis.

276. *Western Oil Refg. Co.* v. *Lipscomb*, 244 U.S. 346 (1917).

Tennessee privilege tax could not validly be imposed on interstate sales consummated at either destination in Tennessee by an Indiana corporation which, for the purpose of filling orders taken by its salesmen in Tennessee, shipped thereto a tank car of oil and a carload of barrels and filled the orders through an agent who drew the oil from the tank car into the barrels, or into barrels furnished by customers, and then made delivery and collected the agreed price, and thereafter moved the two cars to another point in Tennessee for effecting like deliveries.

Justices Concurring: Van Devanter, Holmes, Brandeis, Pitney, McReynolds, Day, Clarke, McKenna.
Justice Dissenting: White, C.J.

277. *Adams* v. *Tanner*, 244 U.S. 590 (1917).

Washington law which proscribed private employment agencies by prohibiting them from collecting fees for their services deprived individuals of the liberty to pursue a lawful calling contrary to due process of law.

Justices Concurring: McReynolds, Pitney, White, C.J., Van Devanter.
Justices Dissenting: McKenna, Brandeis, Holmes, Clarke.

278. *American Express Company* v. *Caldwell*, 244 U.S. 617 (1917).

Consistent with natural supremacy, South Dakota law regulating advance of interstate rates could not be applied to changes in intrastate rates which a carrier put into effect pursuant to an order of the Interstate Commerce Commission to abate discrimination against interstate traffic.

Justices Concurring: Brandeis, Holmes, Pitney, White, C.J., McReynolds, Day, Clarke, Van Devanter.
Justice Dissenting: McKenna.

279. *Hendrickson* v. *Apperson*, 245 U.S. 105 (1917).

Kentucky act of 1906, amending act of 1894 and construed in such manner as to enable a county to avoid collection of taxes to repay judgment on unpaid bonds impaired the obligation of contract.
*Accord: Hendrickson* v. *Creager*, 245 U.S. 115 (1917).

280. *Looney* v. *Crane Co.*, 245 U.S. 178 (1917).

Texas law, which, under the guise of taxing the privilege of doing an intrastate business, imposing on an Illinois corporation a license tax based on its authorized capital stock, was void not only as imposing a burden on interstate commerce, but also as contravening the due process clause by affecting property outside the jurisdiction of Texas.

281. *Crew Levick* v. *Pennsylvania*, 245 U.S. 292 (1917).

Pennsylvania gross receipts tax on wholesalers, as applied to a merchant who sold part of his merchandise to customers in foreign countries either as the result of the receipt directly of orders from them or as the result of orders solicited by agents abroad was void as a regulation of foreign commerce and as a duty on exports.

282. *International Paper Co.* v. *Massachusetts*, 246 U.S. 135 (1918).

License fee or excise of a given per cent of the par value of the entire authorized capital stock of a foreign corporation doing both a local and interstate business and owning property in several States was a tax on the entire business and property of the corporation and was void both as an illegal burden on interstate commerce and as a violation of due process by reason of affecting property beyond the borders of the taxing State.

*Accord: Locomobile Co.* v. *Massachusetts*, 246 U.S. 146 (1918).

283. *Cheney Brothers Co.* v. *Massachusetts*, 246 U.S. 147 (1918).

When a Connecticut corporation maintains and employs a Massachusetts office with a stock of samples and an office force and traveling salesmen merely to obtain local orders subject to confirmation at the Connecticut office and with deliveries to be made directly from the latter, its business was interstate commerce and a Massachusetts annual excise could not be validly applied thereto.

284. *New York Life Ins. Co.* v. *Dodge*, 246 U.S. 357 (1918).

Liberty of contract, as protected by the due process clause of the Fourteenth Amendment, precluded enforcement of the Missouri nonforfeiture statute, prescribing how net value of a life insurance policy is to be applied to avert a forfeiture in the event the annual premium is not paid, so as to prevent a Missouri resident from executing in the New York office of the insurer a different agreement sanctioned by New York law whereby the policy was pledged as security for a loan and later canceled in satisfaction of the indebtedness.

Justices Concurring: McReynolds, McKenna, Holmes, White, C.J., Van Devanter.

Justices Dissenting: Brandeis, Day, Pitney, Clarke.

285. *Georgia* v. *Cincinnati So. Ry.*, 248 U.S. 26 (1918).

Georgia act of 1916 revoking a grant in 1879 of a perpetual right of way to a railroad impaired the obligation of contract (Art. I, § 10).

286. *Union Pac. R. Co.* v. *Pub. Service Comm.*, 248 U.S. 67 (1918).

Missouri act, insofar as it authorized the Missouri Public Service Commission to exact a fee of $10,000 for a certificate of authority for issuance by an interstate railroad, doing no intrastate business in Missouri, of a $30,000,000 mortgage bond issue to meet expenditures incurred but in small part in that State, imposed an invalid burden on interstate commerce.

287. *Flexner* v. *Farson*, 248 U.S. 289 (1919).

Kentucky law, insofar as it authorized a judgment against nonresident individuals based on service against their Kentucky agent after his appointment had expired, was violative of due process.

288. *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525 (1919).

Tax exemptions in charters granted to certain railroads inured to their lessee, and, accordingly, a Georgia tax authorized by a constitutional provision postdating such charters and imposed on the leasehold interest of the lessee impaired the obligation of contract.

289. *Union Tank Line Co.* v. *Wright*, 249 U.S. 275 (1919).

Georgia law under which a New Jersey company's tank cars operating in and out of that State were assessed upon a track-mileage basis, i.e., in an amount bearing the same ratio to the value of all its cars and other personal property as the ratio of the miles of railroad over which the cars were run in Georgia to the total miles over which they were run in all States, was invalid for the reason that the rule bore no necessary relation to the real value in Georgia and hence conflicted with due process.

Justices Concurring: McReynolds, White, C.J., McKenna, Holmes, Day, Van Devanter.

Justices Dissenting: Pitney, Brandeis, Clarke.

290. *Standard Oil Co.* v. *Graves*, 249 U.S. 389 (1919).

Washington law under which, in a ten-year period, inspection fees collected on oil products brought into the State for use or consumption amounted to $335,000, of which only $80,000 was disbursed for expenses, was deemed to impose an excessive charge and accordingly an invalid burden on interstate commerce.

291. *Chalker* v. *Birmingham & N.W. Ry. Co.*, 249 U.S. 522 (1919).

Tennessee act which made the annual tax for the privilege of doing railway construction work dependent on whether the person taxed had his chief office in Tennessee, i.e. $25 if he had and $100 if he did not, was violative of the privilege and immunities clause of Art. IV, § 2.

292. *New Orleans & N.E.R.R. Co.* v. *Scarlet*, 249 U.S. 528 (1919).

Mississippi "Prima Facie" act, relieving plaintiff of burden of proof to establish negligence, could not constitutionally be applied by a state court in suits under the Federal Employees' Liability Act.

*Accord: Yazoo & M.V.R.R. Co.* v. *Mullins*, 249 U.S. 531 (1919).

293. *Pennsylvania R. Co.* v. *Public Service Comm.*, 250 U.S. 566 (1919).

Pennsylvania law, as applied to an interstate train terminated by a mail car, forbidding operation of any train consisting of United States mail, or express, cars without rear end of car being equipped with a platform with guard rails and steps was inoperative by reason of conflict with federal legislation and regulations which preempted the field.

Justices Concurring: Holmes, White, C.J., McKenna, Day, Van Devanter, Pitney, McReynolds, Brandeis.
Justice Dissenting: Clarke.

294. *Postal Tel.-Cable Co.* v. *Waren-Godwin Co.*, 251 U.S. 27 (1919).

By virtue of federal legislation preempting the field, Mississippi law could not be applied to determine validity of a contract by telegraph company limiting its responsibility when its lower rate is paid for unrepeated interstate messages.

Justices Concurring: Holmes, White, C.J., McKenna, Day, Van Devanter, McReynolds, Brandeis, Clarke.
Justice Dissenting: Pitney.

295. *Western Union Telegraph Co.* v. *Boegli*, 251 U.S. 315 (1920).

Federal legislation having preempted the field, Indiana law no longer was operative to subject a telegraph company to a penalty for failure to deliver promptly in Indiana a message sent from a point in Illinois.

296. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).

New York income tax law which allowed exemptions to residents, with increases for married persons and dependents but which allowed no equivalent exemptions to nonresidents abridged the privileges and immunities clause of Art. IV, § 2.

297. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920).

Oklahoma constitution and laws, under which an order of the State Corporation Commission declaring a laundry a monopoly and limiting its rates was not judicially reviewable, and which compelled litigant, for purposes of obtaining a judicial test of rates, to disobey the order and invite serious penalty for each day of refusal pending completion of judicial appeal, were violative of due process insofar as rates were enforced by penalties.

298. *Accord: Oklahoma Gin Co.* v. *Oklahoma*, 252 U.S. 339 (1920).

Illinois law denying Illinois courts jurisdiction in actions for wrongful death occurring in another State which was construed as barring jurisdiction of actions on a sister State judgment founded upon a like cause was, as so applied, violative of the full faith and credit clause.

299. *Askren* v. *Continental Oil Co.*, 252 U.S. 444 (1920).

New Mexico law levying annual license on distributors of gasoline plus 2¢ per gallon on all gasoline sold was a privilege tax, and, as applied to parties who bring gasoline from without and sell it in New Mexico, imposed an invalid burden on interstate commerce insofar as it related to their business of selling in tank car lots and in barrels or packages as originally imported.

300. *Wallace* v. *Hines*, 253 U.S. 66 (1920).

North Dakota act, as administered, imposed invalid burden on interstate commerce and took property without due process by reason of taxing an interstate railroad by assessing the value of its property in the State at that proportion of the total value of its stock and bonds that the main track mileage within the State bore to the main track mileage of the entire line; this formula was indefensible inasmuch as the cost of construction per mile was within than without the taxing State, and the large and valuable terminals of the railroad were located elsewhere.

301. *Hawke* v. *Smith (No. 1)*, 253 U.S. 221 (1920).

Action of Ohio legislature ratifying proposed Eighteenth Amendment could not be referred to the voters, and the provisions of the Ohio constitution requiring such referendum were inconsistent with Article V of the Federal Constitution.

*Accord: Hawke* v. *Smith (No. 2)*, 253 U.S. 221 (1920), applicable to proposed Nineteenth Amendment.

302. *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920).

Since Pennsylvania Public Service Commission Law failed to provide opportunity by way of appeal to the courts or by injunctive proceedings to test issue as to whether rates fixed by Commission are confiscatory, order of Commission establishing maximum future rates violated due process of law.

Justices Concurring: McReynolds, White, C.J., Day, Van Devanter, Pitney, McKenna.

Justices Dissenting: Brandeis, Holmes, Clarke.

303. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920).

Virginia law which taxed all income of local corporation derived from business within and without Virginia, while exempting entirely income derived outside of Virginia by local corporations which did no local business violated the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Pitney, White, C.J., McReynolds, McKenna, Day, Van Devanter, Clarke.

Justices Dissenting: Brandeis, Holmes.

304. *Johnson* v. *Maryland*, 254 U.S. 51 (1920).

Maryland law requiring operator's license of drivers of motor trucks could not constitutionally be applied to a Postal Department employee operating a federal mail truck in the performance of official duty.

Justices Concurring: Holmes, White, C.J., McKenna, Day, Van Devanter, Brandeis, Clarke.

Justices Dissenting: Pitney, McReynolds.

305. *Turner* v. *Wade*, 254 U.S. 64 (1920).

Georgia Tax Equalization Act denied due process insofar as it authorized an increase in the assessed valuation of the taxpayer's property without notice and hearing and accorded him an abortive remedy of arbitration which was nullified by the inability of the arbitrators to agree on a lower assessment before the expiration of the time when the assessment became final and binding.

306. *Bank of Minden* v. *Clement*, 256 U.S. 126 (1921).

Louisiana law which exempted proceeds of insurance policy, payable upon death of insured to his executor, from the claims of insured's creditors impaired the obligation of contract as enforced against a debt on a promissory note antedating such laws and also as enforced against policies which antedated the law.

Justices Concurring: McReynolds, White, C.J., McKenna, Holmes, Day, Van Devanter, Pitney, Brandeis.
Justice Dissenting: Clarke.

307. *Bethlehem Motors Co.* v. *Flynt,* 256 U.S. 421 (1921).

North Carolina statute which exacted a $500 license fee of every automobile manufacturer as a condition precedent to selling cars in the State and which imposed a like requirement on any firm selling cars of a manufacturer who had not paid the tax, but which reduced the fee to $100 in the event that the manufacturer had invested three-fourths of his assets in North Carolina state and municipal securities or properties, was invalid as violative of the commerce clause and of the equal protection clause when enforced against nonresident manufacturers selling cars in North Carolina directly or through local dealers.

Justices Concurring: McKenna, Holmes, Day, Van Devanter, McReynolds, Clarke.
Justices Dissenting: Pitney, Brandeis

308. *Merchant's National Bank* v. *Richmond,* 256 U.S. 635 (1921).

Richmond, Virginia, ordinance and Virginia statute which, as construed, levied a tax on state and national bank shares at the aggregate rate of $1.75 per $100 of valuation and upon intangibles at the aggregate rate of 85¢ per $100 valuation, a substantial proportion of which property was in the hands of individual taxpayers, were void as in conflict with federal law prohibiting discriminatory taxation of national bank shares for the reason that the tax was imposed on the national bank stocks to the aggregate value of more than $8,000,000 whereas the value of state bank stocks taxed was only $6,000,000.

309. *Bowman* v. *Continental Oil Co.,* 256 U.S. 642 (1921).

New Mexico statute which imposed a tax of 2 cents per gallon sold on distributors of gasoline was void insofar as it embraced interstate transactions, but the annual license fee of $5 imposed thereby on each gasoline station was totally void insofar as interstate sales thereof could not be separated out from the intrastate sales.

310. *Kansas City So. Ry.* v. *Road Imp. Dist. No. 6,* 256 U.S. 658 (1921).

Arkansas statute which authorized local assessments for road improvements denied equal protection of the laws insofar as railroad property was burdened for local improvement on a basis totally different from that used for measuring the contribution demanded of individual owners.

311. *Eureka Pipe Line Co.* v. *Hallanan*, 256 U.S. 265 (1921).

West Virginia statute which forbade engaging in the business of transporting petroleum in pipe lines without the payment of a tax of 2¢ for each barrel of oil transported imposed an invalid burden on interstate commerce as applied to company's volume of oil produced in, but moving out of, West Virginia to extra-state destinations.

Justices Concurring: Holmes, Taft, C.J., McKenna, Day, Van Devanter, McReynolds.

Justices Dissenting: Clarke, Pitney, Brandeis.

*Accord: United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277 (1921), voiding like application of the West Virginia tax on the interstate movement of natural gas.

Justices Concurring: Holmes, Taft, C.J., Pitney, McReynolds, Day, Van Devanter, McKenna.

Justices Dissenting: Brandeis, Clarke.

312. *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282 (1921).

Kentucky law prescribing conditions under which foreign corporations could do business in that State and which precluded enforcement in Kentucky courts of contracts made by foreign corporations not complying with said conditions could not be enforced against Tennessee corporation which sued in a Kentucky court for breach of a contract consummated in that State for the purchase of grain to be delivered to and used in Tennessee; such transaction was in interstate commerce, notwithstanding that the Tennessee purchaser might change its mind after delivery to a carrier in Kentucky and sell the grain in Kentucky or consign it to some other place in Kentucky.

Justices Concurring: Van Devanter, Taft, C.J., Holmes, Pitney, Day, McKenna, McReynolds.

Justices Dissenting: Brandeis, Clarke.

313. *Truax* v. *Corrigan*, 257 U.S. 312 (1921).

Arizona statute, regulating injunctions in labor disputes which exempted ex-employees, when committing tortious injury to the business of their former employer in the form of mass picketing, libelous utterances, and inducement of customers to withhold patronage, while leaving subject to injunctive restraint all other tort-feasors engaged in like wrong-doing, deprived the employer of property without due process and denied him equal protection of the law.

Justices Concurring: Van Devanter, Taft, C.J., Day, McKenna, McReynolds.

Justices Dissenting: Holmes, Pitney, Clarke, Brandeis.

314. *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922).

Oklahoma income tax law could not validly be enforced as to net income of lessee derived from the sales of his share of oil and gas received under leases of restricted Indian lands which constituted him in effect an instrumentality used by the United States in fulfilling its duties to the Indians.

Justices Concurring: Holmes, Taft, C.J., Day, Van Devanter, McKenna, McReynolds.

Justices Dissenting: Pitney, Brandeis, Clarke.

315. *Terral* v. *Burke Constr. Co.*, 257 U.S. 529 (1922).

Arkansas law which revoked the license of a foreign corporation to do business in that State whenever it resorted to the federal courts sitting in that State exacted an unconstitutional condition.

316. *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50 (1922).

North Dakota statute which required purchasers of grain to obtain a license to act under a defined system of grading, inspection, and weighing, and to abide by regulations as to prices and profits imposed an invalid burden on interstate commerce insofar as it was applied to a North Dakota association which bought grain in the State and loaded it promptly on cars for shipment to other States for sale, notwithstanding occasional diversion of the grain for local sales.

Justices Concurring: Day, Taft, C.J., McKenna, McReynolds, Van Devanter, Pitney.

Justices Dissenting: Brandeis, Holmes, Clarke.

*Accord: Lemke* v. *Homer Farmers Elevator Co.*, 258 U.S. 65 (1922).

Justices Concurring: Day, Taft, C.J., McKenna, McReynolds, Pitney, Van Devanter.

Justices Dissenting: Holmes, Brandeis, Clarke.

317. *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165 (1922).

Rates fixed for the sale of gas by New York statute were confiscatory and deprived the utility of its property without due process of law.

*Accord: Newton* v. *New York Gas Co.*, 258 U.S. 178 (1922); *Newton* v. *Kings County Lighting Co.*, 258 U.S. 180 (1922); *Newton* v. *Brooklyn Union Gas Co.*, 258 U.S. 604 (1922); *Newton* v. *Consolidated Gas Co.*, 259 U.S. 101 (1922).

318. *Forbes Pioneer Boat Line* v. *Everglades Drainage Dist.*, 258 U.S. 338 (1922).

Florida law retroactively validating collection of fee for passage through a canal, the use of which was then free by law, was ineffec-

tive; a legislature could not retroactively approve what it could not lawfully do.

319. *Texas Co.* v. *Brown*, 258 U.S. 466 (1922).

Georgia law levying inspection fees and providing for inspection of oil and gasoline was unconstitutional as applied to gasoline and oil in interstate commerce; for the fees clearly exceeded the cost of inspection and amounted to a tariff levied without the consent of Congress.

320. *Chicago & N.W. Ry.* v. *Nye Schneider Fowler Co.*, 260 U.S. 35 (1922).

Nebraska law, as construed, which authorized imposition against carrier, in favor of claimant, of an additional attorney's fee of $100, upon the basis of the service rendered, time and labor bestowed, and recovery secured by claimant's attorney in resisting appeal by which the carrier obtained a large reduction of an excessive judgment was unreasonable in that it deterred carrier from vindicating its rights by appeal and therefore was violative of due process.

321. *St. Louis Compress Co.* v. *Arkansas*, 260 U.S. 346 (1922).

Arkansas law exacting of persons insuring property in Arkansas a five percent tax on amounts paid on premiums to insurers not authorized to do business in Arkansas was violative of due process insofar as it was applied to insurance contracted and paid for outside Arkansas by a foreign corporation doing a local business.

322. *Champlain Co.* v. *Brattleboro*, 260 U.S. 366 (1922).

Logs under control of the owner which, in the course of their interstate journey, were being temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss were in interstate commerce and, accordingly, a Vermont levy of a property tax thereon was void.

323. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

Pennsylvania law which forbade mining in such a way as to cause subsidence of any human habitation or public street or building and which thereby made commercially impracticable the removal of valuable coal deposits was deemed arbitrary and amounted to a deprivation of property without due process. As applied to an owner of land who, prior to this enactment, had validly deeded the surface with express reservation of right to remove coal underneath and subject to waiver by grantee of damage claims resulting from such mining, said law also impaired the obligation of contract.

Justices Concurring: Holmes, Taft, C.J., McKenna, Day, Van Devanter, Pitney, McReynolds, Sutherland.
Justice Dissenting: Brandeis.

324. *Columbia R., Gas & Electric Co.* v. *South Carolina*, 261 U.S. 236 (1923).

South Carolina statute, as construed, which sought to convert a covenant in a prior legislative contract into a condition subsequent, and to impose as a penalty for its violation the forfeiture of valuable property impaired the obligation of contract.

325. *Federal Land Bank* v. *Crosland*, 261 U.S. 374 (1923).

A first mortgage executed to a Federal Land Bank is a federal instrumentality and cannot be subjected to an Alabama recording tax.

326. *Phipps* v. *Cleveland Refg. Co.*, 261 U.S. 449 (1923).

Ohio law, which was applicable to interstate and intrastate commerce and which exacted fees for inspection of petroleum products in excess of the legitimate cost of inspection, imposed an invalid import tax to the extent that the excess could not be separated and assigned solely to intrastate commerce.

327. *Thomas* v. *Kansas City So. Ry.*, 261 U.S. 481 (1923).

Insofar as drainage district tax authorized under Arkansas law imposed upon a railroad a levy disproportionate to the value of the benefits derived from said improvement, the tax was violative of the equal protection clause.

328. *Davis* v. *Farmers Co-operative Co.*, 262 U.S. 313 (1923).

Minnesota law which provided that interstate railroads which had an agent in Minnesota to solicit traffic over lines outside Minnesota may be served with summons by delivery of copy thereof to the agent imposed an invalid burden on interstate commerce as applied to a carrier which owned and operated no facilities in Minnesota and which was sued by a plaintiff who did not reside therein on a cause of action arising outside the State.

329. *First National Bank* v. *California*, 262 U.S. 366 (1923).

California law which escheated to state bank deposits unclaimed for 20 years, notwithstanding that no notice of residence has been filed with the bank by the depositor or any claimant, was invalid, as to deposits in national banks by reason of conflict with applicable federal law.

330. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Nebraska law which forbade the teaching of any language other than English in any school, private, denominational, or public, maintaining classes for the first eight grades affected a denial of liberty without due process of law.

331–332. *Accord: Bartels* v. *Iowa*, 262 U.S. 404 (1923), and *Bohning* v. *Ohio*, 262 U.S. 404 (1923), voiding similar Iowa and Ohio laws.

Justices Concurring (in each of the above cases): McReynolds, Brandeis, Butler, Taft, C.J., Sanford, Van Devanter, McKenna.
Justices Dissenting (in each of the above cases): Holmes, Sutherland.

333. *Georgia Ry. Co.* v. *Decatur*, 262 U.S. 432 (1923).

Georgia law which extended corporate limits of a town and which, as judicially construed, had the effect of rendering applicable to the added territory street railway rates fixed by an earlier contract between the town and the railway impaired the obligation of that contract by adding to its burden.

*Accord: Georgia Ry. Co.* v. *College Park*, 262 U.S. 441 (1923).

334. *Wolff Packing Co.* v. *Industrial Court*, 262 U.S. 522 (1923).

Kansas law which compelled business engaged in manufacturing and in the processing of food to continue operation in the event of a labor dispute, to submit the controversy to an arbitration board, and to abide by the latter's recommendations pertaining to the payment of minimum wages subjected both employers and employees to a denial of liberty without due process of law.

*Accord: Dorchy* v. *Kansas*, 264 U.S. 286 (1924), same Kansas law voided when applied to labor disputes affecting coal mines; *Wolff Packing Co.* v. *Industrial Court*, 267 U.S. 552 (1925), voiding other provisions of this Kansas law which authorized arbitration tribunal in the course of compulsory arbitration, to fix the hours of labor to be observed by an employer involved in a labor dispute.

335. *Kentucky Co.* v. *Paramount Exch.*, 262 U.S. 544 (1923).

Wisconsin law which required a foreign corporation not doing business in Wisconsin, or having property there, other than that sought to be recovered in a suit, to send, as a condition precedent to maintaining such action, its officer with corporate records pertinent to the matter in controversy, and to submit to an adversary examination before answer, but which did not subject nonresident individuals to such examination, except when served with notice and subpoena within Wisconsin, and then only in the court where the service was had, and which limited such examinations, in the case of residents of

Wisconsin, individual or corporate, to the county of their residence violated the equal protection clause.

Justices Concurring: Van Devanter, Taft, C.J., Sanford, Butler, McKenna, McReynolds, Sutherland.

Justices Dissenting: Brandeis, Holmes.

336. *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923).

West Virginia law which required pipe line companies to fill all local needs before endeavoring to export any natural gas extracted in West Virginia was void as a prohibited interference with interstate commerce.

Justices Concurring: Van Devanter, Taft, C.J., Sutherland, Butler, McKenna.

Justices Dissenting: Holmes, McReynolds, Brandeis, Sanford.

337. *Bunch* v. *Cole*, 263 U.S. 250 (1923).

When lease of an Indian allotment, made by the allottee in excess of the powers of alienation granted by federal law, is declared null and void by federal law, Oklahoma statute, as judicially applied, which gave the lease the effect of a tenancy at will and as controlling the amount of compensation which the allottee may recover for use and occupation by the lessees also was void, consistently with the principle of national supremacy.

338. *Clallam County*, v. *United States*, 263 U.S. 341 (1923).

Washington state and county property taxes cannot be levied on the property of a corporation which, though formed under Washington law, was a federal instrumentality created and operated by the United States as an instrument of war.

339. *Tampa Interocean Steamship Co.* v. *Louisiana*, 266 U.S. 594 (1925).

Louisiana license tax law could not validly be enforced as to the business of companies employed as agents by owners of vessels engaged exclusively in interstate and foreign commerce when the services performed by the agents consisted of the soliciting and engaging of cargo, and the nomination of vessels to carry it, etc. (*See Texas Transp. Co.* v. *New Orleans*, 264 U.S. 150 (1924), voiding like application of a similar New Orleans ordinance.)

340. *Sperry Oil Co.* v. *Chisholm*, 264 U.S. 488 (1924).

Oklahoma law which required that the execution of a lease on the family homestead also must be executed by the wife was inoperative, consistently with the principle of national supremacy, to the extent that under federal law Congress had empowered a Cherokee

Indian to make an oil or gas lease on his restricted "homestead" allotment subject only to the approval of the Secretary of the Interior.

341. *Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924).

Nebraska law which prescribed the minimum weights of loaves of bread to be made and sold and which, in order to prevent the palming off of smaller for larger sizes, fixed a maximum for each class and allowed a "tolerance" of only two ounces per pound in excess of the minimum was found to be unreasonable, to be unnecessary to protect purchasers against the imposition of fraud by short weights, and therefore to deprive bakers and sellers of bread of their liberty without due process of law.

Justices Concurring: Butler, Taft, C.J., Sanford, McReynolds, Sutherland, McKenna, Van Devanter.

Justices Dissenting: Brandeis, Holmes.

342. *Missouri ex rel. Burnes National Bank* v. *Duncan*, 265 U.S. 17 (1924).

Inasmuch as under the Federal Reserve Act national banks were authorized to act as executors, a Missouri law was ineffective, under the principle of national supremacy, to withhold such powers from such banks.

Justices Concurring: Holmes, Taft, C.J., Sanford, Brandeis, McKenna, Van Devanter, Butler.

Justices Dissenting: Sutherland, McReynolds.

343. *Atchison, T.&S.F. Ry. Co.* v. *Wells*, 265 U.S. 101 (1924).

Texas law which permitted a nonresident to prosecute a case which arose outside of Texas against a railroad corporation of another State which was engaged in interstate commerce and neither owned nor operated facilities in Texas was inoperative by reason of imposing a burden on interstate commerce.

344. *Air-Way Corp.* v. *Day*, 266 U.S. 71 (1924).

Ohio law which levied an annual fee on foreign corporations for the privilege of exercising their franchise in the State, which was computed at the rate of 5¢ per share upon the proportion of the number of shares of authorized common stock represented by property owned and used and business transacted in Ohio was void as imposing a burden on interstate commerce when applied to a foreign corporation all of whose business, intrastate and interstate, and all of whose property were represented by the shares outstanding; application of the rate to all shares authorized, or even to a greater number than the total outstanding, amounted to a burden on all property and

business including interstate commerce. As imposed, the tax also violated the equal protection clause.

345. *Aetna Life Ins. Co.* v. *Dunken*, 266 U.S. 389 (1924).

Policy of insurance originally issued to insurer in Tennessee and converted by him in Texas from term insurance to 20 year payment life was deemed to be a mere continuation of the original policy, and upon suit on the policy in Texas, a Texas law imposing a penalty and allowing an attorney's fee could not constitutionally be applied against the insurer for the reason that Texas could not regulate contracts consummated outside its limits in conformity with the laws of the place where the contract was made without violating full faith and credit clause.

346. *Ozark Pipe Line* v. *Monier*, 266 U.S. 555 (1925).

Missouri law which required foreign corporations doing business therein to pay an annual franchise tax of 1/10 of 1% of the par value of capital stock and surplus employed in business in the State could not constitutionally be exacted of a pipe line company for the privilege of doing in Missouri what was exclusively an interstate business.

Justices Concurring: Sutherland, Taft, C.J., Holmes, Van Devanter, McReynolds, Butler, Sanford, McKenna.
Justice Dissenting: Brandeis

347. *Michigan Commission* v. *Duke*, 266 U.S. 570 (1925).

Michigan law which converted an interstate contract motor carrier into a public utility by legislative fiat in effect took property for public use without compensation in violation of the due process clause, and also imposed unreasonable conditions on the right to carry on interstate commerce.

348. *Flanagan* v. *Federal Coal Co.*, 267 U.S. 222 (1925).

In a suit for breach of contract, plaintiff's right to maintain suit could not be barred by his failure to pay a Tennessee license tax for the reason that the state law levying the same could not be applied to a contract for the purchase of coal to be delivered to customers in other States, that is, in interstate commerce.

349. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925).

Washington law which prohibited motor vehicle common carriers for hire from using its highways without obtaining a certificate of convenience could not validly be exacted of an interstate motor carrier; the law was not a regulation designed to promote public safety but a prohibition of competition and, accordingly, burdened interstate commerce.

Justices Concurring: Brandeis, Taft, C.J., Sanford, Sutherland, Van Devanter, Butler, Holmes.

Justice Dissenting: McReynolds.

350. *Accord: Bush Co.* v. *Maloy*, 267 U.S. 317 (1925), voiding like application of a similar Maryland law.

Justices Concurring: Brandeis, Taft, C.J., Sutherland, Van Devanter, Holmes, Sanford, Butler.

Justice Dissenting: McReynolds.

351. *Accord: Allen* v. *Galveston Truck Line Corp.*, 289 U.S. 708 (1933), voiding like application of a Texas law.

352. *Missouri Pacific R. Co.* v. *Stroud*, 267 U.S. 404 (1925).

When carrier had two routes by which freight might move between two points in a State, the second of which was partly interstate a suit against the carrier for discrimination in the furnishing of cars which arose out of use of the interstate route in conformity with the carrier's practice was governed by the Interstate Commerce Act, and the Missouri law governing such discrimination was superseded and inapplicable (Art. VI).

353. *Lancaster* v. *McCarty*, 267 U.S. 427 (1925).

Federal law (39 Stat. 441 (1916)) which authorized carriers to limit liability upon property received for transportation to value declared by shipper, where the rates were based on such value pursuant to authority of Interstate Commerce Commission, superseded Texas law in respect to a claim for damage to goods shipped intrastate between Texas points for the reason that the tariff and classification had been adopted by the carrier pursuant to an order of the Commission requiring it to remove discrimination against interstate commerce which had resulted from lower Texas intrastate rates.

354. *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925).

North Dakota Grain Grading Act which required locally grown wheat, 90% of which was for interstate shipment, to be graded by licensed inspectors and imposed various requirements, such as the keeping of records of quantity purchased and price paid and the exaction of bonds from purchasers maintaining grain elevators was not supportable as an inspection law and was void by reason of imposing undue burdens on interstate commerce.

Justices Concurring: Van Devanter, Taft, C.J., Holmes, Butler, McReynolds, Sutherland, Sanford, Stone.

Justice Dissenting: Brandeis.

355. *Alpha Cement Co.* v. *Massachusetts*, 268 U.S. 203 (1925).

Massachusetts law which imposed excise tax on foreign corporations doing business therein, measured by a combination of the total value of capital shares attributable to transactions therein and the proportion of net income attributable to such transactions, could not validly be applied to a foreign corporation which transacted only as interstate business therein. The tax as here imposed also violated the due process clause by affecting property beyond Massachusetts borders.

Justices Concurring: McReynolds, Taft, C.J., Holmes, Van Devanter, Butler, Sutherland, Stone, Sanford.
Justice Dissenting: Brandeis.

356. *Frick* v. *Pennsylvania*, 268 U.S. 473 (1925).

Pennsylvania estate tax law, insofar as it measured the tax on the transfer of that part of the decedent's estate located within Pennsylvania by taking the whole of the decedent's estate which included tangible personal property located outside Pennsylvania, was violative of due process.

357. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

Oregon Compulsory Education Law which required every parent to send his child to a public school was an unconstitutional interference with the liberty of parents and guardians to direct the upbringing of children and was violative of due process.

358. *Davis* v. *Cohen*, 268 U.S. 638 (1925).

When the Federal Transportation Act of 1920 provided that suits on claims arising out of federal wartime control of the railroads might be brought against a federal agent, if instituted within two years after federal control had ended, Massachusetts law allowing amendments of proceedings prior to judgment, could not be invoked to substitute the Agent as defendant more than two years after federal control had ended; the suit in which the substitution was attempted had erroneously been filed against the railroad rather than against the Federal Director General during the period of federal control, and since the substitution amounted to filing a new action, invocation of the Massachusetts law was repugnant to the Federal Transportation Act's provisions as to limitations.

359. *Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643 (1925).

Arkansas statute which imposed special assessment on lands acquired by private owners from the United States on account of benefits resulting from road improvements completed before the United

States parted with title effected a taking of property without due process of law.

360. *First National Bank* v. *Anderson*, 269 U.S. 341 (1926).

As applied to national banks, Iowa tax law providing for a levy on shares of such banks at rates less favorable than the rates applied to moneyed capital invested in competition with such banks was repugnant to federal law prohibiting such discrimination (Art. VI).

361. *Connally* v. *General Const. Co.*, 269 U.S. 385 (1926).

Iowa law which imposed severe, cumulative punishments upon contractors with the State who paid their workers less than "the current rate of *per diem* wages in the locality where the work is performed" was void for vagueness and violative of due process.

Justices Concurring: Brandeis, Holmes.

362. *Browning* v. *Hooper*, 269 U.S. 396 (1926).

Texas statute which permitted property taxpaying voters to originate an election approving creation of a road improvement district with power to float bond issue and to levy taxes to amortize the same, with provision for establishment of the district if approved by two-thirds of those voting in the election, was procedurally defective in that each taxpayer to be assessed for the improvement was not accorded a notice and opportunity to be heard on the question of the benefits and hence denied due process.

363. *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69 (1926).

North Carolina law purporting to tax inheritance of shares owned by nonresident in a foreign corporation having 50% or more of its property in North Carolina was violative of due process inasmuch as the property of a corporation is not owned by a shareholder and presence of corporate property in the State did not give it jurisdiction over his shares for tax purposes.

364. *Oregon-Washington Co.* v. *Washington*, 270 U.S. 87 (1926).

Federal legislation having preempted the field, a Washington law which established a quarantine against importation of hay and alfalfa meal, except in sealed containers, coming from areas in other States harboring the alfalfa weevil was inoperative.

Justices Concurring: Taft, C.J., Holmes, Van Devanter, Brandeis, Butler, Sanford, Stone.

Justices Dissenting: McReynolds, Sutherland.

365. *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926).

Wisconsin law which established a conclusive presumption that all gifts of a material part of a decedent's estate made by him within six years of his death were made in contemplation of death and therefore subject to the graduated inheritance tax created an arbitrary classification violative of the due process and equal protection clauses.

Justices Concurring: McReynolds, Taft, C.J., Butler, Sutherland, Sanford, Van Devanter.
Justices Dissenting: Holmes, Brandeis, Stone.

*Accord: Uihlein* v. *Wisconsin*, 273 U.S. 642 (1926).

366. *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402 (1926).

Pennsylvania law which prohibited the use of shoddy, even when sterilized, in the manufacture of bedding materials, was so arbitrary and unreasonable as to be violative of due process.

Justices Concurring: Butler, Taft, C.J., Van Devanter, Sutherland, Sanford, McReynolds.
Justices Dissenting: Holmes, Brandeis, Stone.

367. *Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426 (1926).

New Mexico law which forbade insurance companies authorized to do business in that State to pay any nonresident any fee for the obtaining or placing of any policies covering risks in New Mexico was violative of due process by reason of attempting to control conduct beyond the jurisdiction of New Mexico.

Justices Concurring: Holmes, Taft, C.J., Van Devanter, Sutherland, Stone, Butler.
Justices Dissenting: McReynolds, Brandeis, Sanford.

368. *Childers* v. *Beaver*, 270 U.S. 555 (1926).

Oklahoma inheritance tax law, applied to inheritance by Indians of Indian lands as determined by federal law, was void as a tax on a federal instrumentality.

369. *Appleby* v. *City of New York*, 271 U.S. 365 (1926).

Acts of New York of 1857 and 1871 authorizing New York City to erect piers over submerged lots impaired the obligation of contract as embraced in deeds to such submerged lots conveyed to private owners for valuable consideration through deeds executed by New York City in 1852.

370. *Appleby* v. *Delaney*, 271 U.S. 403 (1926).

Act of New York of 1871 whereby New York City was authorized to construct certain harbor improvements impaired the obligation of

contract embraced in prior deeds to grantees whereunder the latter were accorded the privilege of filling in their underwater lots and constructing piers thereover.

371. *Frost Trucking Co.* v. *Railroad Comm.*, 271 U.S. 583 (1926).

California law whereunder private carriers by automobile for hire could not operate over California highways between fixed points in the State without obtaining a certificate of convenience and submitting to regulation as common carriers exacted an unconstitutional condition and effected a denial of due process.

Justices Concurring: Sutherland, McReynolds (separately), Taft, C.J., Sanford, Stone, Butler, Van Devanter.
Justices Dissenting: Holmes, Brandeis.

372. *Jaybird Mining Co.* v. *Wier*, 271 U.S. 609 (1926).

Oklahoma law which levied an *ad valorem* tax on ores mined and in bins on the land was void as a tax on federal instrumentality when applied to a lessee of Indian land leased with the approval of the Secretary of the Interior.

Justices Concurring: Butler, Taft, C.J., Stone, Holmes, Sanford, Sutherland, Van Devanter.
Justices Dissenting: McReynolds, Brandeis.

373. *Hughes Bros. Co.* v. *Minnesota*, 272 U.S. 469 (1926).

Minnesota law levying personal property tax could not be collected on logs cut in Minnesota pursuant to a contract of sale for delivery in Michigan while they were in transit in interstate commerce by a route from Minnesota to Michigan.

374. *Hanover Ins. Co.* v. *Harding*, 272 U.S. 494 (1926).

When an Illinois tax law originally is construed as a personal property tax whereby the local net receipts of foreign insurance companies were subjected to assessment at only 30% of full value, but at a later date is construed as a privilege tax with the result that all the local net income of such foreign companies was taxed at the rate applicable to personal property while domestic companies continued to pay the tax on their personal property assessed at the reduced valuation, the resulting discrimination denied the foreign companies the equal protection of the laws.

375. *Wachovia Trust Co.* v. *Doughton*, 272 U.S. 567 (1926).

North Carolina inheritance tax law could not validly be applied to property constituting a trust fund in Massachusetts established under the will of a Massachusetts resident and bestowing a power of appointment upon a North Carolina resident who exercised that

power through a will made in North Carolina; the levy by a State of the tax on property beyond its jurisdiction was violative of due process.

Justices Concurring: Holmes, Brandeis, Stone.

376. *Ottinger* v. *Consolidated Gas Co.*, 272 U.S. 576 (1926).

Act of New York prescribing a gas rate of $1 per thousand feet was confiscatory and deprived the utility of its property without due process of law.

*Accord: Ottinger* v. *Brooklyn Union Co.*, 272 U.S. 579 (1926).

377. *Napier* v. *Atlantic Coast Line*, 272 U.S. 605 (1926).

The Federal Boiler Inspection Act having occupied the field of regulation pertaining to locomotive equipment on interstate highways, a Georgia law requiring cab curtains and automatic fire box doors was deemed to have been superseded and therefore inoperative.

378. *Miller* v. *Milwaukee*, 272 U.S. 713 (1927).

Wisconsin law which exempted income of corporation derived from interest received from tax exempt federal bonds owned by said corporation, but which attempted to tax such income indirectly by taxing only so much of the stockholder's dividends as corresponded to the corporate income not assessed, was invalid.

Justices Concurring: Brandeis, Stone.

379. *Di Santo* v. *Pennsylvania*, 273 U.S. 34 (1927).

Pennsylvania law exacting a license from persons engaged in the State in the sale of steamship tickets and orders for transportation to or from foreign countries was void as imposing an undue burden on foreign commerce.

Justices Concurring: Butler, Taft, C.J., McReynolds, Van Devanter, Sutherland, Sanford.
Justices Dissenting: Brandeis, Holmes, Stone.

380. *Missouri Pacific* v. *Porter*, 273 U.S. 341 (1927).

Congress having occupied the field by its own legislation, an Arkansas law which prohibited carriers from incorporating into their bills of lading stipulations exempting the carriers from liability for loss of shipments by fire not due to the carriers' negligence was deemed to have been superseded and therefore inoperative.

381. *Tyson & Brother* v. *Banton*, 273 U.S. 418 (1927).

New York law which prohibited ticket agencies for selling theatre tickets at prices in excess of 50¢ over the price printed on the

ticket was void by reason of regulating a business not affected with the public interest and depriving such business of due process.

Justices Concurring: Sutherland, Taft, C.J., Van Devanter, Butler, McReynolds.

Justices Dissenting: Holmes, Brandeis, Stone, Sanford.

382. *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

Ohio law which compensated mayors serving as judges in minor prohibition offenses solely out of the fees and costs collected from defendants who were convicted was violative of due process.

383. *Nixon* v. *Herndon*, 273 U.S. 536 (1927).

Texas White Primary Law which barred Negroes from participation in Democratic party primary elections denied them the equal protection of the laws.

384. *First National Bank* v. *Hartford*, 273 U.S. 548 (1927).

Wisconsin tax law, as imposed on shares of a national bank, was in conflict with federal law prohibiting state taxation of such shares at rates in excess of those levied on moneyed capital employed in competition with the business of such banks and was therefore inoperative as to the shares of said banks.

385. *Accord: Minnesota* v. *First National Bank*, 273 U.S. 561 (1927), holding inoperative for the same reason a Minnesota law taxing national bank shares.

386. *Accord: Commercial National Bank* v. *Custer County*, 275 U.S. 502 (1927), holding inoperative a similar Montana tax law.

387. *Accord: Keating* v. *Public National Bank*, 284 U.S. 587 (1932), holding inoperative for the same reason a New York tax law.

388. *Fairmont Co.* v. *Minnesota*, 274 U.S. 1 (1927).

Minnesota law which punished anyone who discriminated between different localities of that State by buying dairy products in one locality at a higher price than was paid for the same commodities in another locality infringed liberty of contract as protected by the due process clause.

Justices Concurring: McReynolds, Taft, C.J., Butler, Van Devanter, Sanford, Sutherland.

Justices Dissenting: Holmes, Brandeis, Stone.

389. *Ohio Pub. Serv. Co.* v. *Ohio ex rel. Fritz*, 274 U.S. 12 (1927).

Ohio law which destroyed assignability of a franchise previously granted to an electric company by a municipal ordinance impaired the obligation of contract.

Justices Concurring: McReynolds, Taft, C.J., Sutherland, Stone, Sanford, Butler, Van Devanter.
Justices Dissenting: Holmes, Brandeis.

390. *Southern Ry. Co.* v. *Kentucky*, 274 U.S. 76 (1927).

Kentucky law which imposed a franchise tax on railroad corporations was constitutionally defective and violative of due process insofar as it was computed by including mileage outside the State which did not in any plain and intelligible way add to the value of the road and the rights exercised in Kentucky.

Justices Concurring: Butler, Taft, C.J., Holmes, Sutherland, Stone, McReynolds, Van Devanter, Sanford.
Justice Dissenting: Brandeis.

391. *Road Improvement Dist.* v. *Missouri Pacific R. Co.*, 274 U.S. 188 (1927).

Special assessments levied against a railroad by a road district pursuant to an Arkansas statute and based on real property and rolling stock and other personality were unreasonably discriminatory and excessive and deprived the railroad of property without due process by reason of the fact that other assessments for the same improvement were based solely on real property.

392. *Fiske* v. *Kansas*, 274 U.S. 380 (1927).

As construed and applied to an organization not shown to have advocated any crime, violence, or other unlawful acts, the Kansas criminal syndicalism law was violative of due process.

393. *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927).

By reason of the exception contained therein, whereby its prohibitions were not to apply to conduct engaged in by participants whenever necessary to obtain a reasonable profit from products traded in, the Colorado Antitrust Law was void for want of a fixed standard for determining guilt and violative of due process.

394. *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490 (1927).

As applied to a foreign corporation having a fixed place of business and an agent in one county, but no property, debts or anything also in the county in which it was sued, Arkansas law which authorized actions to be brought against a foreign corporation in any county in the State, while restricting actions against domestic corporations to

the county where it had a place of business or where its chief officer resided deprived the foreign corporation of equal protection of the laws.

Justices Concurring: Van Devanter, Taft, C.J., McReynolds, Sutherland, Stone, Sanford, Butler.
Justices Dissenting: Holmes, Brandeis.

395. *Northwestern Ins. Co.* v. *Wisconsin*, 275 U.S. 136 (1927).

Wisconsin law levying a tax on the gross income of domestic insurance companies was void where the income was derived in part as interest on United States bonds.

396. *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928).

New Jersey statute which provided that in suits by residents against nonresidents for injuries resulting from operation of motor vehicles by the latter, service might be made on the Secondary of State as their agent, but which failed to provide any assurance that notice of such service would be communicated to the nonresidents was violative of due process.

Justices Concurring: Taft, C.J., Van Devanter, Butler, Sutherland, Sanford, McReynolds.
Justices Dissenting: Brandeis, Holmes, Stone.

397. *Accord: Consolidated Flour Mills Co.* v. *Muegge*, 278 U.S. 559 (1928), voiding similar service as authorized by an Oklahoma law.

398. *Missouri ex rel. Robertson* v. *Miller*, 276 U.S. 174 (1928).

Mississippi statute which terminated right of retired revenue agent to prosecute suits for unpaid taxes in the name of his successor by requiring that the successor approve and join in such suits, and which further stipulated that the successor share equally in the commissions hitherto accruing solely to the retired agent was held to impair the latter's rights under the contract clause insofar as it was enforced retroactively to accord a share to the successor in suits instituted by the retired agent before this legislative alteration.

399. *Montana National Bank* v. *Yellowstone County*, 276 U.S. 479 (1928).

Montana law which levied tax on national bank shares was violative of federal law prohibiting levy on such shares as rates higher than those assessed on moneyed capital in hands of individual citizens.

400. *New Brunswick* v. *United States*, 276 U.S. 547 (1928).

Property taxes assessed under New Jersey law on land acquired from the United States Housing Corporation by private purchasers

subject to retention of mortgage by the federal agency could not be collected by sale of the land unless the federal liens were excluded and preserved as prior liens.

Justices Concurring: Sanford, Stone, Sutherland, Butler, Brandeis, Holmes, Taft, C.J., Van Devanter.
Justice Dissenting: McReynolds.

401. *Brooke* v. *Norfolk*, 277 U.S. 27 (1928).

State and city taxes authorized under laws of Virginia may not be levied on the corpus of a trust located in Maryland, the income from which accrued to a beneficiary resident in Virginia; the corpus was beyond the jurisdiction of Virginia and accordingly the assessments were violative of due process.

402. *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32 (1928).

Kentucky law which conditioned the recording of mortgages not maturing within five years upon the payment of a tax of 20¢ for each $100 of value secured, but which exempted mortgages maturing within that period was void as denying equal protection of the laws.

Justices Concurring: Sutherland, Taft, C.J., Butler, Van Devanter, McReynolds.
Justices Dissenting: Holmes, Brandeis, Sanford, Stone.

403. *Long* v. *Rockwood*, 277 U.S. 142 (1928).

Massachusetts income tax law could not validly be imposed on income received by a citizen as royalties for the use of patents issued by the United States.

Justices Concurring: McReynolds, Taft, C.J., Butler, Van Devanter, Sanford.
Justices Dissenting: Holmes, Brandeis, Sutherland, Stone.

404. *Standard Pipe Line* v. *Highway Dist.*, 277 U.S. 160 (1928).

Arkansas law which purported to validate assessments by the district was ineffective to sustain an arbitrary assessment against the pipe line at the rate of $5000 per mile in view of the fact that the pipe line originally was constructed in 1909–1915 at a cost under $9000 per mile, and the benefit, if any, which accrued to the pipe line was small.

405. *Panhandle Oil Co.* v. *Missouri ex rel. Knox*, 277 U.S. 218 (1928).

Mississippi law imposing tax on the sale of gasoline was void as applied to sales to federal instrumentalities such as the Coast Guard or a Veterans' Hospital.

Justices Concurring: Butler, Taft, C.J., Sutherland, Van Devanter, Sanford.
Justices Dissenting: Holmes, Brandeis, Stone, McReynolds.

406. *Accord: Graysburg Oil Co.* v. *Texas*, 278 U.S. 582 (1929), voiding application of-Texas gasoline tax statute to gasoline sold to the United States.

407. *Ribnik* v. *McBride*, 277 U.S. 350 (1928).

New Jersey law empowering Secretary of Labor to fix the fees charged by employment agencies was violative of due process inasmuch as the regulation was not imposed on a business affected with a public interest.

Justices Concurring: Sutherland, Taft, C.J., Sanford, Butler, McReynolds, Van Devanter.
Justices Dissenting: Stone, Holmes, Brandeis.

408. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928).

Pennsylvania law which taxed gross receipts of foreign and domestic corporations derived from intrastate operation of taxicabs, but exempted like receipts derived by individuals and partnerships, denied equal protection of the laws.

Justices Concurring: Butler, Taft, C.J., Sutherland, Sanford, Van Devanter, McReynolds.
Justices Dissenting: Holmes, Brandeis, Stone.

409. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928).

Louisiana Shrimp Act which permitted shipment of shrimp taken in Louisiana tidal waters only if the heads and hulls had previously been removed, and which was designed to favor the canning in Louisiana of shrimp destined for the interstate market was unconstitutional; those taking the shrimp immediately became entitled to ship them in interstate commerce.

Justices Concurring: Butler, Sutherland, Sanford, Stone, Van Devanter, Taft, C.J., Holmes, Brandeis.
Justice Dissenting: McReynolds.

410. *Accord: Johnson* v. *Haydel*, 278 U.S. 16 (1928), voiding the Louisiana Oyster Act for like reasons.

411. *Hunt* v. *United States*, 278 U.S. 96 (1928).

Arizona game laws were not enforceable in a national game preserve and could not be invoked to prevent the killing of wild deer therein as ordered by federal officers.

412. *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928).

Pennsylvania law which prohibited corporate ownership of a drug store unless all of the stockholders were licensed pharmacists had no reasonable relationship to public health and therefore was violative of due process.

Justices Concurring: Sutherland, Taft, C.J., Butler, Van Devanter, Stone, Sanford, McReynolds.
Justices Dissenting: Holmes, Brandeis.

413. *Williams* v. *Standard Oil Co.*, 278 U.S. 235 (1929).

Tennessee law which fixed the prices at which gasoline may be sold violated the due process clause inasmuch as the business sought to be regulated was not affected with a public interest.

Justices Concurring: Sutherland, Taft, C.J., Stone (separately), Sanford, McReynolds, Butler, Brandeis (separately), Van Devanter.
Justice Dissenting: Holmes.

414. *International Shoe Co.* v. *Pinkus*, 278 U.S. 261 (1929).

Arkansas insolvency law was superseded by the Federal Bankruptcy Act to the extent that a creditor of one who invoked the state laws was entitled to have his claim paid by the state receiver in conformity with the order of distribution sanctioned by the federal law.

Justices Concurring: Butler, Taft, C.J., Holmes, Stone, Sanford, Van Devanter.
Justices Dissenting: McReynolds, Brandeis, Sutherland.

415. *Cudahy Co.* v. *Hinkle*, 278 U.S. 460 (1929).

Where the local property of a foreign corporation and the part of its business transacted in the State, less than half of which was intrastate, were but small fractions of its entire property and its nationwide business, Washington law which imposed a tax on such company in the form of a filing fee and a license tax, both reckoned upon its authorized capital stock, was inoperative by reason of burdening interstate commerce and reaching property beyond the State contrary to due process.

Justices Concurring: McReynolds, Taft, C.J., Sutherland, Stone, Sanford, Butler, Van Devanter.
Justices Dissenting: Brandeis, Holmes.

416. *Frost* v. *Corporation Commission*, 278 U.S. 515 (1929).

Oklahoma law which permitted an individual to engage in the business of ginning cotton only upon a showing of public necessity, but allowed a corporation to engage in said business in the same locality without such showing denied the individual equal protection of the law.

Justices Concurring: Sutherland, Taft, C.J., Butler, Van Devanter, McReynolds, Sanford.
Justices Dissenting: Brandeis, Holmes, Stone.

417. *Manley* v. *Georgia*, 279 U.S. 1 (1929).

Georgia banking law which declared every insolvency of a bank shall be deemed to have been fraudulent, with provision for rebutting said presumption, was arbitrary and unreasonable and violative of due process.

418. *Nielsen* v. *Johnson*, 279 U.S. 47 (1929).

Iowa inheritance tax law discriminating against nonresident alien heirs was violative of a treaty with Denmark.

419. *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929).

Louisiana tax law could not be enforced against oil purchased at interior points for export in foreign commerce for the oil did not lose its character as goods in foreign commerce merely because, after shipment to the exporter at a Louisiana port, the oil was temporarily stored there preparatory to loading on vessels of foreign consignees.

Justices Concurring: Taft, C.J., Holmes, Brandeis, Stone, Sanford, Van Devanter, Butler.

Justices Dissenting: McReynolds, Sutherland.

420. *London Guarantee & Accident Co.* v. *Industrial Comm.*, 279 U.S. 109 (1929).

California workmen's compensation act could not be applied in settlement of a claim for the death of a seaman in a case that was subject to the exclusive maritime jurisdiction of federal costs.

Justices Concurring: Taft, C.J., Holmes, Stone, Sanford, Sutherland, McReynolds, Butler, Van Devanter.

Justice Dissenting: Brandeis.

421. *Helson* v. *Kentucky*, 279 U.S. 245 (1929).

Kentucky law imposing a tax on the sale of gasoline could not be applied to gasoline purchased outside Kentucky for use in a ferry engaged as an instrumentality of interstate commerce, that is, in operation on the Ohio River between Kentucky and Illinois.

Justices Concurring: Sutherland, Taft, C.J., Butler, Van Devanter, Sanford, Stone (separately), Brandeis (separately), Holmes (separately).

Justice Dissenting: McReynolds.

422. *Macallen Co.* v. *Massachusetts*, 279 U.S. 620 (1929).

Massachusetts law imposing an excise on domestic business corporations was in reality a statute imposing a tax on income rather than a tax on the corporate privilege and, as an income tax law, could not be imposed on income derived from United States bonds nor, by

reason of impairment of the obligation of contract on income from local county and municipal bonds exempt by statutory contract.

Justices Concurring: Sutherland, Taft, C.J., Sanford, Butler, Van Devanter, McReynolds.
Justices Dissenting: Stone, Holmes, Brandeis.

423. *Western & Atlantic R. Co.* v. *Henderson*, 279 U.S. 639 (1929).

Georgia law which viewed a fatal collision between railroad and motor car at grade crossing as raising a presumption of negligence on the part of the railroad and as the proximate cause of death and which permitted the jury to weigh the presumption as evidence against the testimony of the railroad's witnesses tending to prove due care was unreasonable and violative of due process.

424. *Safe Deposit & T. Co.* v. *Virginia*, 280 U.S. 83 (1929).

Virginia law which levied a property tax on corpus of a trust consisting of securities managed by a Maryland trustee which paid over to children of settlor, all of whom resided in Virginia, the income therefrom, was violative of due process in that it taxed intangibles with a taxable situs in Maryland, where the trustee and owner of the legal title was located.

Justices Concurring: McReynolds, Taft, C.J., Van Devanter, Butler, Sutherland, Sanford, Stone (separately), Brandeis (separately), Holmes (separately).

425. *Farmers Loan Co.* v. *Minnesota*, 280 U.S. 204 (1930).

Minnesota inheritance tax law, insofar as it was applied to Minnesota securities kept in New York by the decedent who died domiciled thereon was violative of due process.

Justices Concurring: McReynolds, Taft, C.J., Van Devanter, Butler, Sutherland, Sanford, Stone (separately).
Justices Dissenting: Holmes, Brandeis.

426. *New Jersey Tel. Co.* v. *Tax Board*, 280 U.S. 338 (1930).

New Jersey franchise tax law, levied at the rate of 5% of gross receipts of a telephone company engaged in interstate and foreign commerce, was a direct tax on foreign and interstate commerce and void.

Justices Concurring: Butler, Sutherland, Sanford, Van Devanter, McReynolds.
Justices Dissenting: Holmes, Brandeis.

427. *Carpenter* v. *Shaw*, 280 U.S. 363 (1930).

Oklahoma law which imposed a 3% tax on the gross value of royalties from oil and gas was void as a tax on the right reserved to Indians as owners and lessors of the fee when applied to Indians who had

received allotments exempted under the Atoka agreement and leased by them for production of oil and gas (Art. VI).

428. *Moore* v. *Mitchell*, 281 U.S. 18 (1930).

Indiana was powerless to give any force or effect beyond her borders to its law of 1927 purporting to authorize a county treasurer to institute suits for unpaid taxes owed by a nonresident; such officer derived no authority in New York from this Indiana law and hence had no legal capacity to institute the suit in a federal court in the latter State.

429. *Lindgren* v. *United States*, 281 U.S. 38 (1930).

The right of action given under the Federal Merchant Marine Act to the personal representative to recover damages on behalf of beneficiaries for the death of a seaman resulting from negligence was exclusive and precluded a right of recovery by reason of unseaworthiness predicated upon the death statute of Virginia where the injury was sustained.

430. *Baizley Iron Works* v. *Span*, 281 U.S. 222 (1930).

Pennsylvania Workmen's Compensation Act could not be invoked to obtain recovery for injuries sustained by a workman while painting angle irons in the engine room of a ship tied to a pier in navigable waters; recovery was controlled exclusively by federal maritime law.

Justices Concurring: McReynolds, Sutherland, Butler, Van Devanter.
Justices Dissenting: Stone, Holmes, Brandeis.

431. *Accord: Employers' Liability Assurance Co.* v. *Cook*, 281 U.S. 233 (1930).

Texas workman's compensation law inapplicable for the same reason.

Justices Concurring: McReynolds, Butler, Sutherland, Van Devanter, Stone (separately), Holmes (separately), Brandeis (separately).

432. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313 (1930).

Missouri law which provided that, in taxing assets of insurance companies, the amounts of their legal reserves and unpaid policy claims should first be deducted was invalid as applied to a company owning nontaxable United States bonds insofar as the law was construed to require that the deduction should be reduced by the proportion that the value which such bonds bore to total assets; the company thus was saddled with a heavier tax burden than would have been imposed had it not owned such bonds.

Justices Concurring: Butler, Hughes, C.J. (separately), Van Devanter, McReynolds, Sutherland.

Justices Dissenting: Stone, Holmes, Brandeis.

433. *Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930).

Texas law, which forbade insurance stipulations limiting the time for suit on a claim for a period less than two years, could not constitutionally be applied, consistently with due process, to permit recovery contrary to the terms of fire insurance policy executed in Mexico by a Mexican insurer and covered in part by reinsurance effected in Mexico and New York by New York insurers licensed to do business in Texas who defended against a Texas claimant to whom the policy was assigned while he was a resident of Mexico and where he resided when the loss was sustained.

434. *Baldwin* v. *Missouri*, 281 U.S. 586 (1930).

Missouri not having jurisdiction for tax purposes of various intangibles, such as bank accounts and federal securities held in banks therein and owned by a decedent domiciled in Illinois, its transfer tax law could not be applied, consistently with due process, to the transfer thereof, under a will probated in Illinois, to the decedent's son who also was domiciled in Illinois.

Justices Concurring: McReynolds, Van Devanter, Sutherland, Butler.
Justices Dissenting: Holmes, Brandeis, Stone (separately).

435. *Surplus Trading Co.* v. *Cook*, 281 U.S. 647 (1930).

Arkansas personal property tax laws could not be enforced against the purchaser of army blankets situate within an army cantonment in that State, as to which exclusive federal jurisdiction attached under Art. I, § 8, cl. 17.

436. *Beidler* v. *South Carolina Tax Comm.*, 282 U.S. 1 (1930).

South Carolina inheritance tax law could not be applied, consistently with due process, to affect the transfer by will of shares in a South Carolina corporation and debts owed by the latter belonging to a decedent who died domiciled in Illinois; such intangibles were not shown to have acquired any taxable business situs in South Carolina.

Justices Concurring: Hughes, C.J., Holmes (separately), Brandeis (separately), Van Devanter, McReynolds, Sutherland, Butler, Stone, Roberts.

437. *Chicago, St. P., M & P. Ry.* v. *Holmberg*, 282 U.S. 162 (1930).

Nebraska law, as construed, which required a railroad to provide an underground cattle-pass across its right of way partly at its own expense for the purpose, not of advancing safety, but merely for the convenience of a farmer owning land on both sides of the railroad, deprived the latter of property without due process.

438. *Furst* v. *Brewster*, 282 U.S. 493 (1931).

Arkansas law which withheld from a foreign corporation the right to sue in state courts unless it had filed a copy of its charter and a financial statement and had designated a local office and an agent to accept service of process could not constitutionally be enforced to prevent suit by a non-complying foreign corporation to collect a debt which arose out of an interstate transaction for the sale of goods.

439. *Coolidge* v. *Long*, 282 U.S. 582 (1931).

Massachusetts law which imposed succession taxes on all property within Massachusetts transferred by deed or gift intended to take effect in possession or enjoyment after the death of the grantor, or transferred to any person absolutely or in trust, could not, consistently with due process and the contract clause, be enforced with reference to rights of succession or rights effected by gift which vested under trust agreements created prior to passage of said act, notwithstanding that the settlor died after its passage.

Justices Concurring: Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J.

Justices Dissenting: Roberts, Holmes, Brandeis, Stone.

440. *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931).

North Carolina income tax law, as applied to income of New York corporation which manufactured leather goods in North Carolina for sale in New York, was violative of due process by reason of the fact that the formula for allocating income to that State, namely, that part of the corporation's net income which bears the same ratio to entire net income as the value of its tangible property in North Carolina bears to the value of all its tangible property, attributed to North Carolina a portion of total income which was out of all appropriate proportion to the business of the corporation conducted in North Carolina.

441. *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183 (1931).

Tennessee law which imposed a privilege tax graduated to carrying capacity on motor buses, the proceeds from which were not segregated for application to highway maintenance, was void insofar as the privilege tax was imposed on a bus carrier engaged exclusively in interstate commerce.

Justices Concurring: Brandeis, Hughes, C.J., Van Devanter, Butler, Sutherland, Roberts, Stone, Holmes.

Justice Dissenting: McReynolds.

442. *Stromberg* v. *California*, 283 U.S. 359 (1931).

California law which prohibited the display of a red flag in a public or meeting place as a symbol of opposition to organized government or as a stimulus to anarchistic action or as an aid to seditious propaganda was so vague and indefinite as to permit punishment of the fair use of opportunity for free political discussion and therefore, as enforced, effected a denial of liberty without due process.

Justices Concurring: Hughes, C.J., Holmes, Stone, Brandeis, Roberts, Van Devanter, Sutherland.
Justices Dissenting: Butler, McReynolds.

443. *Smith* v. *Cahoon*, 283 U.S. 553 (1931).

Florida law which required motor carriers to furnish bond or an insurance policy for the protection of the public against injuries but which exempted vehicles used exclusively in delivering dairy products and carriers engaged exclusively in transporting fish, agricultural, and dairy products between production to shipping points en route to primary market denied the equal protection of the laws; and insofar as it subjected carriers for hire to the same requirements as to procurement of a certificate of convenience and necessity and rate regulation as were exacted of common carriers the law was violative of due process.

444. *Near* v. *Minnesota ex rel. Olsen*, 283 U.S. 697 (1931).

Minnesota law which authorized the enjoinder of one engaged regularly in the business of publishing a malicious, scandalous, and defamatory newspaper or magazine, as applied to publications charging neglect of duty and corruption on the part of state law enforcement officers, effected an unconstitutional infringement of freedom of the press as safeguarded by the due process clause of the Fourteenth Amendment.

Justices Concurring: Hughes, C.J., Brandeis, Holmes, Stone, Roberts.
Justices Dissenting: Butler, Van Devanter, McReynolds, Sutherland.

445. *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931).

New York law pertaining to the descent of property of an alien decedent was inoperative as to the property of an alien by reason of the conflicting provisions of a treaty negotiated with the nation to which the decedent owed allegiance.

446. *State Tax Comm.* v. *Interstate Natural Gas Co.*, 284 U.S. 41 (1931).

Mississippi privilege tax could not be enforced as to an interstate pipe line company which sold gas wholesale to local, independent distributors from a supply which passed into and through the State in

interstate commerce; fact that pipe line company, in order to make delivery, used a thermometer and reduced pressure, did not convert the sale into an intrastate transaction.

447. *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931).

Wisconsin income tax law which authorized an assessment against a husband of a tax computed on the combined total of his and his wife's incomes, augmented by surtaxes resulting from the combination, notwithstanding that under the laws of Wisconsin the husband had no interest in, or control over, the property or income of his wife, was violative of the due process and equal protection clauses of the Fourteenth Amendment.

Justices Concurring: Roberts, Hughes, C.J., Butler, Van Devanter, McReynolds, Sutherland.
Justices Dissenting: Holmes, Brandeis, Stone.

448. *Van Huffel* v. *Harkelrode*, 284 U.S. 225 (1931).

Federal bankruptcy courts are empowered to sell the real estate of bankrupts free from liens for state taxes; lien laws of Ohio stipulating that the liens were to attach to the property were ineffective to prevent the federal court from transferring the liens from the property to the proceeds of the sale.

449. *First National Bank* v. *Maine*, 284 U.S. 312 (1932).

Maine transfer tax law could not be applied, consistently with due process, to the inheritance of shares in a Maine corporation passing under the will of a Massachusetts testator who died a resident of Massachusetts and owning the shares.

Justices Concurring: Sutherland, Hughes, C.J., Butler, Van Devanter, Roberts, McReynolds.
Justices Dissenting: Stone, Holmes, Brandeis.

450. *Henkel* v. *Chicago, St. P., M. & O. Ry. Co.*, 284 U.S. 444 (1932).

Minnesota statute fixing amounts to be paid as compensation or in fees to expert witnesses could not be applied to determine costs in a federal court proceeding inasmuch as the statute was superseded by a federal enactment determining the fees to be paid witnesses.

451. *New State Ice Co.* v. *Liebmann*, 285 U.S. 262 (1932).

Oklahoma law which prohibited anyone from engaging in the manufacture, sale, or distribution of ice without a state license, to be issued only on proof of public necessity and capacity to meet public demand, effected an invalid regulation of a business not affected with a public interest and a denial of liberty to pursue a lawful calling contrary to the due process clause of the Fourteenth Amendment.

Justices Concurring: Sutherland, Hughes, C.J., Van Devanter, McReynolds, Butler, Roberts.
Justices Dissenting: Brandeis, Stone.

452. *Coombes* v. *Getz*, 285 U.S. 434 (1932).

Repeal of California constitutional provision making directors of corporations liable to creditors for all moneys misappropriated or embezzled impaired the obligation of contract as to creditors who dealt with corporations during the period when such constitutional provision was in force, and inclusion in the state constitution of another provision whereunder the State reserved the power to alter or repeal all existing or future laws concerning corporations could not be invoked to destroy vested rights contrary to due process.

Justices Concurring: Sutherland, Hughes, C.J., Roberts, Butler, McReynolds, Van Devanter.
Justices Dissenting: Cardozo, Brandeis, Stone.

453. *Nixon* v. *Condon*, 286 U.S. 73 (1932).

Texas White Primary Law which empowered the state executive committee of a political party to prescribe the qualifications of members of the party and thereby to exclude Negroes from voting in primaries conducted by the party amounted to state action violative of the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Cardozo, Hughes, C.J., Brandeis, Stone, Roberts.
Justices Dissenting: McReynolds, Van Devanter, Butler, Sutherland.

454. *Champlin Rfg. Co.* v. *Corporation Comm.*, 286 U.S. 210 (1932).

Section of Oklahoma law which provided that any person violating the statute shall be subject to have his oil producing property placed in the hands of a receiver by a court at the instance of a suit filed by the state Attorney General but which restricted such receivership to the operation of producing wells and the marketing of the production thereof in conformity with this law was a penal provision and as such was void under the due process clause for the reason that it punished violations of regulatory provisions of the statute that were too vague to afford a standard of conduct.

455. *Anglo-Chilean Corp.* v. *Alabama*, 288 U.S. 218 (1933).

Alabama law which subjected foreign corporations to an annual franchise tax for the doing of business, levied at the rate of $2 for each $1000 of capital employed in the State, violated both Art. I, § 10, cl. 2, prohibiting state import duties and the commerce clause when enforced against a foreign corporation, whose sole business in Alabama consisted of the landing, storing, and the selling in original packages of goods imported from abroad.

Justices Concurring: Butler, McReynolds, Van Devanter, Hughes, C.J., Roberts, Sutherland.
Justices Dissenting: Cardozo, Brandeis, Stone.

456. *Louis K. Liggett Co.* v. *Lee,* 288 U.S. 517 (1933).

Florida Chain Store Tax Law which levied a heavier privilege tax per store on the owner whose stores were in different counties than on the owner whose stores were all in the same county effected an arbitrary discrimination amounting to a denial of equal protection of the laws.

Justices Concurring: Roberts, Hughes, C.J., McReynolds, Sutherland, Butler, Van Devanter.
Justices Dissenting: Brandeis, Cardozo, Stone.

457. *Consolidated Textile Co.* v. *Gregory,* 289 U.S. 85 (1933).

Wisconsin law, insofar as it authorized service of process on a foreign corporation which sold goods in Wisconsin through a controlled subsidiary and hence was not carrying on any business in the State at the time of the attempted service was violative of due process, notwithstanding that the summons was served on an officer of the corporation temporarily in Wisconsin for the purpose of negotiating a controversy with a local attorney.

458. *Johnson Oil Co.* v. *Oklahoma ex rel. Mitchell,* 290 U.S. 158 (1933).

Oklahoma property tax law, consistently with due process, could not validly be enforced against the entire fleet of tank cars of an Illinois corporation which were used in transporting oil from its refinery in Oklahama to other States for the reason that all of the cars never acquired a tax situs in Oklahoma.

459. *Southern Ry. Co.* v. *Virginia,* 290 U.S. 190 (1933).

Virginia law which authorized an administrative officer to require railroads to eliminate grade crossing whenever, in his opinion, such alterations were necessary to promote public safety and convenience and afforded the railroads no notice or hearing on the existence of such necessity and no means of reviewing the officer's decision was violative of due process.

Justices Concurring: McReynolds, Roberts, Butler, Van Devanter, Sutherland, Brandeis.
Justices Dissenting: Hughes, C.J., Stone, Cardozo.

460. *Morrison* v. *California,* 291 U.S. 82 (1934).

Section of California Alien Land Law which stipulated that when the State, in a prosecution for violation thereof, proved use or occupancy by an alien lessee, alleged in the indictment to be an alien in-

eligible for naturalization, the onus of proving citizenship shall devolve upon the defense was arbitrary and violative of due process as applied to the lessee for the reason that a lease of land conveys no hint of criminality and there is no practical necessity for relieving the prosecution of the obligation of proving Japanese race.

461. *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934).

California law which levied a license upon every distributor for each gallon of motor vehicle fuel sold and delivered by him in the State could not constitutionally be applied to the sale and delivery of gasoline to a military reservation as to which the United States had acquired exclusive jurisdiction.

462. *Murray* v. *Gerrick & Co.*, 291 U.S. 315 (1934).

Washington Workman's Compensation Act, adopted after the United States had acquired exclusive jurisdiction over a tract which became Puget Sound Navy Yard, could not be invoked by the widow and child of a worker fatally injured while working for a contractor in said Yard for the reason that Congress by law had consented only to the institution of suits by a personal representative under the Washington Wrongful Death Statute.

463. *Hartford Accident & Insurance Co.* v. *Delta Pine Land Co.*, 292 U.S. 143 (1934).

As judicially applied, Mississippi statutes which deemed all contracts of insurance and surety covering its citizens to have been made therein and which were enforced to facilitate recovery under an indemnity contract, consummated in Tennessee in conformity with the law of the latter where the insured, a Mississippi corporation, also conducted its business, and to nullify as contrary to Mississippi law nonobservance of a contractual stipulation as to the time for filing claims were violative of due process in that the Mississippi laws were accorded effect beyond the territorial limits of Mississippi.

464. *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230 (1934).

Alabama law, as judicially construed, which precluded Alabama courts from entertaining actions against foreign corporations arising in other States under federal law, while permitting entertainment of like actions arising in other States under state law, was violative of the Constitution.

465. *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426 (1934).

Arkansas law which exempted life insurance proceeds from judicial process, when applied to prevent recovery by a creditor of the in-

sured who had garnished the insurer prior to passage of the law, impaired the obligation of contract.

Justices Concurring: Hughes, C.J., Cardozo, Brandeis, Roberts, Stone, Sutherland (separately), Van Devanter (separately), McReynolds (separately), Butler (separately).

466. *Concordia Ins. Co.* v. *Illinois*, 292 U.S. 535 (1934).

Illinois tax laws were discriminatory and violative of the equal protection clause for the reason that they (1) subjected foreign insurance companies selling fire, marine, inland marine, and casualty insurance to two property taxes, one on tangible property and a second, on net receipts, including net receipts from their casualty business, while subjecting competing foreign insurance companies selling only casualty insurance to the single tax on tangible property; and (2) insofar as the net receipts were assessed at full value while other personal property in general was assessed at only 60% of value.

Justices Concurring: Van Devanter, Sutherland, Butler, McReynolds, Roberts.
Justices Dissenting: Cardozo, Brandeis, Stone.

467. *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U.S. 216 (1935).

Section of Indiana Bank Collection Code which purported to make the owners of paper which a bank had collected, but which it had not satisfied, preferred claimants in the event of the bank's failure, irrespective of whether the funds representing such paper could be traced or identified as part of the bank's assets or intermingled with or converted into other assets of the bank was inoperative as to a national bank by reason of conflict with applicable federal law.

468. *Accord: Old Company's Lehigh* v. *Meeker*, 294 U.S. 227 (1935), embracing a comparable New York statutory provision.

469. *Cooney* v. *Mountain States Tel. Co.*, 294 U.S. 384 (1935).

Montana laws which imposed an occupation tax on every telephone company providing service in the State imposed an invalid burden on interstate commerce when applied to a company which used the same facilities to furnish both interstate as well as intrastate services.

470. *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935).

New York Milk Control Act, insofar as it prohibited the sale of milk imported from another State unless the price paid to the producer in the other State equalled the minimum prescribed for purchases from local producers, imposed an invalid burden on interstate commerce irrespective of resale of such milk in the original or other containers.

471. *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935).

Kentucky law which taxed the sales of retailers at the rate of 1/20 of 1% on the first $400,000 of gross sales, and which imposed increasing rates on each additional $100,000 of gross sales up to $1,000,000, with a maximum rate of 1% on sales over $1,000,000, was arbitrary and violative of the equal protection clause for the reason that there existed no reasonable relation between the amount of the tax and the value of the privilege of merchandising or between gross sales, the measure of the tax, and net profits.

Justices Concurring: Roberts, Hughes, C.J., Sutherland, Van Devanter, Butler, McReynolds.
Justices Dissenting: Cardozo, Brandeis, Stone.

472. *Accord: Valentine* v. *A. & P. Tea Co.*, 299 U.S. 32 (1936), voiding a similar Iowa Chain Store Tax Act.

Justices Concurring: Roberts, Hughes, C.J., Sutherland, Butler, McReynolds, Van Devanter.
Justices Dissenting: Brandeis, Cardozo.

473. *Panhandle Co.* v. *Highway Comm.*, 294 U.S. 613 (1935).

Kansas law which, as judicially construed, empowered the state highway commission to order a pipe line company, at its own expense, to relocate its pipe and telephone lines, then located on a private right of way, in order to conform to plans adopted for new highways across the right of way, deprived the company of property without due process of law.

Justices Concurring: McReynolds, Butler, Van Devanter, Sutherland, Brandeis, Hughes, C.J., Roberts, Stone (separately), Cardozo (separately).

474. *Broderick* v. *Rosner*, 294 U.S. 629 (1935).

New Jersey law, which prohibited institution of suits in New Jersey courts to enforce a stockholder's statutory personal liability arising under the laws of another State and which was invoked to bar a suit by the New York Superintendent of Banks to recover assessments levied on New Jersey residents holding stock in a New York bank, was ineffective to prevent New Jersey courts from entertaining said action consistently with the full faith and credit clause.

Justices Concurring: Brandeis, Sutherland, Butler, Van Devanter, Stone, Roberts, Hughes, C.J., McReynolds.
Justice Dissenting: Cardozo.

475. *Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935).

Arkansas law which reduced the remedies available to mortgagees in the event of a default on mortgage bonds issued by an im-

provement district, with the result that they were deprived of effective means of recovery for 6½ years, impaired the obligation of contract.

476. *Georgia Ry. & Electric Co.* v. *Decatur*, 295 U.S. 165 (1935).

Insofar as a Georgia law, which authorized a municipality to effect certain street improvements and to assess railways having tracks on such streets with the cost of such improvement, supported a presumption that a benefit accrued to the railway from said improvements which could not be rebutted by contrary proof offered in a court of law, the effect of the statute was to deny the railway a hearing essential to due process of law.

Justices Concurring: Sutherland, Butler, Van Devanter, McReynolds, Hughes, C.J., Roberts.

Justices Dissenting: Stone, Brandeis, Cardozo.

477. *Senior* v. *Braden*, 295 U.S. 422 (1935).

Insofar as trust certificates held by a resident represented interests in various parcels of land located in, and outside of, Ohio, which afforded the holder no voice in the management of such property but only a right to share in the net income therefrom and in the proceeds from the sale thereof, such interests could be taxed only by a uniform rule according to value, and Ohio law which levied on intangible property tax thereon measured by income was violative of the equal protection and due process clauses.

Justices Concurring: McReynolds, Butler, Van Devanter, Sutherland, Roberts, Hughes, C.J.

Justices Dissenting: Stone, Brandeis, Cardozo.

478. *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U.S. 113 (1935).

Pennsylvania law which levied a tax on trust companies was in conflict with provisions of federal law proscribing discriminatory taxation of national bank shares by virtue of deductions allowed trust company for amounts represented by shares owned in Pennsylvania corporations already taxed or exempted, without any corresponding deduction on account of nontaxable federal securities owned or on account of national bank shares already taxed.

Justices Concurring: Roberts, Hughes, C.J., Van Devanter, Butler, McReynolds, Sutherland.

Justices Dissenting: Cardozo, Brandeis, Stone.

479. *Colgate* v. *Harvey*, 296 U.S. 404 (1935).

Vermont law which levied a 4% tax on income derived from loans made outside the State but which exempted entirely like

income derived from money loaned within Vermont at interest not exceeding 5% per year embodied an arbitrary discrimination and abridged the privileges and immunities of United States citizens contrary to the Fourteenth Amendment.

Justices Concurring: Sutherland, Van Devanter, Butler, McReynolds, Roberts, Hughes, C.J.

Justices Dissenting: Stone, Brandeis, Cardozo.

480. *Oklahoma* v. *Barnsdall Corp.*, 296 U.S. 521 (1936).

Oklahoma law which levied a tax on the gross production of oil, as applied to oil produced by lessees of lands of Indian tribes, was in conflict with federal law consenting to levy of a different tax and hence inoperative as a tax on a federal instrumentality.

481. *Treigle* v. *Acme Homestead Assn.*, 297 U.S. 189 (1936).

Louisiana law which abolished prior requirement that building and loan associations, when income was insufficient to pay all demands of withdrawing stockholders within 60 days, to set apart 50% of receipts to pay such withdrawals and provided, instead, that the directors be vested with sole discretion as to the amount to be allocated for such withdrawals, impaired the obligation of contract as to a stockholder who, prior to such amending statute, gave notice of withdrawal and whose demand had not been paid.

482. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

Louisiana law which imposed a tax on the gross receipts derived from the sale of advertisements by newspapers enjoying a circulation of more than 20,000 copies per week unconstitutionally restricted freedom of the press contrary to the due process clause of the Fourteenth Amendment.

483. *Accord: Arizona Publishing Co.* v. *O'Neil*, 304 U.S. 543 (1938).

484. *Mayflower Farms* v. *Ten Eyck*, 297 U.S. 266 (1936).

New York Milk Control Act which permitted milk dealers without well advertised trade names, who were in business before April 10, 1933, to sell milk in New York City at a price one cent below the minimum binding on competitors with well advertised trade names subjected dealers without well advertised names who established their business after that date to a denial of equal protection of the law.

Justices Concurring: Roberts, Hughes, C.J., Van Devanter, Sutherland, Butler, McReynolds.

Justices Dissenting: Cardozo, Brandeis, Stone.

485. *Bingaman* v. *Golden Eagle Lines*, 297 U.S. 626 (1936).

New Mexico law which imposed an excise tax on the sale and use of gasoline and motor fuel and collected a license tax of $25 from users who import for use in New Mexico gasoline purchased in another State could not validly be imposed on a motor vehicle carrier engaged exclusively in interstate commerce which imported out-of-state gasoline for use in New Mexico; for the tax was levied, not as compensation for the use of that State's highways, but on the use of an instrumentality of interstate commerce.

486. *Fisher's Blend Station* v. *State Tax Comm.*, 297 U.S. 650 (1936).

Washington law which levied an occupation tax measured by gross receipts of radio broadcasting stations within that State whose programs were received by listeners in other States imposed an unconstitutional burden on interstate commerce.

487. *International Steel & I. Co.* v. *National Surety Co.*, 297 U.S. 657 (1936).

Tennessee law relative to settlement of public construction contracts which retroactively released the surety on a bond given by a contractor as required by prior law for the security of claims of materialmen and substituted therefor, without the latter's consent, the obligation of another bond impaired the obligation of contract.

488. *Graves* v. *Texas Company*, 298 U.S. 393 (1936).

Alabama law which imposed an excise tax on the sale of gasoline could not be enforced as to sales of gasoline to the United States.

Justices Concurring: Butler, Sutherland, Van Devanter, Roberts, Hughes, C.J., McReynolds.
Justices Dissenting: Cardozo, Brandeis.

489. *Morehead* v. *New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

New York law which required employers to pay women minimum wages that would be not only equal to the fair and reasonable value of the services rendered but also sufficient to meet the minimum cost of living necessary for health deprived employers and employees of their freedom of contract without due process of law.

Justices Concurring: Butler, Van Devanter, McReynolds, Sutherland, Roberts.
Justices Dissenting: Hughes, C.J., Brandeis, Stone, Cardozo.

490. *Binney* v. *Long*, 299 U.S. 280 (1936).

Massachusetts succession tax law whereunder succession to property through failure of an intestate to exercise a power of appointment under a non-testamentary conveyance of the property by deed or trust made after September 1, 1907, was not taxed, whereas if the

conveyance was made before that date, the succession was not only taxable but the rate might be substantially increased by aggregating the value of that succession with other interests derived by the transferee by inheritance from the donee of the power, was discriminatory and violative of the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Roberts, Hughes, C.J., Van Devanter, Butler, Sutherland, McReynolds.
Justices Dissenting: Cardozo, Brandeis.

491. *De Jonge* v. *Oregon*, 299 U.S. 353 (1937).

Oregon Criminal Syndicalism Law, invoked to punish participation in the conduct of a public meeting devoted to a lawful purpose merely because the meeting had been held under the auspices of an organization which taught or advocated the forcible overthrow of government but which did not engage in such advocacy during the meeting, was violative of freedom of assembly and freedom of speech guaranteed by the due process clause of the Fourteenth Amendment.

492. *New York ex rel. Rogers* v. *Graves*, 299 U.S. 401 (1937).

New York income tax law could not be extended to salaries of employees of the Panama Railroad Company by reason of the fact that the latter together with its employees was a federal instrumentality (Art. VI).

493. *Lawrence* v. *Shaw*, 300 U.S. 345 (1937).

North Carolina property tax law could not be enforced so as to levy a tax on bank deposits made by petitioner as guardian of an incompetent veteran of World War I; by the terms of applicable federal law bank deposits which resulted from the receipt of federal veterans benefits payments were exempted from local taxation.

494. *Ingels* v. *Morf*, 300 U.S. 290 (1937).

California Caravan Act which imposed a $15 fee on each motor vehicle transported from another State into California for the purposes of sale therein imposed an unconstitutional burden on interstate commerce inasmuch as the proceeds from such fees were used, not to meet the cost of highway construction or maintenance, but to reimburse the State for the added expense of policing caravaning traffic and for such purposes the fee was excessive.

495. *Herndon* v. *Lowry*, 301 U.S. 242 (1937).

Georgia insurrection statute which punished as a crime the acts of soliciting members for a political party and conducting meetings of a local unit of that party, where one of the doctrines of the party, es-

tablished by reference to a document not shown to have been exhibited by any one, may be said to embrace ultimate resort in the indefinite future to violence against government invaded freedom of speech as guaranteed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Roberts, Brandeis, Stone, Hughes, C.J., Cardozo.
Justices Dissenting: Van Devanter, McReynolds, Butler, Sutherland.

496. *Lindsey* v. *Washington,* 301 U.S. 397 (1937).

Washington statute which increased the severity of a penalty for a specific offense, specifically, mandatory sentence of 15 years as a against sentence at the discretion of the judge for less than the maximum of 15 years, when applied retroactively to a crime committed before its enactment, was invalid as an *ex post facto* law.

497. *Hartford Ins. Co.* v. *Harrison,* 301 U.S. 459 (1937).

Georgia law which prohibited stock insurance companies writing fire and casualty insurance from acting through agents who were their salaried employees, but which permitted mutual companies writing such insurance to do so, violated the equal protection clause of the Fourteenth Amendment.

Justices Concurring: McReynolds, Sutherland, Van Devanter, Butler, Hughes, C.J.
Justices Dissenting: Roberts, Brandeis, Stone, Cardozo.

498. *Puget Sound Co.* v. *Tax Commission,* 302 U.S. 90 (1937).

Washington gross receipts tax law could not validly be enforced as to receipts accruing to a stevedoring corporation acting as an independent contractor in loading and unloading cargoes of vessels engaged in interstate or foreign commerce by longshoremen subject to its own direction and control; such business was a form of interstate and foreign commerce.

499. *James* v. *Dravo Contracting Co.,* 302 U.S. 134 (1937).

West Virginia gross receipts tax law could not validly be enforced to sustain levy on that part of gross receipts of a federal contractor working on a federal installation in West Virginia which was derived from the fabrication of equipment at its Pennsylvania plant for which the contractor received payment prior to installation of such equipment on the West Virginia site owned by the Federal Government; for such compensable activities were completed beyond the jurisdiction of West Virginia.

500. *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77 (1938).

California law which levied a privilege tax on admitted foreign insurers, measured by gross premiums received, was violative of due process insofar as it affected premiums received in Connecticut on contracts of reinsurance consummated in the later State and covering policies of life insurance issued by other insurers to residents of California; California was without power to tax activities conducted beyond its borders.

Justices Concurring: Stone, Hughes, C.J., McReynolds, Brandeis, Butler, Roberts.
Justice Dissenting: Black.

501. *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938).

Indiana law of 1933 which repealed tenure rights of certain teachers accorded under a Tenure Act of 1927 impaired the obligation of contract.

Justices Concurring: Roberts, Hughes, C.J., McReynolds, Brandeis, Butler, Stone.
Justice Dissenting: Black.

*Accord: Indiana ex rel. Valentine* v. *Marker*, 303 U.S. 628 (1938).

502. *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938).

Indiana gross receipts tax law could not constitutionally be applied to gross receipts derived by an Indiana corporation from sales in other States of goods manufactured in Indiana; as thus applied the law burdened interstate commerce.

Justices Concurring: Roberts, Hughes, C.J., Brandeis, Butler, Stone, Reed.
Justices Dissenting: Black (in part), McReynolds (in part).

*Freeman* v. *Hewit*, 329 U.S. 239 (1946).

The tax imposes an unconstitutional burden on interstate commerce when applied to the receipt by one domiciled in the State of the proceeds of a sale of securities sent out of the State to be sold.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Rutledge, Burton.
Justices Dissenting: Black, Douglas, Murphy.

*Indiana Dept. of Revenue* v. *Nebeker*, 348 U.S. 933 (1955).

This gross receipts tax law also could not be levied on receipts from the purchase and sale on margin of securities by resident owners through a nonresident broker engaged in interstate commerce.

Justices Concurring: Warren, C.J., Reed, Frankfurter, Burton, Clark, Minton.

Justices Dissenting: Black, Douglas.

503. *Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938).

California Alcoholic Beverages Control Act, as to its regulatory provisions which embraced a fee for a license to import alcoholic beverages and control over importation of such beverages, could not be enforced, consistently with the Twenty-first Amendment, against a retail dealer doing business in a National Park as to which California retained no jurisdiction.

504. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938).

A Missouri statute which accorded Negro residents financial aid to enable them to obtain instruction at out-of-state universities equivalent to that afforded exclusively to white students at the University of Missouri denies such Negroes the equal protection of the laws. The obligation of a State to give equal protection of the laws can be performed only where its laws operate, that is, within its own jurisdiction.

Justices Concurring: Hughes, C.J., Brandeis, Stone, Roberts, Black, Reed.
Justices Dissenting: McReynolds, Butler.

505. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939).

A Washington gross receipts tax levied on the privilege of engaging in business in the State cannot constitutionally be imposed on the gross receipts of a marketing agent for a federation of fruit growers whose business consists of the marketing of fruit shipped from Washington to places of sale in other States and foreign countries. Such a tax burdens interstate and foreign commerce contrary to Art. I, § 8, cl. 3.

Justices Concurring: Butler, McReynolds, Hughes, C.J., Brandeis, Stone, Roberts, Reed.
Justice Dissenting: Black.

506. *Hale* v. *Bimco Trading Co.*, 306 U.S. 375 (1939).

Florida statute imposing an inspection fee of 15 cents per cwt. (60 times the cost of the inspection) on cement imported from abroad is invalid under the commerce clause (Art. I, § 8, cl. 3).

507. *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

A New Jersey statute which stipulated that "any person not engaged in a lawful occupation, known to be a member of a gang of two or more persons, who had been convicted at least three times of being a disorderly person, or who has been convicted of any crime in New Jersey or any other State, is declared to be a gangster" and punish-

able upon conviction is repugnant to the due process clause of the Fourteenth Amendment because of vagueness and uncertainty.

508. *Lane* v. *Wilson*, 307 U.S. 268 (1939).

An Oklahoma statute which provided that all persons, other than those who voted in 1914, qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, should be perpetually disenfranchised was found to be repugnant to the Fifteenth Amendment.

Justices Concurring: Hughes, C.J., Roberts, Black, Reed, Frankfurter.
Justices Dissenting: McReynolds, Butler.

509. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

A statute which forbids the publicizing of facts concerning a labor dispute, whether by printed sign, pamphlet, by word of mouth, or otherwise in the vicinity of the business involved, and without regard to the number of persons engaged in such activity, the peaceful character of their conduct, the nature of the dispute, or the accuracy or restraint of the language used in imparting information, is violative of freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy.
Justice Dissenting: McReynolds.

510. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

A statute which forbids any person to solict money or valuables for any alleged religious cause, unless a license has first been procured from an official who is required to determine whether such cause is a religious one and who may deny issuance if he determines that the cause is not, imposes a previous restraint of the free exercise of religion and effects a deprivation of liberty without due process of law in violation of the Fourteenth Amendment.

511. *McCarroll* v. *Dixie Lines*, 309 U.S. 176 (1940).

Gasoline carried by interstate motor busses through Arkansas for use as fuel in interstate transportation beyond the Arkansas line cannot be subject to an Arkansas tax imposed from maintenance of state highways and collected on every gallon of gasoline above 20 brought into the State in any motor vehicle for use in operating the same. The statute levying this tax imposes an unconstitutional burden on interstate commerce.

Justices Concurring: McReynolds, Stone, Hughes, C.J., Roberts, Reed (separately).

Justices Dissenting: Black, Frankfurter, Douglas.

512. *Best* v. *Maxwell*, 311 U.S. 454 (1940).

A North Carolina statute which levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the State; who displays samples in any hotel room or house rented for the purpose of securing retail orders cannot be applied to a nonresident merchant who took orders in the State and shipped interstate directly to customers. In view of the imposition of a one dollar per year license tax collected from regular retail merchants, the enforcement of the statute as to nonresidents effects an unconstitutional discrimination in favor of intrastate commerce contrary to Art. I, § 8, cl. 3.

513. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

A Pennsylvania alien registration statute, imposing requirements at variance with those set forth in the Federal Alien Registration Act of 1940 containing a comprehensive scheme for the regulation of aliens is rendered unenforceable by reason of conflict with federal legislative and treaty-making powers.

Justices Concurring: Roberts, Black, Reed, Frankfurter, Douglas, Murphy.
Justices Dissenting: Stone, Hughes, C.J., McReynolds.

514. *Wood* v. *Lovett*, 313 U.S. 362 (1941).

When a State, with the help of a statute curing irregularities in a tax proceeding, sells land under a tax title which is valid, subsequent repeal of such curative statute is unconstitutional by reason of effecting an impairment of the obligation of contract (Art. I, § 10, cl. 1).

Justices Concurring: Hughes, C.J., Stone, Roberts, Reed, Frankfurter.
Justices Dissenting: Black, Douglas, Murphy.

515. *Federal Land Bank* v. *Bismarck Co.*, 314 U.S. 95 (1941).

Inasmuch as the Federal Farm Loan Act exempts federal land banks from state taxes, other than those on property acquired in the course of dealings, the North Dakota sales tax cannot validly be collected on the sale of materials to a federal land bank to be used in improving real estate (Art. VI, cl. 2).

516. *Edwards* v. *California*, 314 U.S. 160 (1941).

A California statute making it a misdemeanor for any one knowingly to bring, or assist in bringing, into the State a nonresident, indigent person is invalid by reason of imposing an unconstitutional burden on interstate commerce.

Justices Concurring: Stone, C.J., Roberts, Reed, Frankfurter, Byrnes. Justices Douglas, Black, Murphy and Jackson would have rested the invalidity on § 1 of the Fourteenth Amendment.

517. *Taylor* v. *Georgia*, 315 U.S. 25 (1942).

A state statute making it a crime for any person to contract with another to perform services of any kind, and thereupon obtain in advance money or other thing of value, with intent not to perform such service, and providing further that failure to perform the service or to return the money, without good and sufficient cause, shall amount to presumptive evidence of intent, at the time of making the contract, not to perform such service, is violative of the Thirteenth Amendment.

518. *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942).

Consistently with the national supremacy clause, federal laws and regulations relating to the entire process of manufacture of renovated butter supersede state laws whereunder Alabama officials inspected and seized packing stock butter acquired by a manufacturer of renovated butter for interstate commerce.

Justices Concurring: Roberts, Black, Reed, Douglas, Jackson.
Justices Dissenting: Stone, C.J., Frankfurter, Murphy, Byrnes.

519. *Tulee* v. *Washington*, 315 U.S. 681 (1942).

Being repugnant to the terms of a treaty concluded with the Yakima Indians reserving to the members of the latter tribe the right to take fish at all usual places in common with the citizens of Washington Territory, a state law requiring such Indians to pay license fees for the exercise of such privilege cannot be enforced.

520. *Skinner* v. *Oklahoma ex rel. Wilwinson*, 316 U.S. 535 (1942).

As applied to one convicted once of stealing chickens, and twice of robbery, an Oklahoma statute providing for the sterilization of habitual criminals, other than those convicted of embezzlement, or violation of prohibition and revenue laws, violates the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Stone, C.J., Jackson.

521. *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285 (1943).

Calif. Agric. Code provided that the selling and delivery of milk "at less than the minimum wholesale, retail prices effective in a marketing area" was an unfair practice warranting revocation of license or prosecution. Sales and deliveries of milk to the War Department on a federal enclave within a State over which the United States has

acquired exclusive jurisdiction are not subject to regulation under a state milk stabilization law.

Justices Concurring: Stone, C.J., Roberts, Black, Reed, Douglas, Jackson.
Justices Dissenting: Frankfurter, Murphy.

522. *Mayo* v. *United States*, 319 U.S. 441 (1943).

Florida Commercial Fertilizer Law constituted a comprehensive regulation of sale or distribution of commercial fertilizer and required a label or stamp on each bag evidencing the payment of an inspection fee. *Held:* a State is without constitutional power to exact an inspection fee, although the design of the inspection service was to protect consumer from fraud, as to fertilizer which the United States owns and is distributing within the State pursuant to provision of the Soil Conservation and Domestic Allotment Act.

523. *Taylor* v. *Mississippi*, 319 U.S. 583 (1943).

General Laws of Mississippi, 1943, chap. 178, provided, in part, that the teaching and dissemination of printed matter designed to encourage disloyalty to the national and state governments, and the distribution of printed matter reasonably tending "to create an attitude of stubborn refusal to salute, honor, or respect the flag or Government of the United States, or of the State of Mississippi" was a felony.

The Fourteenth Amendment of the Constitution prohibits the imposition of punishment for: (1) urging and advising on religious grounds that citizens refrain from saluting the flag; and (2) the communication of beliefs and opinion concerning domestic measures and trends in national and world affairs, when this is without sinister purpose and not in advocacy of, or incitement to, subversive action against the Nation or State and does not involve any clear and present danger to our institutions or our Government. Conviction under the statute for disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor or respect the national and state flags and governments denies the liberty guaranteed by the Fourteenth Amendment.

524. *Pollock* v. *Williams*, 322 U.S. 4 (1944).

Florida Statute of 1941, sec. 817.09 and sec. 817.10, made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained prima facie evidence of intent to defraud. The statute is violative of the Thirteenth Amendment and the Federal Antipeonage Act for it cannot be said that a plea of guilty is unin-

fluenced by the statute's threat to convict by its prima facie evidence section.

Justices Concurring: Roberts, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge.
Justices Dissenting: Stone, C.J., Reed.

525. *United States* v. *Allegheny County*, 322 U.S. 174 (1944).

Pennsylvania law provided in part that "The following subjects and property shall be valued and assessed, and subject to taxation, "and that taxes are declared "to be a first lien on said property." The effect of an *ad velorem* property tax is to increase the valuation of the land and buildings of a manufacturer by the value of machinery leased to him by the United States and is therefore a tax on property owned by the United States and is violative of the Constitution.

Justices Concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge.
Justices Dissenting: Roberts, Frankfurter.

526. *McLeod* v. *Dilworth Co.*, 322 U.S. 327 (1944).

The commerce clause prohibits the imposition of an Arkansas sales tax on sales to residents of the State which are consummated by acceptance of orders in, and the shipments of goods from, another State, in which title passes upon delivery to the carrier.

Justices Concurring: Stone, C.J., Roberts, Reed, Frankfurter, Jackson.
Justices Dissenting: Black, Douglas, Murphy, Rutledge

527. *Thomas* v. *Collins*, 323 U.S. 516 (1945).

A Texas statute required union organizers, before soliciting members, to obtain an organizer's card from the Secretary of State. As applied in this case, the statute is violative of the First and Fourteenth Amendments in that it imposes a previous restraint upon the rights of free speech and free assembly. The First Amendment's safeguards are not inapplicable to business or economic activity and restrictions of these activities can be justified only by clear and present danger to the public welfare.

Justices Concurring: Black, Douglas, Murphy, Jackson, Rutledge.
Justices Dissenting: Stone, C.J., Roberts, Reed, Frankfurter.

528. *Hooven and Allison Co.* v. *Evatt*, 324 U.S. 652 (1945).

An Ohio *ad valorem* tax on Philippine importations was violative of the constitutional prohibition of state taxation of imports for the reason that the place from which the imported articles are brought is not a part of the United States in the constitutional sense.

Justices Concurring: Stone, C.J., Roberts, Reed (dissenting in part), Frankfurter, Douglas (concurring in part), Murphy (concurring in part), Jackson, Rutledge (concurring in part).

Justice Dissenting: Black.

529. *Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1945).

Florida law provided that no one shall be licensed as a "business agent" of a labor union without meeting certain specified standards and that all labor unions in the State must file annual reports disclosing certain information and pay an annual fee therefor. The statute circumscribes the "full freedom" to choose collective bargaining agents secured to employees by the National Labor Relations Act. The reporting requirement and fee levied on labor unions does not conflict with the Act but is the sanction imposed by injunction against the labor union from functioning as such that is inconsistent with the federally protected processes of collective bargaining.

Justices Concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge.

Justices Dissenting: Roberts, Frankfurter.

530. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

The Arizona Train Limit Law makes it unlawful to operate a train of more than fourteen passenger or seventy freight cars. As applied to interstate trains, this law contravenes the commerce clause of the Constitution. The state regulation passes beyond what is plainly essential for safety, since it does no appear that it will lessen, rather than increase, the danger of accident.

Justices Concurring: Stone, C.J., Roberts, Reed, Frankfurter, Murphy, Jackson, Rutledge.

Justices Dissenting: Black, Douglas.

531. *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

Alabama law makes it a crime to enter or remain on the premises of another after having been warned not to do so. A State, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town's management, where the town and its shopping district are freely accessible to and freely used by the public in general.

Justices Concurring: Black, Frankfurter, Douglas, Murphy, Rutledge.

Justices Dissenting: Stone, C.J., Reed, Burton.

532. *Tucker* v. *Texas*, 326 U.S. 517 (1946).

Texas Penal Code makes it an offense for any "peddler or hawker of goods or merchandise" willfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof. A State, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment upon a person engaged in religious activities and distributing religious literature in a village owned by the United States under a congressional program designed to provide housing for workers engaged in national defense activities, where the village is freely accessible and open to the public.

Justices Concurring: Black, Frankfurter, Douglas, Murphy, Rutledge.
Justices Dissenting: Stone, C.J., Reed, Burton.

533. *Republic Pictures Corp.* v. *Kappler*, 327 U.S. 757 (1946).

Iowa statute, insofar as it required actions on claims arising under a federal statute not continuing any period of limitations, to be commenced within six months, effected a denial of equal protection of law when enforced as to one seeking to recover under the Federal Fair Labor Standards Act; a State may not discriminate against rights accruing under federal laws by imposing as to the former a special period of limitations not applicable to other claims.

534. *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152 (1946).

Iowa Code provided that no dam shall be constructed, operated or maintained in any navigable or meandered stream unless a permit has been granted by the executive council. Where sec. 9(b) of the Federal Power Act requires an applicant to submit satisfactory evidence of compliance with state laws with respect to the use of water for power purposes but petitioner made no attempt to comply with law requiring permit, the Court held that compliance with the Iowa law requiring a state permit is not a condition precedent to securing a federal license since it is the Federal Power Commission rather than the Iowa Executive Council that must pass upon issues affecting the use of navigable waters on the commerce clause of the Constitution.

Justices Concurring: Burton, Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge.
Justice Dissenting: Frankfurter.

535. *Morgan* v. *Virginia*, 328 U.S. 373 (1946).

Virginia Code required motor carriers, both interstate and intrastate, to separate without discrimination white and colored passengers in their motor buses so that contiguous seats would not be occupied by persons of different races at the same time. Even though Con-

gess has enacted no legislation on the subject, the state provisions are invalid as applied to passengers in vehicles moving interstate because they burden interstate commerce.

Justices Concurring: Black (separately), Reed, Frankfurter (separately), Douglas, Murphy, Rutledge.

Justice Dissenting: Burton.

536. *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69 (1946).

The California Retail Sales Tax, measured by gross receipts, cannot constitutionally be collected on exports in the form of oil delivered from appellant's dockside tanks to a New Zealand vessel in a California port for transportation to Auckland pursuant to a contract of sale with the New Zealand Government.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Jackson, Rutledge, Burton.

Justice Dissenting: Black.

537. *Bethlehem Steel Co.* v. *New York Employment Relations Board,* 330 U.S. 767 (1947).

Where the National Labor Relations Board has asserted general jurisdiction over unions of foreman employed by industries subject to the National Labor Relations Act but had refused to certify such unions as collective bargaining representatives on the ground that to do so at the time would obstruct rather than further effectuation of the purposes of the Act, certification of such unions by the New York Employment Relations Board under a state act is invalid as in conflict, with the National Labor Relations Act and the commerce clause of the Constitution.

538. *Accord: Plankington Packing Co.* v. *WERB,* 338 U.S. 953 (1950).

539. *Rice* v. *Sante Fe Elevator Corp.,* 331 U.S. 218 (1947).

By reason of amendments of the United States Warehouse Act, Congress terminated the dual system of regulation and substituted an exclusive system of federal regulations of warehouses licensed under the federal act. Such warehouses therefore no longer need to obtain Illinois licenses or comply with Illinois laws regulating those phases of the warehouse business which have been regulated under the federal act. Compliance with Illinois law is limited to those phases of the business which the federal act expressly subjects to state law.

Justices Concurring: Vinson, C.J., Black, Reed, Douglas, Murphy, Jackson, Burton.

Justices Dissenting: Frankfurter, Rutledge.

540. *Order of Travelers* v. *Wolfe*, 331 U.S. 586 (1947).

South Dakota Law provided that the time for commencing action on contracts was within six years and declared void every stipulation in a contract which reduces the time within which a party thereto may enforce his rights by legal proceedings. A claimant bringing an action in South Dakota for benefits arising under the constitution of a fraternal benefit society incorporated in Ohio and licensed to do business in South Dakota is bound by the limitation prescribed in the society's constitution barring actions on claims six months after disallowance by the society. South Dakota is required under the Federal Constitution to give full faith and credit to the public acts of Ohio.

Justices Concurring: Vinson, C.J., Frankfurter, Reed, Jackson, Burton.
Justices Dissenting: Black, Douglas, Murphy, Rutledge.

541. *United States* v. *California*, 332 U.S. 19 (1947).

California claimed that it owned the resources of the soil under the three-mile marginal belt as an incident to those elements of sovereignty which it exercised in that area, and therefore might grant permits to California residents to prospect far out and on the ocean floor within said limits. *Held:* California is not the owner of the three-mile marginal belt along its coast; the Federal Government rather than the State has paramount rights in and power over that belt, and full dominion over the resources of the soil under that water area. The United States is therefore, entitled to a decree enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

Justices Concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge, Burton.
Justices Dissenting: Reed, Frankfurter.

542. *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948).

Oklahoma constitutional and statutory provisions barring Negroes from the University of Oklahoma Law School are violative of the equal protection clause of the Fourteenth Amendment by reason of the fact that the University Law School is the only institution for legal education maintained by the State.

543. *Oyama* v. *California*, 332 U.S. 633 (1948).

California Alien Land Law forbade aliens ineligible for American citizenship to acquire, own, occupy, lease or transfer agricultural land and provided that any property acquired in violation of the statutes shall escheat as of the date of acquisition and that the same result shall follow any transfer made with "intent to prevent, evade, or avoid" escheat. Such intent is presumed prima facie, wherever an in-

eligible alien pays the consideration for a transfer to a citizen or eligible alien.

Applied to effect an escheat of agricultural lands acquired in the name of a minor American citizen with funds contributed by a father, a Japanese alien ineligible for naturalization, the statute deprived the son of the equal protection of the laws and of his privileges as an American citizen contrary to the Fourteenth Amendment.

Justices Concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge.

Justices Dissenting: Reed, Jackson, Burton.

544. *Seaboard R. Co.* v. *Daniel*, 333 U.S. 118 (1948).

South Carolina provided that a railroad line within the State can be owned and operated only by state-created corporations. A railroad corporation chartered under the laws of another State is forbidden under heavy penalties to exercise such powers within South Carolina. However, under South Carolina law, a foreign railroad corporation may organize a South Carolina subsidiary and may consolidate that corporation with itself. In that event, the consolidated corporation would be a corporation both of South Carolina and of another State.

A Virginia corporation authorized by the Interstate Commerce Commission under § 5 of the Interstate Commerce Act to own and operate an entire railway system with mileage in South Carolina is exempt from compliance with South Carolina's laws forbidding foreign corporations to own or operate railroads in the State.

545. *Winters* v. *New York*, 333 U.S. 507 (1948).

New York Penal Law provided that a person was guilty of a misdemeanor who "prints, utters, publishes, sells, lends, gives away, distributes, shows, or has in his possession with intent to sell, lend, give away, distribute or show or otherwise offer for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed matter devoted to the publication, and principally made up of criminal laws, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime. . . ."

Subsection 2 was construed by the state Court of Appeals to prohibit distribution of a magazine principally made up of news or stories of criminal deeds of bloodshed or lust so massed as to become a vehicle for inciting violent and depraved crimes against the person. As thus construed this provision is so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

Justices Concurring: Vinson, C.J., Black, Reed, Douglas, Murphy, Rutledge.

Justices Dissenting: Frankfurter, Jackson, Burton.

546. *Toomer* v. *Witsell*, 334 U.S. 385 (1948).

South Carolina law required a license of shrimp boat owners, the fee for which was $25 per boat for residents and $2,500 per boat for nonresidents. The law also required all boats licensed to trawl for shrimp in South Carolina waters to dock in the State and to unload their catch, pack, and properly stamp the catch before shipping or transporting it to another State. The differential license fees plainly discriminated against nonresidents and violated the privileges and immunities clause of Art. IV, § 2. The latter requirement burdened interstate commerce in violation of the commerce clause.

Justices Concurring: Vinson, C.J., Reed, Douglas, Murphy, Rutledge, Burton, Black (dissenting in part), Frankfurter (dissenting in part), Jackson (dissenting in part).

547. *Takahaski* v. *Fish Comm.*, 334 U.S. 410 (1948).

California required a commercial fishing license of every person bringing fish ashore in the State to sell but denied such a license to any person ineligible to citizenship. The statute precluded a resident Japanese alien from earning his living as a commercial fisherman in the ocean waters off the State and was held invalid under the equal protection clause of the Fourteenth Amendment and under federal statutory law (42 U.S.C. § 1981).

Justices Concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge, Burton.

Justices Dissenting: Reed, Jackson.

548. *Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948).

New York constitutionally may tax gross receipts of a common carrier from the transportation apportioned as to mileage within the State, but collection of the tax on gross receipts from that portion of the mileage outside the State unduly burdens interstate commerce in violation of the commerce clause of the Constitution.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Rutledge, Burton.

Justices Dissenting: Black, Douglas, Murphy.

549. *La Crosse Tel. Corp.* v. *WERB*, 336 U.S. 18 (1949).

Certification by a state employment relations board under a state labor relations act of a union as the collective bargaining representative of employees engaged in interstate commerce is invalid as in conflict with the National Labor Relations Act; the employer is one over which the NLRB consistently has exercised jurisdiction.

550. *Hood and Sons* v. *Du Mond*, 336 U.S. 525 (1949).

Agricultural and Market Law of New York, provided in part, that the Commissioner in issuing licenses to milk dealers must be satisfied "that the issuance of the license will not tend to destructive competition in a market already adequately served, and that the issuance of the license is in the public interest."

Denial of a license under this provision violates the commerce clause of the Constitution and the Federal Agricultural Marketing Act where petitioner, a distributor of milk in Massachusetts and operating three receiving plants licensed under the New York Agricultural and Market Law, was denied a license to operate an additional plant on grounds that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.

Justices Concurring: Vinson, C.J., Reed, Douglas, Jackson, Burton.
Justices Dissenting: Black, Frankfurter, Murphy, Rutledge.

551. *Schnell* v. *Davis*, 336 U.S. 933 (1949).

The Boswell Amendment to the Alabama constitution which vested unlimited authority in electoral officials to determine whether prospective voters satisfied the literacy requirement was violative of the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment.

552. *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949).

Missouri law, whereunder a judgment could not be revived after ten years from its rendition, could not be invoked, consistently with the full faith and credit clause, to prevent enforcement in a Missouri court of a Colorado judgment obtained in 1927 and revived in Colorado in 1946.

Justices Concurring: Vinson, C.J., Reed, Douglas, Murphy, Jackson, Burton.
Justices Dissenting: Black, Frankfurter, Rutledge.

553. *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949).

The Ohio *ad valorem* tax levied on accounts receivable of foreign corporations derived from sales of goods manufactured within the State, but exempting receivables owned by residents and domestic corporations, denied foreign corporations equal protection of the laws in violation of the Fourteenth Amendment. The tax was not saved from invalidity by the "reciprocity" provision of the statute imposing it, since this plan is not one which, by credit or otherwise, protects the nonresident or foreign corporation against discrimination.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Murphy, Jackson, Rutledge, Burton.

Justices Dissenting: Black, Douglas.

554. *Treichler* v. *Wisconsin*, 338 U.S. 251 (1949).

Insofar as the Wisconsin emergency tax on inheritances is measured by tangible property located outside the State, the tax violates the due process clause of the Fourteenth Amendment.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Burton, Clark, Minton.

Justice Dissenting: Black.

555. *Wissner* v. *Wissner*, 338 U.S. 655 (1950).

Consistently with the principle of national supremacy, the California community property law could not be invoked to sustain an award to a deceased soldier's widow of one-half of the proceeds of an insurance policy issued under the National Life Insurance Act; by the terms of the latter insured soldier is accorded the right to designate his beneficiary, in this instance, his mother, and his widow, not having been designated, is expressly precluded from acquiring a vested right to these proceeds.

556. *New Jersey Insurance Co.* v. *Div. of Tax Appeals*, 338 U.S. 665 (1950).

Collection by a New Jersey taxing district of a tax on intangible property of a stock insurance company, computed without deducting the principal amount of certain United States bonds and accrued interest thereon was invalid by reason of conflict with federal law exempting federal obligations from state and local taxation.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton.

Justice Dissenting: Black.

557. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Notice by publication, as authorized by the New York Banking Law for purposes of enabling banks managing common trust funds to obtain a judicial settlement of accounts binding on all having an interest in such funds, is not sufficient under the due process clause of the Fourteenth Amendment for determining property rights of persons whose whereabouts are known.

Justices Concurring: Vinson, C.J., Black, Reed, Jackson, Clark, Minton, Frankfurter.

Justice Dissenting: Burton.

558. *United Automobile Workers* v. *O'Brien*, 339 U.S. 454 (1950).

The strike vote provision of the Michigan Mediation Law, which prohibits the calling of a strike unless a state-prescribed procedure for mediation is followed and unless a majority of the employees in a state-defined bargaining unit authorizes the strike, conflicts with the National Labor Relations Act and is invalid under the commerce clause of the Constitution.

559. *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

Texas constitutional and statutory provisions restricting admission to the University of Texas Law School to white students are violative of the equal protection clause of the Fourteenth Amendment by reason of the fact that Negro students, denied admission thereto, are afforded educational facilities inferior to those available at the University.

560. *United States* v. *Louisiana*, 339 U.S. 699 (1950).

The Louisiana constitution provides that the Louisiana boundary includes all islands within three leagues of the coast; and Louisiana statutes provide that the State's southern boundary is 27 marine miles from the shore line.

Since the three-mile belt off the shore is in the domain of the Nation rather than that of the States, it follows that the area claimed by Louisiana extends 24 miles seaward beyond the three-mile belt is also in the domain of the Nation rather than Louisiana. The marginal sea is a national, not a state, concern and national rights are paramount in that area. The United States, therefore, is entitled to a decree upholding such paramount rights and enjoining Louisiana and all persons claiming under it from trespassing upon the area in violation of the rights of the United States, and requiring Louisiana to account for the money derived by it from the area after June 23, 1947.

Justices Concurring: Vinson, C.J., Black, Frankfurter, Douglas, Burton.
Justices Dissenting: Reed, Minton.

561. *United States* v. *Texas*, 339 U.S. 707 (1950).

Notwithstanding provisions in Texas laws whereby that State extended its boundary to a line in the Gulf of Mexico 24 marine miles beyond the three-mile limit and asserted ownership of the bed within that area and to the outer edge of the continental shelf, the United States is entitled to a decree sustaining its paramount rights to dominion of natural resources in said area, beyond the low-water mark on the coast of Texas and outside inland waters. Any claim which Texas may have asserted over the marginal belt when she existed as

an independent Republic was relinquished upon her admission into the Union on an equal footing with the existing States.

Justices Concurring: Vinson, C.J., Black, Frankfurter, Douglas, Burton.
Justices Dissenting: Reed, Minton.

562. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950).

Oklahoma law required segregation in educational facilities at institutions of higher learnings. As applied to assign a Negro student to a special row in the classroom, to a special table in the library, and to a special table in the cafeteria, the law impaired and inhibited the student's ability to study, engage in discussion, exchange views with other students, and in general to learn his profession. The conditions under which the student was required to receive his education deprived him of his personal and present right to the equal protection of the laws and were contrary to the command of the Fourteenth Amendment.

563. *Bus Employees* v. *WERB*, 340 U.S. 383 (1951).

Wisconsin Public Utility Anti-Strike Law substituted arbitration upon order of the Wisconsin Employment Relations Board for collective bargaining whenever an impasse is reached in the bargaining process. To insure conformity with this statutory scheme, Wisconsin denied to utility employees the right to strike.

As applied, this law conflicts with the National Labor Relations Act and is invalid under the supremacy clause.

Justices Concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark.
Justices Dissenting: Frankfurter, Burton, Minton.

564. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534 (1951).

The Illinois occupation tax, levied on gross receipts from sales of tangible personal property, cannot be collected on orders sent directly by the customer to the head officer of a corporation in Massachusetts and shipped directly to the customers from that office. These sales are interstate in nature and are immune from state taxation by virtue of the commerce clause.

Justices Concurring: Vinson, C.J., Black (dissenting in part), Reed (dissenting in part), Frankfurter, Douglas (dissenting in part), Jackson, Burton, Clark (dissenting in part), Minton.

565. *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951).

A state franchise tax for the privilege of doing business in a State, computed at a nondiscriminatory rate on that part of a foreign corporation's net income which is reasonably attributed to its business activities within the States and not levied as compensation for

the use of highways, or collected in lieu of an *ad valorem* property tax, or imposed as a fee for inspection, or as a tax on sales or use, cannot constitutionally be applied to a foreign motor carrier engaged exclusively in interstate trucking. A State cannot exact a franchise tax for the privilege of engaging in interstate commerce.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Minton.
Justices Dissenting: Black, Douglas, Clark.

566. *Hughes* v. *Fetter*, 341 U.S. 609 (1951).

The Wisconsin Wrongful Death Act provided that, ". . . actions thereunder shall be brought only for a death caused in this State."

Wisconsin's policy against entertaining suits under the wrongful death acts of other States must give way to the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each State of the obligations or rights created or recognized by the statutes of sister states.

Justices Concurring: Vinson, C.J., Black, Douglas, Burton, Clark.
Justices Dissenting: Reed, Frankfurter, Jackson, Minton.

567. *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232 (1952).

Tennessee Retailers' Sales Tax Act could not be enforced as to sales of commodities to a contractor employed by the Atomic Energy Commission; the contractor's activities were those of the Commission and exempt under federal law.

568. *Accord: General Electric Co.* v. *Washington*, 347 U.S. 909 (1954), embracing exemption of a similar contractor from Washington business and occupation tax law.

569. *Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952).

When boats and barges of an Ohio corporation used in transporting oil along the Mississippi River do not pick up or discharge oil in Ohio, and, apart from stopping therein occasionally for fuel and repairs, are almost continuously outside Ohio and are subject, on an apportionment basis, to taxation by other States, an Ohio tax on their full value violates the due process clause of the Fourteenth Amendment.

Justices Concurring: Vinson, C.J., Reed, Clark, Frankfurter, Douglas, Jackson, Burton.
Justices Dissenting: Black, Minton.

570. *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389 (1952).

A Mississippi privilege tax, levied on the privilege of soliciting business for a laundry not licensed in the State and collected at the

rate of $50 on each vehicle used in the business cannot validly be imposed on a foreign corporation operating an establishment in Tennessee and doing no business in Mississippi other than sending trucks thereto to solicit business, and pick up, deliver, and collect for laundry. A tax so administered burdens interstate commerce.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton.
Justice Dissenting: Black.

571. *First National Bank* v. *United Air Lines*, 342 U.S. 396 (1952).

Illinois law provided that "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and services of process in such suit may be had upon the defendant in such place."

In a suit brought in a federal district court in Illinois on grounds of diversity of citizenship to recover under the Utah death statute for a death occurring in Utah, the Illinois statute was held to be violative of the full faith and credit clause.

Justices Concurring: Vinson, C.J., Black, Douglas, Jackson, Burton, Clark, Minton.
Justices Dissenting: Reed, Frankfurter.

572. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952).

Insofar as the New York Education Law forbids the commercial showing of any motion picture without a license and authorizes denial of a license on a censor's conclusion that a film is "sacrilegious," it is void as a prior restraint on freedom of speech and of the press under the First Amendment made applicable to the States by the due process clause of the Fourteenth Amendment. The statute authorized designated officers to refuse to license the showing of any film which is obscene, indecent, immoral, inhuman, sacrilegious, or the exhibition of which would tend to corrupt morals or incite to crime.

573. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952).

As construed and applied, Art. 5-C of the New York Religious Corporations Laws, which authorized transfer of administrative control of the Russian Orthodox churches of North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches is invalid. Legislation which determines, in a hierarchical church, ecclesiastical administration or the appointment of the clergy, or transfers control of churches from one group to another, interferes with the free exercise of religion contrary to the Constitution.

Justices Concurring: Black, Douglas, Frankfurter, Vinson, C.J., Reed, Burton, Clark, Minton.
Justice Dissenting: Jackson.

574. *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

Oklahoma law requires each state officer and employee, as a condition of his employment, to take a "loyalty oath," that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive."

As construed, this statute excludes persons from state employment on the basis of membership in an organization, regardless of their knowledge concerning the activities and purposes of the organization and therefore violates the due process clause of the Fourteenth Amendment.

575. *Dameron* v. *Brodhead*, 345 U.S. 322 (1953).

Where a serviceman domiciled in one State is assigned to military duty in another State, the latter is barred by § 514 of the Soldiers and Sailor's Civil Relief Act of 1940 from imposing a tax on his tangible personal property temporarily located within its borders, even when the State of his domicile has not taxed such property.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton.
Justices Dissenting: Black, Douglas.

576. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954).

The Arkansas Gross Receipts Tax, levied on the gross receipts of sales within the State, cannot be applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract. Applicable federal laws provide that in procuring articles required for accomplishment of the agreement, the contractor shall act as purchasing agent for the Government and that the Government not only acquires title but shall be directly liable to the vendor for the purchase price. The tax is void as a levy on the Federal Government.

Justices Concurring: Reed, Frankfurter, Jackson, Burton, Clark, Minton.
Justices Dissenting: Warren, C.J., Black, Douglas.

577. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

A Texas tax on the occupation of "gathering gas" measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State

for the purpose of immediate interstate transmission, is violative of the commerce clause. As here applied, the State delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun; to that the tax is not levied on the capture or production of the gas, but on its taking into interstate commerce after production, gathering and processing.

578. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954).

Where residents of nearby Maryland make purchase from appellant in Delaware, some deliveries being made in Maryland by common carrier and some by appellant's truck, seizure of the appellant's truck in Maryland and holding it liable for the Maryland use tax on all goods sold in Delaware to Maryland customers is a denial of due process; the Delaware corporation has not subjected itself to the taxing power of Maryland and has not afforded Maryland a jurisdiction or power to impose upon it a liability for collections of the Maryland use tax.

Justices Concurring: Reed, Frankfurter, Jackson, Burton, Minton.
Justices Dissenting: Warren, C.J., Black, Douglas, Clark.

579. *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954).

In addition "taxes on property of express companies," Virginia provided that "for the privilege of doing business in the State," express companies shall pay an "annual license tax" upon gross receipts earned in the State "on business passing through, into, or out of, this State."

The gross-receipts tax is in fact and effect a privilege tax, and its application to a foreign corporation doing an exclusively interstate business violated the commerce clause of the Constitution.

Justices Concurring: Reed, Frankfurter, Jackson, Burton, Minton.
Justices Dissenting: Warren, C.J., Black, Douglas, Clark.

580. *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954).

Insofar as the New York Banking Law forbids national banks to use the word "saving" or "savings in their business or advertising," it conflicts with federal laws expressly authorizing national banks to receive deposits and to exercise incidental powers and is void.

Justices Concurring: Warren, C.J., Black, Frankfurter, Douglas, Jackson, Burton, Clark, Minton.
Justice Dissenting: Reed.

581. *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

State constitutional and statutory provisions requiring segregation of white and Negro children in public schools on the basis of race denies to such Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment and are void.

582. *Castle* v. *Hayes Freight Lines,* 348 U.S. 61 (1954).

Illinois law provides for a 90-day suspension upon a finding of 10 or more violations of regulations calling for a balanced distribution of freight loads in relation to the truck's axles. If thereafter the same carrier is found to have been guilty of 10 or more later violations, the suspension is for one year.

Where an interstate motor carrier holds a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act, a State may not suspend the carrier's rights to use the State's highways in its interstate operations. The Illinois law, as applied to such carrier, is violative of the commerce clause.

583. *Society for Savings* v. *Bowers,* 349 U.S. 143 (1955).

When a state property tax is levied against a mutual saving bank and a federal savings and loan association in their own names and is measured by the amount of each bank's capital, surplus, or reserve and undivided profits, without deduction of the value of federal securities owned by each or provision for reimbursement of each bank by its depositors for the tax, the latter is void as a tax upon obligations of the Federal Government (Art. VI, cl. 2).

584. *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956).

The Smith Act, as amended, 18 U.S.C. § 2385, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct. The scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the States to supplement it—enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. The decision of the Supreme Court of Pennsylvania holding that the Smith Act superseded the Pennsylvania statute is affirmed.

Justices Concurring: Warren, C.J., Black, Frankfurter, Douglas, Clark, Harlan.

Justices Dissenting: Reed, Burton, Minton.

585. *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

Illinois statutes provide that a writ of error may be prosecuted on a "mandatory record" kept by the court clerk and consisting of the indictment, arraignment, plea, verdict, and sentence. The "mandatory record" can be obtained free of charge by an indigent defendant. In such instances review is limited to errors on the face of the mandatory record, and there is no review of trial errors such as an erroneous ruling on admission of evidence. No provision was made whereby a convicted person in a non-capital case can obtain a bill of exceptions or report of the trial proceedings, which by statute is furnished free only to indigent defendants sentenced to death. Griffin, an indigent defendant, convicted of robbery, accordingly was refused a free certified copy of the entire record, including a stenographic transcript of the proceedings, and therefore was unable to perfect his appeal founded upon nonconstitutional errors of the trial court. Petitioner was held to have been denied due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment.

Justices Concurring: Warren, C.J., Black, Frankfurter, Douglas, Clark.
Justices Dissenting: Reed, Burton, Minton, Harlan.

586. *Covey* v. *Town of Somers*. 351 U.S. 141 (1956).

New York statutory procedure which sanctioned notice by mail together with the posting of a copy of said notice at a local post office and the publication thereof in two local newspapers of proceedings to foreclose a lien for delinquent real estate taxes was constitutionally inadequate and effected a taking of property without due process when employed in the foreclosure of the property of a mentally incompetent woman resident in the taxing jurisdiction and known by the officials thereof to be financially responsible but incapable of handling her affairs.

Justice Concurring: Frankfurter (separately).

587. *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225 (1956).

A "right to work" provision of the Nebraska constitution, by virtue of the supremacy clause of Art. VI of the Constitution, cannot be invoked to invalidate a "union shop" agreement between an interstate railroad and unions of its employees for the reason that such "union shop" agreement is expressly authorized by § 2(11) of the Railway Labor Act. By reason of such authorization, such "union shop" agreements cannot be invalidated by any state law.

Justice Concurring: Frankfurter (separately).

588. *Walker* v. *Hutchinson City*, 352 U.S. 112 (1956).

Kansas statutes permitted condemnation proceedings for the taking of private property for public use to be instituted by notice either in writing or by publication in an official city paper.

Where the commissioners, appointed to determine compensation in condemnation of appellant's land for public use, gave no notice of a hearing except by publication in the official city newspaper, though appellant was a resident of Kansas and his name was known to the city and on its official records, and there was no reason why direct notice could not be given, the newspaper publication alone did not measure up to the quality of notice the due process clause of the Fourteenth Amendment requires as a prerequisite to this type of proceedings.

Justices Concurring: Warren, C.J., Black, Reed, Douglas, Clark, Harlan.
Justices Dissenting: Frankfurter, Burton.

589. *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956).

Arkansas statute licensing contractors cannot be applied to a federal contractor operating pursuant to an award issued pursuant to the Armed Services Procurement Act of 1947. The state statute, being in conflict with the federal law, cannot validly be enforced.

590. *Butler* v. *Michigan*, 352 U.S. 380 (1957).

The Michigan Penal Code proscribed the sale to the general reading public of any book containing obscene language "tending to the corruption of the morals of youth." When invoked to convict a proprietor who sold a book having such a potential effect on youth to an adult police officer, the statute violated the due process clause of the Fourteenth Amendment. Thus enforced, the statute would permit the adult population of Michigan to read only what is fit for children.

591. *Gayle* v. *Browder*, 352 U.S. 903 (1956).

Alabama statutes and Montgomery City ordinances which required segregation of white and Negro races on motor buses in the City were violative of the equal protection clause of the Fourteenth Amendment.

592. *Guss* v. *Utah Labor Board*, 353 U.S. 1 (1957).

By vesting in the NLRB jurisdiction over labor relations affecting interstate commerce, Congress has completely displaced state legislative power to deal with such matters. When the Board declines to exercise its jurisdiction and has not ceded jurisdiction to a state labor relations agency pursuant to § 10(a) of the National Labor Relations Act, a state labor relations board, acting pursuant to state enactment,

is precluded by the national supremacy clause from exercising jurisdiction over a labor dispute involving an employer engaged in interstate commerce.

Justices Concurring: Warren, C.J., Black, Frankfurter, Douglas, Harlan, Brennan.
Justices Dissenting: Burton, Clark.

593. *Morey* v. *Doud*, 354 U.S. 457 (1957).

Illinois Community Currency Exchange Act exempted money orders of the American Express Company from the requirements that any firm selling or issuing money orders in the State must secure a license and submit to State regulation.

Application of the Act to appellees denies them the equal protection of the laws guaranteed by the Fourteenth Amendment. Although the equal protection clause does not require that every state regulation apply to all in the same business, a statutory discrimination must be based on differences that are reasonably related to the purposes of the statute. The effect of the discrimination was to create a closed class by singling out American Express money orders for exemption and thereby to afford that company important economic and competitive advantages over the appellees.

Justices Concurring: Warren, C.J., Douglas, Burton, Clark, Brennan, Whittaker.
Justices Dissenting: Black, Frankfurter, Harlan.

594. *Public Utility Comm.* v. *United States*, 355 U.S. 534 (1958).

A California statute making contingent upon prior approval by its Public Utilities Commission of the Federal Government's practice, sanctioned by federal law of negotiating special rates with carriers for the transportation of federal property in California is unconstitutional by reason of conflict with the national supremacy clause.

Justices Concurring: Black, Frankfurter, Douglas, Clark, Brennan, Whittaker.
Justices Dissenting: Warren, C.J., Burton, Harlan.

595. *Eskridge* v. *Washington Prison Bd.*, 357 U.S. 214 (1958).

A Washington state law authorizes furnishing a stenographic transcript of trial proceedings to an indigent defendant in conjunction with his appeal of a conviction whenever, in the trial judge's opinion, "justice thereby will be promoted." Denial of a free transcript to the defendant, sustained by the state appellate court, as well as refusal of a petition for *habeas corpus* based on such denial, deprived the defendant of rights guaranteed by the Fourteenth Amendment.

Justices Concurring: Warren, C.J., Douglas, Clark, Black, Burton, Brennan.
Justices Dissenting: Harlan, Whittaker.

596. *Speiser* v. *Randall*, 357 U.S. 513 (1958).

The California statutory provisions exacting as a prerequisite for property tax exemption that applicants therefor swear that they do not advocate the forcible overthrow of federal or state governments or the support of a foreign government against the United States during hostilities are unconstitutional insofar as they are enforced by procedures placing upon the taxpayer the burden of proving that he is not guilty of advocating that which is forbidden. Such procedures deprive the taxpayer of freedom of speech without the procedural safeguards required by the due process clause of the Fourteenth Amendment.

Justices Concurring: Black, Frankfurter, Douglas, Burton, Harlan, Brennan, Whittaker.
Justice Dissenting: Clark.

*First Unitarian Church* v. *Los Angeles*, 357 U.S. 545 (1958).

Solely because of their refusal to subscribe oaths that they do not advocate the forcible overthrow of government, or support of a foreign government against the United States during hostilities, petitioners were denied tax exemptions authorized by the California constitution and statutes. Enforcement of the oath requirement through statutory procedures which place upon taxpayers the burden of proving nonadvocacy violates the due process clause of the Fourteenth Amendment.

Justices Concurring: Black, Frankfurter, Douglas, Burton, Harlan, Brennan, Whittaker.
Justice Dissenting: Clark.

597. *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959).

An Ohio antitrust law cannot be invoked to prohibit enforcement of a collective bargaining agreement between a group of interstate motor carriers and local labor unions, which agreement stipulates that truck drivers owning and driving their own vehicles shall be paid the prescribed wages plus at least a prescribed minimum rental for the use of their vehicles. The state antitrust law, insofar as it is applied to prevent contracting parties from enforcing agreement upon a subject matter as to which the National Labor Relations Act directs them to bargain, is invalid.

Justices Concurring: Black, Douglas, Clark, Harlan, Brennan.
Justice Dissenting: Whittaker.

598. *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959).

Illinois statute which requires trucks and trailers operating on state highways to be equipped with specified type of rear fender mudguard, which is different from those permitted in at least 45 other

States, and which would seriously interfere with "interline operations" of motor carriers cannot validly be applied to interstate motor carriers certified by the Interstate Commerce Commission for the reason that interstate commerce is unreasonably burdened thereby.

Justices Concurring: Harlan (separately), Stewart (separately).

599. *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959).

The failure of the NLRB to assume jurisdiction does not leave California free to apply its laws defining torts and regulating labor relations for purposes of awarding damages to an employer for economic injuries resulting from the picketing of his plant by labor unions not selected by his employees as their bargaining agent. Since the employer is engaged in interstate commerce, California laws cannot be applied to matters falling within compass of the National Labor Relations Act.

Justices Concurring: Harlan, Clark, Whittaker, Stewart (separately).

600. *Accord: DeVries* v. *Baumgartner's Electric Co.*, 359 U.S. 498 (1959), as to a South Dakota law.

Justices Concurring: Frankfurter, Brennan, Warren, C.J., Black, Douglas.
Justices Dissenting: Clark, Harlan, Whittaker, Stewart.

601. *Accord: Superior Court* v. *Washington ex rel. Yellow Cab*, 361 U.S. 373 (1960), as to a Washington law.

602. *Accord: Bogle* v. *Jakes Foundry Co.*, 362 U.S. 401 (1960), as to a Tennessee law.

603. *Accord: McMahon* v. *Milam Manufacturing Company*, 368 U.S. 7 (1961), as to a Mississippi law.

604. *Accord: Marine Engineers* v. *Interlake Co.*, 370 U.S. 173 (1962), as to a Minnesota law.

605. *Accord: Waxman* v. *Virginia*, 371 U.S. 4 (1962), as to a Virginia law prohibiting picketing by non-employees.

606. *Accord: Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), invoiving enjoinder of picketing as violative of Georgia right-to-work law.

Justice Concurring: Harlan (separately).

607. *Accord: Journeymen & Plumbers' Union* v. *Borden*, 373 U.S. 690 (1962), as to a Texas law.

Justices Concurring: Harlan, Warren, C.J., Brennan, Black, Stewart, White.
Justices Dissenting: Douglas, Clark.

608. *Accord: Iron Workers* v. *Perko*, 373 U.S. 701 (1963), as to an Ohio law.

Justices Concurring: Harlan, Warren, C.J., White, Brennan, Stewart, Black.
Justices Dissenting: Douglas, Clark.

609. *State Athletic Commission* v. *Dorsey*, 359 U.S. 533 (1959).

Louisiana statute prohibiting athletic contests between Negroes and white persons was violative of the equal protection clause of the Fourteenth Amendment.

610. *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959).

As construed and applied, the New York Education Law which requires denial of a license to show a motion picture "presenting adultery as being right and desirable for certain people under certain circumstances" is unconstitutional. Refusal thereunder of a license to show a motion picture found to portray adultery alluringly as proper behavior violates the freedom to advocate ideas guaranteed by the First Amendment and protected by the Fourteenth Amendment from infringement by the States.

Justices Concurring: Black (separately), Frankfurter (separately), Douglas (separately), Clark (separately), Harlan (separately).

611. *Faubus* v. *Aaron*, 361 U.S. 197 (1959).

Arkansas statutes which empowered the Governor to close the public schools and to hold an election as to whether or not the schools were to be integrated as well as to withhold public moneys, hitherto allocated to such schools, on the occasion of their closing and to make such funds available to other public schools or nonprofit private schools to which pupils from a closed school might transfer were violative of the due process and equal protection clauses of the Fourteenth Amendment.

612. *Phillips Co.* v. *Dumas School District*, 361 U.S. 376 (1960).

As applied to the United States and its lessee, a Texas statute which levied a tax on any portion of federally owned land and improvements used and occupied by a firm in its private capacity or in the conduct of a business enterprise discriminated against the Federal Government unconstitutionally contrary to Art. VI, cl. 2. This discrimination resulted from the fact that art. 7173 of the Texas Revised Civil Statutes imposed a distinctly lesser burden on similarly situated lessees of exempt property owned by Texas and its subdivisions. Under art. 7173 the measure of the tax was not the full value of the leased premises, as under art. 5248, but only the price the taxable leasehold would bring at a sale. Also, art. 7153 imposed no tax on a lessee whose lease is for a term of less than three years. In addition,

under art. 7173, a lease for three years or longer, but subject as was the appellant's lease with the United States, to terminate at the lessor's option, was not a lease for a term of three years or more.

Justices Concurring: Brennan, Clark, Black, Douglas, Stewart, Warren, C.J., Whittaker, Harlan, Frankfurter (separately).

613. 3Rohr Corp. v. *San Diego County*, 362 U.S. 628 (1960).

Property taxes assessed under California law could not be levied on real estate owned by the Reconstruction Finance Corporation after the latter had declared the property to be surplus and surrendered it to the War Assets Administration for disposal; this exemption arose even before execution of a quitclaim deed transferring title from the RFC to the United States and even though a property had been leased to a private lessee in the name of both the RFC and the United States.

Justices Concurring: Clark, Warren, C.J., Harlan, Stewart, Frankfurter, Brennan, Whittaker.

Justices Dissenting: Douglas, Black.

614. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

Alabama statute which altered the boundaries of the City of Tuskegee in such manner as to eliminate all but four or five of its 400 Negro voters without eliminating any white voter was violative of the Fifteenth Amendment.

Justice Concurring: Whittaker (separately).

615. *Boynton* v. *Virginia*, 364 U.S. 454 (1960).

Virginia statute making it a misdemeanor for any person to remain on premises of another after having been forbidden to do so could not be enforced against a Negro for refusing to leave the section reserved for white people in a restaurant in a bus terminal by reason of conflict with provision of Interstate Commerce Act forbidding interstate motor vehicle bus carriers from subjecting persons to unjust discrimination.

Justices Concurring: Black, Douglas, Warren, C.J., Brennan, Stewart, Frankfurter, Harlan.

Justices Dissenting: Whittaker, Clark.

616. *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

Arkansas statute which required every school teacher, as a condition of employment in state-supported schools and colleges, to file an affidavit listing every organization to which he had belonged or contributed within the preceding five years deprived teachers of associa-

tional freedom guaranteed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Stewart, Warren, C.J., Brennan, Douglas, Black.
Justices Dissenting: Frankfurter, Clark, Harlan, Whittaker.

617. *Bush* v. *Orleans School Board,* 364 U.S. 500 (1961).

Louisiana interposition statute which averred that the decision in the school segregation case (*Brown* v. *Board of Education,* 347 U.S. 483 (1954)) constituted usurpation of state power and which interposed the sovereignty of the State against enforcement of that decision did not assert "*a constitutional doctrine,*" and if taken seriously, it is legal defiance of constitutional authority.

618. *Orleans Parish School Board* v. *Bush,* 365 U.S. 569 (1961).

Louisiana statutes which (1) provided for segregation of races in public schools and the withholding of funds from integrated schools; (2) conferred on the Governor the right to close all schools upon the integration of any one of them; and (3) directed the Governor to supersede a school board under a court order to desegregate and take over management of public schools were unconstitutional and denial of equal protection of the laws.

619. *Ferguson* v. *Georgia,* 365 U.S. 570 (1961).

When, by reason of a Georgia law which granted defendant in a criminal trial the right to make an unsworn statement to the jury without subjecting himself to cross-examination, defendant's counsel was denied the right to ask him any question when he took the stand to make his unsworn statement, such application of the Georgia law deprived the defendant of the effective assistance of counsel without due process of law.

Justices Concurring: Frankfurter (separately), Clark (separately).

620. *Louisiana* v. *NAACP ex rel. Gremillion,* 366 U.S. 293 (1961).

Louisiana statute which prohibited any "non-trading" association from doing business in Louisiana if it is affiliated with any "foreign or out of state non-trading" association, any of the officers or directors of which are members of subversive organizations as cited by a House committee or by the United States Attorney General, and which required every non-trading association with an out of state affiliate to file annually an affidavit that none of the officers of the affiliate is a member of such organizations was void for vagueness and violative of due process.

Justices Concurring: Harlan (separately), Stewart (separately), Frankfurter (separately), Clark (separately).

621. *United States* v. *Oregon*, 366 U.S. 643 (1961).

Oregon escheat law could not be applied to support claim of State to property of a resident who died without a will or heirs in a Veterans' Hospital in Oregon; the United States has asserted title thereto under a superseding federal law.

Justices Concurring: Black, Warren, C.J., Brennan, Stewart, Frankfurter, Harlan, Clark.

Justices Dissenting: Douglas, Whittaker.

622. *United States* v. *Shimer*, 367 U.S. 374 (1961).

Pennsylvania Deficiency Judgment Act had been displaced by applicable provisions of the Federal Servicemen's Readjustment Act of 1944, and regulations issued thereunder, and could not be invoked to bar suit by the Veterans' Administration against a veteran to recover the indemnity for a defaulted home loan which it had guaranteed and which had been foreclosed by the lender.

Justices Concurring: Harlan, Brennan, Stewart, Warren, C.J., Clark, Whittaker, Frankfurter.

Justices Dissenting: Black, Douglas.

623. *Torasco* v. *Watkins*, 367 U.S. 488 (1961).

Maryland constitutional provision under which an appointed notary public who would not declare his belief in God was denied his commission imposed an invalid test for public office violative of freedom of belief and religion as guaranteed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Frankfurter (separately), Harlan (separately).

624. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

Missouri statutory procedure which enabled a city policy officer, in an *ex parte* proceeding, to obtain from a trial judge search warrants authorizing seizure of all "obscene" material possessed by wholesale and retail distributors without granting the latter a hearing or even seeing any of such materials in question and without specifying any particular publications, sanctioned search and seizure tactics violative of due process.

Justices Concurring: Black (separately), Douglas (separately).

625. *Tugwell* v. *Bush*, 367 U.S. 907 (1961).

Louisiana statute which punished the giving to or acceptance by any parent of anything of value as an inducement to sending his child to a school operated in violation of Louisiana law was void for vagueness and was designed to scuttle a desegregation program.

626. *Legislature of Louisiana* v. *United States*, 367 U.S. 908 (1961).

Louisiana statutes which purported to remove New Orleans school board and replace it with a new group appointed by the legislature, which deprived the board of its attorney and substituted the Louisiana Attorney General, and a resolution addressing out of office the school superintendent chosen by the board, were unconstitutional and violative of the equal protection clause of the Fourteenth Amendment.

627. *Federal Land Bank* v. *Kiowa County*, 368 U.S. 146 (1961).

Kansas statute which declared that oil and gas leases and the royalties derived therefrom were taxable as personal property could not be applied so as to subject to local taxation an oil and gas lease and income therefrom derived by a Federal Land Bank from property acquired in satisfaction of a debt; under supervening federal law such Land Banks were exempted from all "except taxes on real estate."

Justice Concurring: Black (separately).

628. *Cramp* v. *Board of Public Institution*, 368 U.S. 278 (1961).

Florida statute which required state and local public employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party," and which subjected them to discharge for refusal was void for vagueness and violative of due process.

Justices Concurring: Black (separately), Douglas (separately).

629. *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291 (1961).

Michigan law regulating the manner in which a federal tax lien must be recorded was in conflict with applicable provisions of the Internal Revenue Code and therefore was ineffective for purposes of withholding priority to the Government's lien.

Justices Concurring: Black, Frankfurter, Brennan, Warren, C.J., Clark, Stewart, Whittaker, Harlan.
Justice Dissenting: Douglas.

630. *Campbell* v. *Hussey*, 368 U.S. 297 (1961).

Congress having preempted the field by enactment of the Federal Tobacco Inspection Act pertaining to the establishment of uniform standards for classification of tobacco, a Georgia law which required Type 14 tobacco grown in Georgia to be identified with a white tag could not be enforced.

Justices Concurring: Douglas, Whittaker (separately), Warren, C.J., Brennan, Stewart, Clark.

Justices Dissenting: Black, Frankfurter, Harlan.

631. *St. Helena Parish School Board* v. *Hall*, 368 U.S. 515 (1962).

Louisiana statute which authorized the school board of a municipally operated school system to close the schools upon a vote of the electors and which provided that the board might then lease or sell any school building, but which subjected to extensive state control and financial aid the private schools which might acquire such buildings was violative of the equal protection of the laws in that it was intended to continue segregation in schools.

632. *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

Mississippi statutes which required racial segregation at interstate and intrastate transportation facilities denied equal protection of the law.

633. *Turner* v. *City of Memphis*, 369 U.S. 350 (1962).

Tennessee statute, and administrative regulation issued under the authority thereof, insofar as they sanctioned racial segregation in a private restaurant operated on premises leased from a city at its municipal airport denied equal protection of the law.

634. *Free* v. *Bland*, 369 U.S. 663 (1962).

By virtue of the supremacy clause of the Constitution, Treasury regulations creating a right of survivorship in United States Savings Bonds preempted appplication of any conflicting provisions of Texas Community Property Law which prohibited a married couple from taking advantage of such survivorship regulations whenever the purchase prices of said bonds was paid out of community property.

635. *State Board of Ins.* v. *Todd Shipyards*, 370 U.S. 451 (1962).

Texas law imposing a premium tax on insured parties who purchased insurance from insurers not licensed to sell insurance in Texas could not be collected, consistently with the Federal McCarran-Ferguson Act, on insurance contracts purchased in New York from a London insurer by the terms of which premiums thereon and claims thereunder were payable in New York.

Justices Concurring: Douglas, Brennan, Warren, C.J., Stewart, Harlan, Clark.
Justice Dissenting: Black.

636. *Central R. Co.* v. *Pennsylvania*, 370 U.S. 607 (1962).

Pennsylvania law which levied a capital stock tax, in the nature of a property tax, could not be collected on that portion of a railroad's cars (158 out of 3074) which represented the daily average of its cars located on a New Jersey railroad's lines during a taxable year; as to

the latter portion of its cars the tax was violative of the commerce clause and the due process clause.

Justice Concurring: Black (separately).

637. *Robinson* v. *California*, 370 U.S. 660 (1962).

California statute which, as construed, made the "status" of narcotics addiction a criminal offense, even though the accused had never used narcotics in California and had not been guilty of antisocial behavior in California was void as inflicting cruel and unjust punishment proscribed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Stewart, Warren, C.J., Brennan, Douglas (separately), Harlan (separately), Black.

Justices Dissenting: Clark, White.

638. *Lassiter* v. *United States*, 371 U.S. 10 (1962).

Louisiana laws which segregated passengers in terminal facilities of common carriers were unconstitutional by reason of conflict with federal law and the equal protection clause.

639. *United States* v. *Buffalo Savings Bank*, 371 U.S. 228 (1963).

New York law which provided that payments out of proceeds of a foreclosure of property to discharge state tax liens should be deemed "expenses" of the mortgage foreclosure sale was ineffective to defeat priority accorded by federal law to federal tax liens antedating liens for state and local real property taxes and assessments.

Justices Concurring: Warren, C.J., Black, Brennan, Stewart, Goldberg, Harlan, Clark, White.

Justice Dissenting: Douglas.

640. *Paul* v. *United States*, 371 U.S. 245 (1963).

California statute which authorized the fixing of minimum wholesale and retail prices for milk could not be enforced as to purchases of milk for strictly military consumption (mess-hall) or for resale at commissaries at federal military installations in California; conflicting federal statutes and regulations governing procurement with appropriated funds of goods for the Armed Forces required competitive bidding or negotiation reflecting active competition which would be nullified by minimum prices determined by factors not specified in federal law.

Justices Concurring: Douglas, Black, Warren, C.J., White, Brennan, Clark.

Justices Dissenting: Stewart, Harlan, Goldberg.

641. *NAACP* v. *Button*, 371 U.S. 415 (1963).

Virginia law which expanded malpractice by attorneys to include acceptance of employment or compensation from any person or organization not a party to a judicial proceeding and having no pecuniary right or liability in it and which made it an offense for such person or organization to solicit business for an attorney was violative of freedom of expression and association, as guaranteed by the due process clause of the Fourteenth Amendment when enforced against a corporation, including its attorneys and litigants, whose major purpose is the elimination of racial segregation through litigation which it solicits, institutes, and finances.

Justices Concurring: Brennan, Warren, C.J., Goldberg, Douglas (separately), Black.

Justices Dissenting: White (in part), Harlan, Clark, Stewart.

642. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Florida statutory provision which did not accord indigent defendants the protection of court appointed counsel in noncapital felony offenses deprived such defendants of due process of law.

Justices Concurring: Douglas (separately), Clark (separately), Harlan (separately).

643. *Gray* v. *Sanders*, 372 U.S. 368 (1963).

Georgia county unit system for nominating candidates in primaries for state-wide offices, including United States Senators, as set forth in statutory provisions, violated the principle of "one-person, one vote" as required by the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Douglas, Stewart (separately), Clark (separately), Warren, C.J., Brennan, White, Goldberg, Black.

Justice Dissenting: Harlan.

644. *Lane* v. *Brown*, 372 U.S. 477 (1963).

Indiana Public Defender Act, insofar as it empowered the Public Defender to refuse to perfect an appeal for an indigent defendant whenever the former believed such an appeal would be unsuccessful and which, independently of such intervention by the Defender, afforded such defendant no alternative means of obtaining a transcript of a *coram nobis* hearing requisite to perfect an appeal from a trial court's denial of a writ of error *coram nobis*, effected a discriminatory denial of a privilege available as of right to a defendant with the requisite funds and was violative of the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Harlan (separately), Clark (separately).

645. *Michigan Nat. Bank* v. *Robertston*, 372 U.S. 591 (1963).

Suability of an out-of-state national bank in courts of Nebraska is determined by applicable provisions of the federal banking laws and not by recourse to Nebraska statute defining the venue of local actions involving liability under the Nebraska Instalment Loan Act.

Justices Concurring: Black (separately), Douglas (separately).

646. *Accord: Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555 (1963), as to venue in Texas.

Justices Concurring: White, Stewart, Brennan, Warren, C.J., Goldberg.
Justices Dissenting: Harlan, Douglas, Black.

647. *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64 (1963).

Louisiana use tax, as herein enforced, effected an invalid discrimination against interstate commerce in that the isolated purchase of an item of used equipment in Louisiana was not subject to its sales tax whereas an Oklahoma contractor was subjected to the Louisiana use tax on an item of used equipment employed in servicing wells in Louisiana which had been acquired in Oklahoma; and further that the Louisiana sales or use tax was computed on the cost of components purchased in Louisiana or purchased out of state for assembly and use in Louisiana whereas here the contractor paid a use tax on equipment assembled in Oklahoma which reflected not only the purchase price of the components but also the cost of labor and shop overhead incurred in assembling the components into a usable item of equipment.

Justices Concurring: Warren, C.J., Douglas, Goldberg, Stewart, White, Harlan, Brennan (separately).
Justices Dissenting: Clark, Black.

648. *Willner* v. *Committee on Character*, 373 U.S. 96 (1963).

New York statutory procedure governing admission to practice law, insofar as it failed to make provision, in cases of denial of admission, for a hearing on the grounds for rejection to be accorded the applicant, either before the Committee on Character on Fitness established by the Appellate Division of its Supreme Court, or before the Appellate Division itself was defective and amounted to a denial of due process.

Justices Concurring: Douglas, Black, White, Warren, C.J., Goldberg, Brennan, Stewart (separately).
Justices Dissenting: Harlan, Clark.

649. *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963).

When a city ordinance required separation of the races in restaurants, South Carolina trespass statute, when enforced against Negroes who refused to leave a lunch counter in a retail store, amounted to a denial of equal protection of the laws.

Justice Concurring: Harlan (separately).

650. *Accord: Gober* v. *City of Birmingham*, 373 U.S. 374 (1963), as to an Alabama law on trespass.

Justices Concurring: Warren, C.J., Black, Douglas, Goldberg, White, Clark, Brennan, Stewart.
Justice Dissenting: Harlan.

651. *Lombard* v. *Louisiana*, 373 U.S. 267 (1963).

When local community policy, as administered by municipal law enforcement officers, proscribed "sit-in demonstrations" protesting refusal of store proprietors to serve Negroes at lunch counters reserved for white patrons, the Louisiana Criminal Mischief Statute could not be invoked, without violation of the equal protection clause of the Fourteenth Amendment, to punish Negroes who engaged in such demonstrations.

Justices Concurring: Warren, C.J., Douglas (separately), Black, Brennan, White, Stewart, Goldberg, Clark.
Justice Dissenting: Harlan.

652. *Wright* v. *Georgia*, 373 U.S. 284 (1963).

Georgia unlawful assemblies act which rendered persons open to conviction for a breach of the peace upon their refusal to disperse upon command of police officers was void for vagueness and violative of due process in that it did not give adequate warning to Negroes that peaceable playing of basketball in a municipal park would expose them to prosecution for violation of said statute.

Justice Concurring: Harlan (separately).

653. *Sperry* v. *Florida ex rel Florida Bar*, 373 U.S. 379 (1963).

Florida law regulating admission to the Bar could be enforced, consistently with the principle of national supremacy, to prevent one, admitted to practice before the United States Patent Office as a Patent Attorney, from serving clients in the latter capacity in Florida.

654. *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963).

Missouri King-Thompson Act which authorized the governor to seize and operate a public utility when the public welfare was jeop-

ardized by a strike threat was violative of 29 U.S.C. § 157 of the National Labor Relations Act defining the rights of employees as to collective bargaining and, consistently with national supremacy, could not be enforced.

655. *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963).

Pennsylvania law which required the reading, without comment, of verses from the Holy Bible at the opening of each public school day was violative of the prohibition against the enactment of any law respecting an establishment of religion as embraced within the due process clause of the Fourteenth Amendment.

Justices Concurring: Clark, Douglas (separately), Brennan (respectively), Goldberg (separately), Harlan (concurs with latter), Warren, C.J., White, Black.
Justice Dissenting: Stewart.

656. *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

South Carolina Unemployment Compensation Act which withheld benefits and deemed ineligible for the receipt thereof a person who has failed, without good cause to accept available work when offered to him, if construed as barring a Seventh-Day Adventist from relief because of religious scruples against working on Saturday, abridged the latter's right to the free exercise of religion contrary to the due process clause of the Fourteenth Amendment.

Justices Concurring: Brennan, Clark, Warren, C.J., Goldberg, Black, Douglas, Stewart (separately).
Justices Dissenting: Harlan, White.

657. *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964).

Florida statute and regulations implementing it which required milk distributor to purchase its total supply of fluid milk from area producers at a fixed price and to take all milk which these producers offered was invalid under the commerce clause since they interfered with distributor's purchases of milk from out-of-state producers.

658. *Anderson* v. *Martin*, 375 U.S. 399 (1964).

Louisiana statute requiring that in all primary, general, or special elections, the nomination papers and ballots shall designate the race of the candidates violated the equal protection clause.

659. *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

Georgia statute establishing congressional districts of grossly unequal populations violates Article I, § 2, of the Constitution.

Concurring: Justices Black, Douglas, Brennan, White, Goldberg, and Chief Justice Warren.
Concurring in part and dissenting in part: Justice Clark.

Dissenting: Justices Harlan and Stewart.

660. *Accord: Martin* v. *Bush,* 376 U.S. 222 (1964).

Texas statute establishing congressional districts of grossly unequal populations unconstitutional on authority of *Wesberry* v. *Sanders,* 376 U.S. 1 (1964).

Same division of Justices as in *Wesberry.*

661. *City of New Orleans* v. *Barthe,* 376 U.S. 189 (1964).

District court decision holding unconstitutional Louisiana statute requiring segregation of races in public facilities is affirmed.

662. *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S. 225 (1964).

Illinois unfair competition law cannot be applied to bar or penalize the copying of a product which does not qualify for a federal patent inasmuch as this use of the state law conflicts with the exclusive power of the Federal Government to grant patents only to true inventions and then only for a limited time.

663. *Baggett* v. *Bullitt,* 377 U.S. 360 (1964).

Washington statutes requiring state employees to swear that they are not subversive persons and requiring teachers to swear to promote by precept and example respect for flag and institutions of United States and Washington, reverence for law and order, and undivided allegiance to Federal Government are void for vagueness.

Concurring: Justices White, Black, Douglas, Brennan, Stewart, Goldberg, and Chief Justice Warren.

Dissenting: Justices Clark and Harlan.

664. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964).

New York law regulating sale of alcoholic beverages could not constitutionally be applied to dealer who sold bottled wines and liquors to departing international airline travelers at JFK airport in New York.

Concurring: Justices Stewart, Douglas, Clark, White, and Chief Justice Warren.

Dissenting: Justices Black and Goldberg.

665. *Accord: Dept. of Alcoholic Beverage Control of California* v. *Ammex Warehouse Co.,* 378 U.S. 124 (1964).

State court voiding of state law affirmed on authority of *Hostetter.*

Same division of Justices.

666. *Dept. of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

Kentucky statute providing for a tax of ten cents per gallon on the importation of whiskey into the State, which was collected while the whiskey was in unbroken packages in importer's possession was unconstitutionally applied to the importer of Scotch whiskey from abroad under Art. I, § 10, cl. 2.

Concurring: Justices Stewart, Douglas, Clark, White, and Chief Justice Warren.

Dissenting: Justices Black and Goldberg.

667. *Chamberlin* v. *Dade County Board of Public Instruction*, 377 U.S. 402 (1964).

Florida statute providing for prayer and devotional reading in public schools is unconstitutional.

668. *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

Alabama constitutional and statutory provisions which do not apportion seats in both houses of legislature on a population basis violated the equal protection clause.

Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, Goldberg, and White.

Concurring specially: Justices Clark and Stewart.

Dissenting: Justice Harlan.

669. *Accord: WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964).

New York constitutional and statutory provisions which do not apportion seats in both houses of legislature on population basis is unconstitutional.

Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, Goldberg, and White.

Concurring specially: Justice Clark.

Dissenting: Justices Harlan and Stewart.

670. *Accord: Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964).

Division of Justices as in 669.

671. *Accord: Davis* v. *Mann*, 377 U.S. 678 (1964). Virginia.

Division of Justices as in 669.

672. *Accord: Roman* v. *Sincock*, 377 U.S. 695 (1964). Delaware.

Division of Justices as in 669, except Justice Stewart concurring specially.

673. *Accord: Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

Apportionment formula written into state constitution invalid under equal protection clause even though approved by electorate in referendum.

Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, Goldberg, and White.
Dissenting: Justices Clark, Harlan, and Stewart.

674. *Accord: Meyers* v. *Thigpen*, 378 U.S. 554 (1964). Washington Legislature.

Division of Justices as in 669, except Justice Stewart favored limited remand.

675. *Accord: Williams* v. *Moss*, 378 U.S. 558 (1964). Oklahoma Legislature.

Division of Justices as in 668.

676. *Accord: Pinney* v. *Butterworth*, 378 U.S. 564 (1964). Connecticut Legislature.

Division of Justices as in 668.

677. *Accord: Hill* v. *Davis*, 378 U.S. 565 (1964). Iowa Legislature.

Division of Justices as in 668.

678. *A Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964).

Statute authorizing issuance of *ex parte* warrant for seizure of allegedly obscene materials prior to a hearing on the issue of obscenity is invalid under First and Fourteenth Amendments.

Concurring: Justices Brennan, White, and Goldberg, and Chief Justice Warren.
Concurring specially: Justices Black and Douglas; Stewart.
Dissenting: Justices Harlan and Clark.

679. *Tancil* v. *Woolls and Virginia Board of Elections* v. *Hamm*, 379 U.S. 19 (1964).

District court decisions holding unconstitutional Virginia statutes requiring notation of race in divorce decrees and separation by race of names on registration, poll tax, and residence certificate lists, and on assessment rolls are affirmed.

680. *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

Criminal Defamation Statute is unconstitutional as applied to criticism of official conduct of public officials because it incorporates standards of malice and truthfulness at variance with *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

681. *McLaughlin* v. *Florida*, 379 U.S. 184 (1964)

Criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room in the nighttime violates equal protection clause.

682. *Stanford* v. *Texas*, 379 U.S. 476 (1965).

Section of law providing for suppression of Communist Party which authorizes issuance of search warrants for subversive books and other materials is constitutionally defective because it does not require a description with particularity of the things to be seized.

683. *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

Breach of the peace statute is unconstitutionally vague.

684. *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

Censorship statute requiring prior submission of films for review is invalid in absence of procedural safeguards eliminating dangers of censorship.

685. *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Texas constitutional provision prohibiting any member of Armed Forces who moves into the State from ever voting in Texas while a member of the Armed Forces violates the equal protection clause.

Concurring: Justices Stewart, Black, Douglas, Clark, Brennan, White, and Goldberg.
Dissenting: Justice Harlan.

686. *Louisiana* v. *United States*, 380 U.S. 145 (1965).

Constitutional and statutory provisions requiring prospective voters to satisfy registrars of their ability to understand and give reasonable interpretation of any section of United States or Louisiana Constitutions violate Fourteenth and Fifteenth Amendments.

687. *Reserve Life Ins. Co.* v. *Bowers*, 380 U.S. 258 (1965).

Ohio statute imposing personal property tax upon furniture and fixtures used by foreign insurance company in doing business in Ohio but not imposing similar tax upon furniture and fixtures used by domestic insurance companies violates equal protection clause.

688. *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965).

Idaho tax statute applied to levy an excise tax on licensed Idaho motor fuel dealer's sale and transfer of gasoline in Utah for importation into Idaho by purchaser violated due process clause of Fourteenth Amendment.

Concurring: Chief Justice Warren and Justices, Douglas, Clark, Harlan, Brennan, Stewart, White, and Goldberg.
Dissenting: Justice Black.

689. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

Louisiana Subversive Activities and Communist Control Law is unconstitutional because of overbreadth of its coverage, violating First Amendment, and because of its lack of procedural due process.

Concurring: Justices Brennan, Douglas, White, and Goldberg, and Chief Justice Warren.
Dissenting: Justices Harlan and Clark.

690. *Harman* v. *Forssenius*, 380 U.S. 528 (1965).

Virginia statute requiring voters in federal election who do not qualify by paying poll tax to file a certificate of residence six months in advance of election is contrary to Twenty-fourth Amendment which absolutely abolished payment of poll tax as a qualification for voting in federal elections.

691. *Corbett* v. *Stergios*, 381 U.S. 124 (1965).

Iowa reciprocal inheritance law conditioning right of nonresident aliens to take Iowa real property by intestate succession upon existence of reciprocal right to United States citizens to take real property upon same terms and conditions in alien's country could not under United States-Greece treaty and supremacy clause bar Greek national from taking.

692. *Jordan* v. *Silver*, 381 U.S. 415 (1965).

District court decision holding unconstitutional California constitutional provisions on apportionment of state senate is affirmed.

Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, White, and Goldberg.
Dissenting: Justices Harlan, Clark, and Stewart.

693. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Statute making it a crime for any person to use any drug or article to prevent conception is unconstitutional invasion of privacy of married couples.

Concurring: Justices Douglas and Clark.
Concurring specially: Justices Goldberg, Brennan, and Chief Justice Warren; Justice Harlan, Justice White.
Dissenting: Justices Black and Stewart.

694. *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966).

Statute permitting jurors to determine whether an acquitted defendant should pay the costs of the trial was void under the due process clause of the Fourteenth Amendment because of vagueness and the absence of any standard that would prevent arbitrary imposition of costs.

695. *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

New York statutory procedure for civil commitment of persons at the expiration of a prison sentence without the jury review available to all others civilly committed in New York and for commitment to an institution maintained by the Department of Correction beyond the expiration of his term without a judicial determination that he is dangerously mentally ill such as that afforded to all those committed except those nearing the end of a penal sentence violates equal protection clause.

696. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

Constitutional provisions making payment of poll taxes a qualification of eligibility to vote violate equal protection clause.

Concurring: Justices Douglas, Clark, Brennan, White, Fortas, and Chief Justice Warren.
Dissenting: Justices Black, Harlan, and Stewart.

697. *Accord: Texas* v. *United States*, 384 U.S. 155 (1966).

698. *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966).

Arizona loyalty oath is unconstitutionally overbroad and inclusive.

Concurring: Justices Douglas, Black, Brennan, Fortas, and Chief Justice Warren.
Dissenting: Justices White, Clark, Harlan, and Stewart.

699. *Mills* v. *Alabama*, 384 U.S. 214 (1966)

Statute making it a criminal offense to electioneer or solicit votes on election day as applied to newpaper editor who published editorial on election day urging people to vote a certain way on a referendum issue violated First and Fourteenth Amendments.

700. *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966)

Statute requiring an unsuccessful appellant to repay the cost of a transcript used in preparing his appeal out of his institutional earning when he is jailed but which does not apply to unsuccessful appellants given suspended sentences, placed on probation, or fined violates equal protection clause.

Concurring: Justices Stewart, Black, Douglas, Brennan, Clark, White, Fortas and Chief Justice Warren.
Dissenting: Justice Harlan.

701. *Alton* v. *Tawes*, 384 U.S. 315 (1966).

District court decision holding unconstitutional congressional districting is affirmed.

702. *Carr* v. *City of Attus*, 385 U.S. 35 (1966).

District court decision holding unconstitutional Texas statute forbidding anyone to withdraw water from any underground sources in State without authorization of legislature on a commerce clause basis is affirmed.

703. *Swann* v. *Adams*, 385 U.S. 440 (1967).

Florida statute apportioning legislative seats fall short of required population equality.

Concurring: Justices White, Black, Douglas, Clark, Brennan, Fortas and Chief Justice Warren.
Dissenting: Justices Harlan and Stewart.

704. *Kirkpatrick* v. *Preisler*, 385 U.S. 450 (1967). Missouri congressional districts.

705. *Short* v. *Ness Produce Co.*, 385 U.S. 537 (1967).

District court decision holding unconstitutional as violating commerce clause Oregon statute requiring sellers of imported meat to label it with country of origin, post notices in their establishment that it is being sold, and keep record of transactions involving it is affirmed.

706. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

New York statute requiring removal of teachers for "treasonable or seditious" utterances or acts is unconstitutionally vague since it apparently bans mere advocacy of abstract doctrine and statute which makes Communist Party membership prima facie evidence of disqualification for teaching in public schools is unconstitutionally broad.

Concurring: Justices Brennan, Black, Douglas, Fortas and Chief Justice Warren.
Dissenting: Justices Clark, Harlan, Stewart, and White.

707. *National Bellas Hess, Inc.* v. *Dept. of Revenue of Illinois,* 386 U.S. 753 (1967).

Commerce clause forbids application of use tax statute to a seller whose only connection with customers in the State is by common carrier or by mail.

Concurring: Justices Stewart, Brennan, Harlan, Clark, White, and Chief Justice Warren.

Dissenting: Justices Fortas, Black, and Douglas.

708. *Holding* v. *Blankenship, 387* U.S. 94 (1967).

Oklahoma obscenity statute empowering commission to investigate and to recommend prosecutions of offending parties is unconstitutional on authority of *Bantam Books* v. *Sullivan,* 372 U.S. 58 (1963).

709. *Reitman* v. *Mulkey,* 387 U.S. 369 (1967).

California constitutional provision adopted on referendum repealing "open housing" law and prohibiting state abridgement of realty owner's right to sell and lease, or to refuse to sell and lease, as he pleases violates the equal protection clause.

Concurring: Justices White, Douglas, Brennan, Fortas, and Chief Justice Warren.

Dissenting: Justices Harlan, Black, Clark, and Stewart.

710. *Berger* v. *New York,* 388 U.S. 41 (1967).

Eavesdrop statute that does not require particularity with respect to crime suspected and conversations sought, sufficiently limit period of order's effectiveness, terminate order once desired conversation is overheard, require notice or showing of exigent circumstances to justify dispensing with notice violates Fourth and Fourteenth Amendments.

Concurring: Justices Clark, Douglas, Brennan, Fortas, and Chief Justice Warren.

Dissenting: Justices Black, Harlan, and White.

711. *Loving* v. *Virginia,* 388 U.S. 1 (1967).

Statute prohibiting interracial marriage violates equal protection clause.

712. *Washington* v. *Texas,* 388 U.S. 14 (1967).

Statute prohibiting persons charged as co-participants in the same crime from testifying for one another violated Sixth and Fourteenth Amendments.

713. *Whitehill* v. *Elkins*, 389 U.S. 54 (1967).

Maryland loyalty oath is unconstitutionally vague when read with surrounding authorization and supplementary statutes which infringe on rights of association.

Concurring: Justices Douglas, Black, Brennan, Fortas, Marshall, and Chief Justice Warren.

Dissenting: Justices Harlan, Stewart, and White.

714. *Lucas* v. *Rhodes*, 389 U.S. 212 (1967).

Ohio congressional statute does not comport with *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, White, and Fortas.

Dissenting: Justices Harlan and Stewart.

715. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967).

Unemployment compensation law disqualifying for benefits any person unemployed as a result of a labor dispute when applied to disqualify a person who has filed an unfair labor practice charge against her employer because of her discharge conflicts with federal labor law and is void under supremacy clause.

716. *Rockefeller* v. *Wells*, 389 U.S. 421 (1967).

District court decision holding unconstitutional New York's congressional districting statute is affirmed.

Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, Fortas, and Marshall.

Dissenting: Justice Harlan.

717. *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

Oregon statute which barred alien from taking personal property intestate unless American citizens had reciprocal rights with alien's country, unless American citizens had right to receive payment within United States from estates of decedents dying in that foreign country, and unless Oregon courts were presented proof that alien heir would receive benefit, use, and control of inheritance without confiscation was void as an intrusion by State into field of foreign affairs reserved to Federal Government.

Concurring: Justices Douglas, Black, Brennan, Stewart, Fortas, and Chief Justice Warren.

Concurring specially: Justice Harlan.

Dissenting: Justice White.

718. *Dinis* v. *Volpe*, 389 U.S. 570 (1968).

District court decision holding Massachusetts congressional districting statute unconstitutional is affirmed.

719. *Louisiana Financial Assistance Comm.* v. *Poindexter*, 389 U.S. 571 (1968).

District court decision holding unconstitutional tuition grant statute authorizing payments to children attending private schools as part of an anti-desegregation program is affirmed.

720. *Kirk* v. *Gong*, 389 U.S. 574 (1968).

District court decision holding unconstitutional Florida congressional districting statute is affirmed.

721. *James* v. *Gilmore*, 389 U.S. 572 (1968).

District court decision holding unconstitutional Texas loyalty oath statute is affirmed.

722. *Lee* v. *Washington*, 390 U.S. 333 (1968).

Alabama statutes requiring racial segregation in prisons and jails violate equal protection clause.

723. *Scafati* v. *Greenfield*, 390 U.S. 713 (1968).

District court decision holding unconstitutional as applied to a prisoner who had been sentenced prior to enactment of statute but paroled after its enactment a statute which forbade a prisoner from earning good conduct deductions for the first six months after his reincarceration following violation of parole is affirmed.

724. *Levy* v. *Louisiana*, 391 U.S. 68 (1968).

Wrongful death statute creating right of action in surviving child or children as interpreted to mean only legitimate child or children denies illegitimate children equal protection of the laws.

Concurring: Justices Douglas, Brennan, White, Fortas, Marshall, and Chief Justice Warren.
Dissenting: Justices Harlan, Black, and Stewart.

725. *Accord: Glona* v. *American Gurantee & Liability Ins. Co.*, 391 U.S. 73 (1968).

726. *Rabeck* v. *New York*, 391 U.S. 462 (1968).

Provision of obsenity law is unconstitutionally vague.

Concurring: Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, Fortas, and Marshall.
Dissenting: Justice Harlan.

727. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

Statute, itself no longer in code but held to be incorporated in general juror challenge statute, which authorizes automatic challenge for cause of any potential juror scrupled against capital punishment in capital cases is invalid.

Concurring: Justices Stewart, Brennan, Fortas, Marshall and Chief Justice Warren.
Concurring specially: Justice Douglas.
Dissenting: Justices Black, Harlan, and White.

728. *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

Series of Ohio election statutes which imposed insurmountable obstacles to success of independent parties and candidates obtaining a place on the ballot violate the equal protection clause.

Concurring: Justices Black, Douglas, Brennan, Fortas, and Marshall.
Concurring specially: Justice Harlan.
Dissenting: Chief Justice Warren and Justices Stewart and White.

729. *Louisiana Education Comm. for Needy Children* v. *Poindexter*, 393 U.S. 17 (1968).

District court decision holding unconstitutional tuition grant statute as part of antidesegregation program is affirmed.

730. *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

Statute prohibiting the teaching of evolution in public schools of State violate First and Fourteenth Amendments.

731. *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968).

New Jersey statute providing for exemption from property taxes only of those nonprofit corporations chartered in New Jersey denies equal protection to Pennsylvania corporation qualified to do business in New Jersey.

Concurring: Chief Justice Warren and Justices Douglas, Harlan, Brennan, Stewart, White, Fortas, and Marshall.
Dissenting: Justice Black.

732. *South Carolina State Board of Education* v. *Brown*, 393 U.S. 222 (1968).

District court decision holding unconstitutional statute providing for scholarship grants for children attending private schools as part of antidesegregation program is affirmed.

733. *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1968).

Missouri congressional districting statute is unconstitutional because it did not achieve required population equality.

Concurring: Justices Brennan, Black, Douglas, Marshall, and Chief Justice Warren.
Concurring specially: Justice Fortas.
Dissenting: Justices Harlan, Stewart, and White.

734. *Accord: Wells* v. *Rockefeller,* 394 U.S. 542 (1969).

735. *Stanley* v. *Georgia,* 394 U.S. 557 (1969).

Statute construed to prohibit possession of obscene materials for one's own private and personal use violates First and Fourteenth Amendments.

736. *Street* v. *New York,* 394 U.S. 576 (1969).

Statute insofar as it punishes verbal abuse of the flag violates First and Fourteenth Amendments.
Five-to-four division of Court not on this issue.

737. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

Connecticut and Pennsylvania statutory provision of one-year durational residency requirement on eligibility for welfare assistance infringes right to travel and violates equal protection clause.

Concurring: Justices Brennan, Douglas, Fortas, Stewart, White, and Marshall.
Dissenting: Chief Justice Warren and Justices Black and Harlan.

738. *Moore* v. *Ogilvie,* 394 U.S. 814 (1969).

Illinois statute requiring independent candidates to present 25,000 signatures, including 200 signatures from each of at least 50 of the State's 200 counties, violates the equal protection clause.

Concurring: Justices Douglas, Black, Brennan, White, Fortas, Marshall, and Chief Justice Warren.
Dissenting: Justices Stewart and Harlan.

739. *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969).

Wisconsin prejudgment garnishment statute which authorizes freezing of defendant's wages in interim between garnishment and culmination of suit without affording defendant a hearing violates due process clause.

Concurring: Justices Douglas, Brennan, Stewart, White, and Marshall and Chief Justice Warren.
Concurring specially: Justice Harlan.
Dissenting: Justice Black.

740. *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

Criminal Syndicalism Statute which proscribes advocacy of use of force in absence of requirement that such advocacy be directed to in-

citing or producing imminent lawless action and be likely to incite or produce such action violates First and Fourteenth Amendments.

741. *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621 (1969).

New York statute limiting eligibility to vote in school district elections to persons who own taxable real property in district or who are parents of children enrolled in the local public schools violates equal protection clause.

Concurring: Chief Justice Warren and Justices Douglas, Brennan, White, and Marshall.
Dissenting: Justices Stewart, Black, and Harlan.

742. *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969).

Louisiana statute limiting eligibility to vote on issuance of municipal utility revenue bonds to property owners violates equal protection clause.

Concurring: Chief Justice Warren and Justices Douglas, Brennan, White, and Marshall.
Concurring specially: Justices Black, Stewart, and Harlan.

743. *Turner* v. *Fouche,* 396 U.S. 346 (1969).

Georgia statute limiting eligibility to school board membership to property holders violates the equal protection clause.

744. *Wyman* v. *Bowens,* 397 U.S. 49 (1970).

District court decision holding unconstitutional statute denying welfare assistance to persons coming into State with intent to obtain such assistance is affirmed.

745. *Hadley* v. *Junior College District,* 397 U.S. 50 (1970).

Statutory scheme for election of trustees of junior college district which allocated trustees to lesser populated districts rather than those of greater populations violated equal protection clause.

Concurring: Justices Black, Douglas, Brennan, White, and Marshall.
Dissenting: Chief Justice Burger and Justices Harlan and Stewart.

746. *In re Winship,* 397 U.S. 358 (1970).

New York statute providing that proof of acts establishing delinquency of a minor must be by a preponderance of the evidence violates due process clause which requires proof beyond a reasonable doubt.

Concurring: Justices Brennan, Douglas, Harlan, White, and Marshall.
Dissenting: Chief Justice Burger and Justices Black and Stewart.

747. *Rosado* v. *Wyman*, 397 U.S. 397 (1970).

New York statute changing levels of benefits and deleting items to be included in levels of benefit which reduced moneys to recipients conflicted with federal law which required States to adjust upward in terms of increases costs of living amounts deemed necessary for subsistence and the state law must yield.

Concurring: Justices Harlan, Douglas, Brennan, Stewart, White, and Marshall.
Dissenting: Justice Black and Chief Justice Burger.

748. *Lewis* v. *Martin*, 397 U.S. 552 (1970).

California statute reducing amount of dependent children funds going to any household by amount of funds imputed to presence of a "man-in-the-house" who was not legally obligated to support the child or children conflicts with federal law as interpreted by valid HEW regulations and must yield.

Concurring: Justices Douglas, Harlan, Brennan, Stewart, White, and Marshall.
Dissenting: Chief Justice Burger and Justice Black.

749. *Baldwin* v. *New York*, 399 U.S. 66 (1970).

Statute providing for trial without jury in New York City of misdemeanors punishable upon conviction with sentences of up to one year violates Sixth and Fourteenth Amendments which require jury trials when possible sentence is six months or more.

Concurring: Justices White, Brennan, and Marshall.
Concurring specially: Justices Black and Douglas.
Dissenting: Chief Justice Burger and Justices Harlan and Stewart.

750. *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970).

Arizona constitutional and statutory provisions which limits eligibility to vote in referendum on issuance of general obligation bonds to property owners violates equal protection clause.

Concurring: Justices White, Black, Douglas, Brennan, and Marshall.
Dissenting: Justices Stewart and Harlan and Chief Justice Burger.

751. *Williams* v. *Illinois*, 399 U.S. 235 (1970).

Statute providing for extension of jail sentence to work off unpaid fine at $5 a day violates equal protection clauses as applied to an indigent convict thus unable to pay his fine.

752. *Rockefeller* v. *Socialist Workers Party*, 400 U.S. 806 (1970).

District court decision holding unconstitutional New York statutory provisions for geographic dispersion of signatures on candidates'

petitions and discriminating against independent candidates' ability to obtain signatures in ways absent from major party candidates is affirmed.

753. *Parish School Board* v. *Stewart*, 400 U.S. 884 (1970).

District court decision holding unconstitutional Louisiana constitutional and statutory provisions limiting eligibility to vote in general obligation bond authorization elections is affirmed.

754. *Bower* v. *Vaughan*, 400 U.S. 884 (1970).

District court decision holding unconstitutional Arizona's one-year residency requirement for treatment in state hospital is affirmed.

755. *Rafferty* v. *McKay*, 400 U.S. 954 (1970).

District court decision holding unconstitutional California loyalty oath similar to that condemned in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) is affirmed.

756. *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

Statute providing for "posting" of "excessive" drinkers which bars them from taverns and similar places denies procedural due process by not requiring notice and opportunity to be heard.

757. *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971).

Statute which categorically precludes a change of venue for trial of misdemeanor cases violates Sixth and Fourteenth Amendments.

Concurring: Justices Stewart, Douglas, Harlan, Brennan, White, and Marshall.
Concurring specially: Justice Blackmun and Chief Justice Burger.
Dissenting: Justice Black.

758. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

Statutory imposition of fees as prerequisite to obtain judicial dissolution of marriage violates due process as applied to persons unable to pay the fees.

Concurring: Justices Harlan, Stewart, White, Marshall, and Blackmun.
Concurring specially: Justices Douglas and Brennan.
Dissenting: Justice Black.

759. *Tate* v. *Short*, 401 U.S. 395 (1971).

Texas statute (and ordinance of City of Houston) which provide for imprisonment of person unable to pay a fine for period calculated at $5 a day violate equal protection clause.

760. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971).

Anti-Busing Law which flatly forbids assignment of any student on account of race and prohibits busing for such purpose is unconstitutional.

761. *California Dept. of Human Resources Development* v. *Java*, 402 U.S. 121 (1971).

Statute providing for suspension of unemployment compensation if former employer appeals eligibility decision of departmental examiner, the suspension to last until decision of the appeal, conflicts with federal act's requirement that compensation must be paid when due and the state law must yield under the supremacy clause.

762. *Bell* v. *Burson*, 402 U.S. 535 (1971).

Georgia statute providing for automatic suspension of driver's license upon involvement in auto accident unless security for amount of damages is posted violates due process in not affording driver a hearing first to establish a reasonable possibility that judgment may be rendered against him as result of accident.

763. *Perez* v. *Campbell*, 402 U.S. 637 (1971).

Arizona statute providing that a discharge in bankruptcy shall not operate to relieve a judgment creditor under the Motor Vehicle Safety Responsibility Act of any obligation under the Act conflicts with the provision of the federal bankruptcy law which discharges a debtor of all but specified judgments and is invalid under the supremacy clause.

764. *Nyquist* v. *Lee*, 402 U.S. 935 (1971).

District court decision holding unconstitutional New York anti-busing law is affirmed.

765. *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

Legislative apportionment and districting statute of Indiana, though its multimember features are not unconstitutional, provides for too much population inequality and is void.

Concurring: Justices White, Black, Douglas, Brennan, Marshall, Blackmun and Chief Justice Burger.

Dissenting: Justices Harlan and Stewart.

766. *Connell* v. *Higginbotham*, 403 U.S. 207 (1971).

Florida loyalty oath provision which requires public employee to swear he does not believe in violent overthrow of government or be

dismissed violates due process by not providing for an inquiry into his reasons for refusing to take the oath.

Concurring: Chief Justice Burger and Justices Black, Harlan, White, and Blackmun.
Concurring specially: Justices Marshall, Douglas, and Brennan.
Dissenting: Justice Stewart.

767. *Graham* v. *Richardson*, 403 U.S. 365 (1971).

Arizona statute limiting eligibility for welfare assistance to aliens who have resided in State at least 15 years and Pennsylvania statute barring such assistance to persons who are not citizens violate equal protection clause and intrude into Federal Government's exclusive powers over admission of aliens.

768. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

Pennsylvania statute providing for reimbursement of sectarian schools for expenses of providing certain secular educational services and Rhode Island statute providing for salary supplements to be paid teachers in sectarian schools violate the establishment clause of the First Amendment as applied to the States through the Fourteenth.

Concurring: Chief Justice Burger and Justices Harlan, Stewart, and Blackmun.
Concurring specially: Justices Black, Douglas, Brennan, and Marshall.
Dissenting: Justice White.

769. *Accord: Sanders* v. *Johnson*, 403 U.S. 955 (1971).

District court decision holding unconstitutional state aid to sectarian schools is affirmed.

770. *Pease* v. *Hansen*, 404 U.S. 70 (1971).

State durational residency requirement as condition on eligibility to state-financed public assistance is unconstitutional under *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

771. *Reed* v. *Reed*, 404 U.S. 71 (1971).

Idaho statutory provision giving preference to males over females for appointment as administrator of decedent's estate violates equal protection clause.

772. *Townsend* v. *Swank*, 404 U.S. 282 (1971).

Illinois statute and implementing regulations which made needy dependent children 18 through 20 years old eligible for welfare benefits if they were attending high school or vocational training school but not if they were attending college or university conflicts with federal social security law and must yield under supremacy clause.

773. *Dunn* v. *Rivera*, 404 U.S. 1054 (1972).

District court decision holding unconstitutional Connecticut one-year durational residency requirement for eligibility to welfare assistance is affirmed.

774. *Wyman* v. *Lopez*, 404 U.S. 1055 (1972).

District court decision holding unconstitutional New York one-year durational residency requirement for eligibility to welfare assistance is affirmed.

775. *Lindsey* v. *Normet*, 405 U.S. 56 (1972).

Oregon statutory provision requiring tenants who wish to appeal housing eviction order as a precondition to file bond in twice the amount of rent expected to accrue during pendency of appeal violates equal protection clause.

776. *Bullock* v. *Carter*, 405 U.S. 134 (1972).

Texas' filing fee system by which it imposes on candidates the costs of the primary election operation and affords no alternative opportunity for candidates unable to pay the fees to obtain access to the ballot violates the equal protection clause.

777. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

Tennessee durational residency requirement of one year as a condition of registration to vote burdens right to travel and violates equal protection clause.

Concurring: Justices Marshall, Douglas, Brennan, Stewart, and White.
Concurring specially: Justice Blackmun.
Dissenting: Chief Justice Burger.

778. *Accord: Caniffe* v. *Burg*, 405 U.S. 1034 (1972).

District court decision holding six and three months durational residency requirements unconstitutional is affirmed.

779. *Accord: Davis* v. *Kohn*, 405 U.S. 1034 (1972).

780. *Accord: Cody* v. *Andrews*, 405 U.S. 1034 (1972).

781. *Accord: Donovan* v. *Keppel*, 405 U.S. 1034 (1972).

782. *Accord: Whitcomb* v. *Affeldt*, 405 U.S. 1034 (1972).

783. *Accord: Amos* v. *Hadnott*, 405 U.S. 1035 (1972).

784. *Accord: Virginia State Board of Elections* v. *Bufford*, 405 U.S. 1035 (1972).

785. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

Massachusetts statute making it a crime to dispense any contraceptive article to an unmarried person, except to prevent disease, is unconstitutional.

Concurring: Justices Brennan, Douglas, Stewart, and Marshall.
Concurring specially: Justices White and Blackmun.
Dissenting: Chief Justice Burger.

786. *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

Georgia statute making it criminal offense to use language of or to another tending to cause a breach of the peace which is not limited to "fighting words" is unconstitutionally vague and overbroad.

Concurring: Justices Brennan, Douglas, Stewart, White, and Marshall.
Dissenting: Justice Blackmun and Chief Justice Burger.

787. *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Statute which presumes without a hearing on issue unfitness of father of illegitimate children to have custody upon death or disqualification of mother denies him due process and equal protection.

Concurring: Justices White, Douglas, Brennan, Stewart, and Marshall.
Dissenting: Chief Justice Burger and Justice Blackmun.

788. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

Louisiana workmen's compensation statute which relegates unacknowledged illegitimate children to a status inferior to legitimate and acknowledged illegitimate children violates equal protection clause.

Concurring: Justice Powell, Douglas, Brennan, Stewart, White, and Marshall, and Chief Justice Burger.
Concurring specially: Justice Blackmun.
Dissenting: Justice Rehnquist.

789. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

Compulsory school attendance law insofar as it does not exempt Amish children from coverage following completion of eighth grade violates First and Fourteenth Amendments.

790. *Brooks* v. *Tennessee*, 406 U.S. 605 (1972).

Statute which requires defendant if he is going to testify to do so before any other witness for him violates Fifth, Sixth, and Fourteenth Amendments.

Concurring: Justices Brennan, Douglas, White, Marshall, and Powell.
Concurring specially: Justice Stewart.
Dissenting: Chief Justice Burger and Justices Blackmun and Rehnquist.

791. *Jackson* v. *Indiana*, 406 U.S. 715 (1972).

Pretrial commitment procedure for allegedly incompetent defendants which provides more lenient standards for commitment than procedure for those persons not charged with any offense and more stringent standards of release violates both due process and equal protection.

792. *James* v. *Strange*, 407 U.S. 128 (1972).

Kansas statute enabling State to recover in subsequent civil proceedings legal defense fees for indigent defendants violates equal protection clause because it dispenses with the protective exemptions state law has erected for other civil judgment debtors.

793. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

Replevin statutes of Florida and Pennsylania which permit installment sellers or other persons alleging entitlement to property to cause the seizure of the property without any notice or opportunity to be heard on the issues violate due process clause.

Concurring: Justices Stewart, Douglas, Brennan, and Marshall.
Dissenting: Justices White and Blackmun and Chief Justice Burger.

794. *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972).

District court decision holding unconstitutional under equal protection clause Florida's denial of welfare assistance to noncitizens is affirmed.

795. *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972).

North Carolina statute which authorized creation of a new school district in a city that was part of a larger county school system is void

inasmuch as its effect would be to impede the dismantling of the dual school system by affording a refuge to white students fleeing desegregation.

796. *Furman* v. *Georgia*, 408 U.S. 238 (1972).

Statutory imposition of capital punishment upon criminal conviction either at discretion of jury or of the trial judge may not be carried out. Such statutes in the view of two Justices are unconstitutional because the death penalty is cruel and unusual punishment per se in violation of the Eighth and Fourteenth Amendments while in the view of three Justices the statutes are unconstitutional as applied because of the discriminatory or arbitrary manner in which death is imposed upon convicted defendants in violation of the Eighth and Fourteenth Amendments.

Concurring specially: Justices Douglas, Brennan, Stewart, White, and Marshall.

Dissenting: Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.

797. *Texas Board of Barber Examiners* v. *Bolton*, 409 U.S. 807 (1972).

District court decision holding invalid under equal protection clause Texas statutes prohibiting licensed cosmetologists from working with male customers and prohibiting licensed barbers from working with female customers is summarily affirmed.

798. *Essex* v. *Wolman*, 409 U.S. 808 (1972).

District court decision holding void under the establishment clause of the First Amendment an Ohio statute providing a reimbursement grant to parents of children attending nonpublic schools is summarily affirmed.

799. *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U.S. 809 (1972).

District court decision holding invalid as in conflict with federal Social Security Act an Indiana statute denying benefits to persons aged 16 to 18 who are eligible but for the fact that they are not regularly attending school is summarily affirmed.

800. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972).

Illinois statute providing for mailing of vehicle forfeiture proceeding notification to home address of vehicle owner is unconstitutional as applied to person known to the State to be incarcerated and not at home.

801. *Amos* v. *Sims*, 409 U.S. 942 (1972).

District court decision holding unconstitutional Alabama legislative apportionment law is summarily affirmed.

802. *Fugate* v. *Potomac Electric Power Co.*, 409 U.S. 942 (1972).

District court decision holding invalid under equal protection clause Virginia statute allowing reimbursement to utilities required by interstate highway construction to relocate their lines in cities and towns but denying reimbursement to utilities required by interstate highway construction to relocate lines in counties is summarily affirmed.

803. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972).

Ohio statute authorizing trial for certain ordinance violations and traffic offenses before mayor responsible for village finances when the fines, forfeitures, costs, and fees imposed in the mayor's courts provided a substantial portion of village funds denied defendants opportunity for trial before an impartial and disinterested tribunal.

Justices Concurring: Brennan, Douglas, Stewart, Marshall, Blackmun and Powell, and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

804. *Evco* v. *Jones*, 409 U.S. 91 (1972).

New Mexico's gross receipts tax is unconstitutionally applied to proceeds from transactions whereby material is produced in State under contract for delivery to out-of-state clients because it impermissibly burdens interstate commerce.

805. *Philpott* v. *Welfare Board*, 409 U.S. 413 (1973).

New Jersey statute providing for recovery by State of reimbursement for financial assistance when recipient subsequently obtains funds cannot be applied to obtain reimbursement out of federal disability insurance benefits inasmuch as federal law bars subjecting such funds to any legal process.

806. *Georges* v. *McClellan*, 409 U.S. 1120 (1973).

District court decision holding unconstitutional under due process clause Rhode Island prejudgment attachment statute is summarily affirmed.

807. *Gomez* v. *Perez*, 409 U.S. 535 (1973).

Texas law denying right of enforced paternal support to illegitimate children while granting it to legitimate children violates equal protection clause.

808. *Roe* v. *Wade*, 410 U.S. 113 (1973).

Texas statute making it a crime to procure or to attempt to procure an abortion except on medical advice to save the life of the mother infringes upon a woman's right of privacy protected by the due process clause of the Fourteenth Amendment.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.

Justices Dissenting: White and Rehnquist.

809. *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Georgia statute permitting abortions under prescribed circumstances nevertheless invalidly imposed a number of procedural limitations: that the abortion be performed in an accredited hospital, be approved by a staff committee and two licensed physicians other than woman's own doctor, and be available only to residents.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.

Justices Dissenting: White and Rehnquist.

810. *Mahan* v. *Howell*, 410 U.S. 315 (1973).

Portion of Virginia apportionment statute assigning large numbers of naval personnel to actual location of station when evidence showed substantial numbers resided in surrounding areas distorted population balance of districts within the one county and was void.

811. *Whitcomb* v. *Communist Party of Indiana*, 410 U.S. 976 (1973).

District court decision holding invalid under First and Fourteenth Amendments Indiana statute requiring political party to submit oath that party has no relationship to a foreign government as a condition of ballot access is summarily affirmed.

812. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973).

New Mexcio use tax may not constitutionally be applied on personal property that Indian tribe purchased out-of-state and installed as permanent improvement on off-reservation ski resort owned and operated by tribe.

813. *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973).

Arizona income tax is invalidly applied to Navajo Indian residing on reservation and whose income is wholly derived from reservation sources.

814. *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973).

New Jersey statute denying assistance to families in which parents are not ceremonially married denies equal protection to children in such families.

Justices Concurring: Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

815. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

Wisconsin statute as interpreted to permit revocation of parole without a hearing denies due process of law.

816. *Parker* v. *Levy*, 411 U.S. 978 (1973).

District court decision voiding as arbitrary denial of equal protection Louisiana's constitutional provision and statute distributing among political subdivisions property relief fund is summarily affirmed.

817. *Miller* v. *Gomez*, 412 U.S. 914 (1973).

District court decision holding a denial of equal protection New York statute denying jury trial on issue of dangerousness to persons being committed to hospitals for criminally insane after felony indictment but before trail is summarily affirmed.

818. *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

Connecticut statute creating irrebuttable presumption that student from out-of-state at time of application to state college remained nonresident for tuition purposes for entire student career violated due process clause.

Justices Concurring: Stewart, Brennan, Marshall, Blackmun, and Powell.
Justice Concurring Specially: White.
Justices Dissenting: Chief Justice Burger and Rehnquist and Douglas.

819. *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

Oregon statute requiring defendant to give pretrial notice of alibi defense and names of supporting witnesses but denying defendant any reciprocal right of discovery of rebuttal evidence denies him due process of law.

820. *White* v. *Regester*, 412 U.S. 755 (1973).

Establishment of multimember legislative districts in certain Texas urban areas in context of pervasive electoral discrimination against blacks and Mexican-Americans denied equal protection of laws.

821. *White* v. *Weiser*, 412 U.S. 783 (1973).

Texas congressional districting law creates districts with too great a population disparity and is void under equal protection clause.

822. *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973).

New York statute to reimburse nonpublic schools for administrative expenses incurred in carrying out state mandated examination and record keeping requirements but requiring no accounting and separating of religious and nonreligious uses violates establishment clause.

Justices Concurring: Chief Justice Burger and Stewart, Blackmun, Powell, and Rehnquist.

Justices Concurring Specially: Douglas, Brennan, and Marshall.

Justice Dissenting: White.

823. *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).

New York statute providing that only United States citizens may hold permanent positions in competitive civil service violates equal protection clause.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, White, Marshall, Powell, and Chief Justice Burger.

Justice Dissenting: Rehnquist.

824. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

New York education and tax laws providing grants to nonpublic schools for maintenance and repairs of facilities and providing tuition reimbursements and income tax benefits to parents of children attending nonpublic schools violate the establishment clause.

Justices Concurring: Powell, Douglas, Brennan, Stewart, Marshall, and Blackmun.

Justices Concurring and Dissenting: Chief Justice Burger and Rehnquist.

Justice Dissenting: White.

825. *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

Pennsylvania statute providing for reimbursement of parents for portion of tuition expenses in sending children to nonpublic schools violates establishment clause.

Justices Concurring: Powell, Douglas, Brennan, Stewart, Marshall, and Blackmun.

Justices Dissenting: White, Rehnquist, and Chief Justice Burger.

826. *Accord: Grit* v. *Wolman*, 413 U.S. 901 (1973).

827. *Stevenson* v. *West*, 413 U.S. 902 (1973).

South Carolina legislative apportionment statute is invalid.

828. *Nelson* v. *Miranda*, 413 U.S. 902 (1973).

Arizona constitutional and statutory provisions denying public employment to aliens violates equal protection clause.

829. *Texas* v. *Pruett*, 414 U.S. 802 (1973).

Federal court decision that Texas statutory system that denies good time credit to convicted felons in jail pending appeal while allowing good time credit to incarcerated nonappealing felons unconstitutionally burdens right of appeal is summarily affirmed.

830. *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973).

Washington State statute construed to prohibit net fishing by Indians is invalid.

831. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973).

Illinois statute prohibiting one who has voted in one party's primary election from voting in another party's primary election for at least 23 months violates the First and Fourteenth Amendments.

Justices Concurring: Stewart, Douglas, White, Marshall, and Powell.
Justice Concurring Specially: Chief Justice Burger.
Justices Dissenting: Blackmun and Rehnquist.

832. *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973).

New York statute providing for cancellation of public contracts and disqualification of contractors from doing business with the State for refusal to waive immunity from prosecution and to testify concerning state contracts violates the Fifth Amendment privilege against self-incrimination.

833. *Danforth* v. *Rodgers*, 414 U.S. 1035 (1973).

District court decision invalidating Missouri abortion statute is summarily affirmed.

834. *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974).

Indiana statute prescribing loyalty oath as qualification for access to ballot violates First and Fourteenth Amendments.

835. *O'Brien* v. *Skinner*, 414 U.S. 524 (1974).

New York election law provisions that permit persons incarcerated outside county of residence while awaiting trial to register and

vote absented while denying absentee privilege to persons incarcerated in county of residence denies equal protection.

Justices Concurring: Chief Justice Burger and Douglas, Brennan, Stewart, White, Marshall, and Powell.
Justices Dissenting: Blackmun and Rehnquist.

836. *Wallace* v. *Sims*, 415 U.S. 902 (1974).

District court decision holding invalid Alabama apportionment statute is summarily affirmed.

837. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

Arizona statute imposing one-year county residency requirement for eligibility for nonemergency medical care for indigents at state expense infringes upon right to travel and violates equal protection clause.

Justices Concurring: Marshall, Brennan, Stewart, White, and Powell.
Justices Concurring Specially: Douglas, Blackmun, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

838. *Davis* v. *Alaska*, 415 U.S. 308 (1974).

Alaska statute protecting anonymity of juvenile offenders was unconstitutionally applied to prohibit cross-examination of prosecution witness for possible bias in violation of confrontation clause.

Justices Concurring: Chief Justice Burger and Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell.
Justices Dissenting: White and Rehnquist.

839. *Smith* v. *Goguen*, 415 U.S. 566 (1974).

Massachusetts statute punishing anyone who treats the flag "contemptuously" without anchoring proscription to specified conduct and modes in unconstitutionally vague.

Justices Concurring: Powell, Douglas, Brennan, Stewart, and Marshall.
Justice Concurring Specially: White.
Justices Dissenting: Blackmun, Rehnquist, and Chief Justice Burger.

840. *Lubin* v. *Panish*, 415 U.S. 709 (1974).

California statute imposing a filing fee as the only means of getting on the ballot denied indigents equal protection.

841. *Schwegmann Bros. Giant Super Markets* v. *Louisiana Milk Comm.*, 416 U.S. 922 (1974).

District court decision holding invalid as burden on interstate commerce Louisiana statute construed to permit commission to regulate prices at which dairy products are sold outside the State to Louisiana retailers is affirmed.

842. *Beasley* v. *Food Fair*, 416 U.S. 653 (1974).

North Carolina right-to-work giving employees discharged by reason of union membership cause of action against employer cannot be applied in case of supervisors in view of 29 U.S.C. § 164(a) which provides that no law should compel an employer to treat a supervisor as an employee.

843. *Indiana Real Estate Comm.* v. *Satoskar*, 417 U.S. 938 (1974).

District court decision invalidating Indiana statute limiting real estate dealer licenses to citizens is summarily affirmed.

844. *Marburger* v. *Public Funds for Public Schools*, 417 U.S. 961 (1974).

District court decisions invalidating under establishment clause New Jersey laws providing reimbursement for parents of nonpublic school children for textbooks and other materials are summarily affirmed.

845. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

Florida statute compelling newspapers to publish free replies by political candidates criticized by newspapers violates First Amendment.

846. *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974).

Virginia statute creating cause of action for "insulting words" as construed to permit recovery for use in labor dispute of words "scab" and similar words is preempted by federal labor law.

Justices Concurring: Marshall, Brennan, Stewart, White, and Blackmun.
Justice Concurring Specially: Douglas.
Justices Dissenting: Powell, Rehnquist, and Chief Justice Burger.

847. *Spence* v. *Washington*, 418 U.S. 405 (1974).

Washington State statute prohibiting "improper use" of flag or display of the flag with any emblem superimposed on it was invalidly applied to a person who taped a peace symbol on the flag in a way as not to damage it and who then displayed it upside down from his own property.

Justices Concurring: Brennan, Stewart, Marshall, and Powell.
Justices Concurring Specially: Douglas and Blackmun.
Justices Dissenting: Rehnquist, White, and Chief Justice Burger.

848. *Accord: Cahn* v. *Long Island Vietnam Moratorium Committee,* 418 U.S. 906 (1974).

849. *Franchise Tax Board* v. *United Americans,* 419 U.S. 890 (1974).

District court decision striking down under First Amendment a California statute providing state income-tax reductions for taxpayers sending their children to nonpublic schools is summarily affirmed.

Justices Concurring: Brennan, Douglas, Stewart, Marshall, Blackmun, and Powell.

Justices Dissenting: White and Rehnquist and Chief Justice Burger.

850. *Taylor* v. *Louisiana,* 419 U.S. 522 (1975).

Constitutional and statutory provisions that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service violates Sixth Amendment right of defendants to be tried before juries composed of a representative cross section of the community.

Justices Concurring: White, Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell.

Justice Concurring Specially: Chief Justice Burger.

Justice Dissenting: Rehnquist.

851. *North Georgia Finishing* v. *Di-Chem,* 419 U.S. 601 (1975).

Georgia statutes permitting writ of garnishment to be issued in pending suits on conclusory affidavit of plaintiff, prescribing filing of bond as the only method of dissolving the writ, which deprives defendant of the use of the property pending the litigation, and making no provision for an early hearing violates Fourteenth Amendment's due process clause.

Justices Concurring: White, Douglas, Brennan, Stewart, and Marshall.

Justice Concurring Specially: Powell.

Justices Dissenting: Blackmun, Rehnquist, and Chief Justice Burger.

852. *Goss* v. *Lopez,* 419 U.S. 565 (1975).

Ohio statute authorizing suspension of public school students for up to 10 days for misconduct without a hearing denies students procedural due process in violation of the Fourteenth Amendment.

Justices Concurring: White, Douglas, Brennan, Stewart, and Marshall.

Justices Dissenting: Powell, Blackmun, Rehnquist, and Chief Justice Burger.

853. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975).

Georgia statute making it a misdemeanor to publish or broadcast the name of a rape victim may not be applied to such publishing or broadcasting when the name is part of a public record; consistent

with the First Amendment, publication of such public record information is absolutely privileged.

854. *Austin* v. *New Hampshire*, 420 U.S. 656 (1975).

State Commuters income tax imposed on nonresidents violates the privileges and immunities clause, Art. V. § 2, cl. 1, inasmuch as the State imposed no income tax on its residents' domestic income and exempted from tax income earned by its residents outside the State, since the tax falls exclusively on nonresidents and is not offset even approximately by other taxes imposed upon residents alone.

Justices Concurring: Marshall, Brennan, Stewart, White, Powell, Rehnquist, and Chief Justice Burger.

Justice Dissenting: Blackmun.

855. *Stanton* v. *Stanton*, 421 U.S. 7 (1975).

Utah age of majority statute applied in the context of child support requirements obligating parental support of son to age 21 but daugther only to age 18 is an invalid gender classification under the equal protection clause of the Fourteenth Amendment.

856. *Hill* v. *Stone*, 421 U.S. 289 (1975).

Texas constitution and statutes and city charter limiting the right to vote in city bond issue elections to persons who have listed property for taxation in the election district in the year of the election is void under the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Marshall, Brennan, White, Blackmun, and Powell.

Justices Dissenting: Rehnquist, Stewart, and Chief Justice Burger.

857. *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

Pennsylvania laws authorizing direct provision to nonpublic school children of "auxiliary services", i.e., counseling, testing, speech and hearing therapy, etc., and loans to the nonpublic schools for instructional material and equipment constitute unlawful assistance to religion and are invalid under First Amendment.

Justices Concurring: Stewart, Douglas, Brennan, Marshall, Blackmun, and Powell.

Justices Dissenting: Chief Justice Burger and Rehnquist.

858. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

State statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, as applied to the editor of a weekly newspaper who published an ad-

vertisement of an out-of-state abortion, is in violation of the First Amendment.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.

Justices Dissenting: Rehnquist and White.

859. *Herring* v. *New York*, 422 U.S. 853 (1975).

Statute granting trial judge in a nonjury criminal case the power to deny counsel the opportunity to make a summation of the evidence before the rendition of judgment violates the Sixth Amendment.

Justices Concurring: Stewart, Douglas, Brennan, White, Marshall, and Powell.

Justices Dissenting: Rehnquist, Blackmun, and Chief Justice Burger.

860. *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975).

Utah statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before expected childbirth until six weeks following violates Fourteenth Amendment due process clause.

Justices Concurring: Brennan, Stewart, White, Marshall, and Powell.

Justices Dissenting: Rehnquist and Blackmun and Chief Justice Burger (from summary action only).

861. *Schwartz* v. *Vanasco*, 423 U.S. 1041 (1976).

District court decision invalidating as overbroad under the First Amendment New York law prohibiting attacks on candidate based on race, sex, religion, or ethnic background and prohibiting misrepresentations of candidate's qualifications, positions, or political affiliation is summarily affirmed.

862. *Tucker* v. *Salera*, 424 U.S. 959 (1976).

District court decision voiding Pennsylvania election law provision requiring that candidates of "political bodies" collect nominating petition signatures between 10th and 7th Wednesdays prior to primary election and file them no later than 7th Wednesday prior to primary is unconstitutional insofar as it disqualifies papers signed after 7th Wednesday is affirmed summarily.

863. *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

Montana laws imposing personal property taxes, vendor license fees, and a cigarette sales tax may not constitutionally be applied to reservation Indians under supremacy clause because federal statutory law precludes such application.

864. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

State statute declaring it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs violates the First Amendment right of citizens to receive the information thus suppressed.

Justices Concurring: Blackmun, Brennan, Stewart, White, Marshall, and Powell.
Justice Concurring Specially: Chief Justice Burger.
Justice Dissenting: Rehnquist.

865. *Accord: California State Board of Pharmacy* v. *Terry*, 426 U.S. 913 (1976).

866. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

Minnesota laws imposing personal property taxes cannot under the supremacy clause be constitutionally applied to an Indian's mobile home located on the reservation.

867. *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

State law providing for the rounding up and sale by a state agency of "estrays" cannot under the supremacy clause be constitutionally applied to unbranded and unclaimed horses and burros on public lands of the United States that are protected by federal law.

868. *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976).

Wisconsin statute proscribing concerted efforts to interfere with production, except through actual strikes, by employees cannot under the supremacy clause be constitutionally applied to union members' concerted refusal to work overtime during negotiations for renewal of an expired contract since such conduct was intended by Congress to be regulable by neither the States nor the NLRB.

Justices Concurring: Brennan, White, Marshall, Blackmun, Power, and Chief Justice Burger.
Justices Dissenting: Stevens, Stewart, Rehnquist.

869. *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

Missouri abortion law that required, *inter alia*, spousal and parental consent before abortion could be performed in appropriate circumstances, and that proscribed the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy was an unconstitutional infringement upon the liberty of pregnant women who wished to terminate their pregnancies.

Justices Concurring: Blackmun, Brennan, Stewart, Marshall, and Powell.
Justice Dissenting: Stevens (on parental consent).

Justices Dissenting: White, Rehnquist, and Chief Justice Burger.

870. *Accord: Gerstein* v. *Coe*, 428 U.S. 901 (1976).

871. *Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

State statute making death penalty mandatory upon conviction of first-degree murder violates Eighth Amendment, since determination to impose death must be individualized.

Justices Concurring: Stewart, Powell, and Stevens.
Justices Concurring Specially: Brennan, and Marshall.
Justices Dissenting: Rehnquist, Blackmun, White, and Chief Justice Burger.

872. *Accord: Roberts* v. *Louisiana*, 428 U.S. 325 (1976).

873. *Accord: Williams* v. *Oklahoma*, 428 U.S. 907 (1976).

874. *Sendak* v. *Arnold*, 429 U.S. 968 (1976).

Statute requiring all abortions, including those during first trimester of pregnancy, to be performed in hospital or licensed health facility was held unconstitutional by district court and decision is primarily affirmed.

Justices Concurring: Brennan, Stewart, Marshall, Blackmun, Powell, and Stevens.
Justices Dissenting: White, Rehnquist, and Chief Justice Burger.

875. *Exon* v. *McCarthy*, 429 U.S. 972 (1976).

District court holding that statutory scheme that fails to provide method by which independent candidate for President may appear on ballot other than through certification by political party violates First and Fourteenth Amendments is summarily affirmed.

876. *Craig* v. *Boren*, 429 U.S. 190 (1976).

Statutory prohibition of sale of "nonintoxicating" 3.2% beer to males under 21 and to females under 18 constituted an impermissible gender-based classification that denied to males 18–20 equal protection.

Justices Concurring: Brennan, White, Marshall, Blackmun, Powell, and Stevens.
Justice Concurring Specially: Stewart.
Justices Dissenting: Chief Justice Burger and Rehnquist.

877. *Lefkowitz* v. *C.D.R. Enterprises*, 429 U.S. 1031 (1977).

District court decision holding invalid as a discrimination against aliens a law granting public works employment preference to citizens who have resided in State for at least 12 months is summarily affirmed.

878. *Boston Stock Exchange* v. *State Tax Comm.*, 429 U.S. 318 (1977).

Transfer tax on securities transactions structured so that transactions involving an out-of-state sale are taxed more heavily than most transactions involving a sale within the State discriminates against interstate commerce in violation of the commerce clause.

879. *Guste* v. *Weeks*, 429 U.S. 1056 (1977).

District court decision voiding statute that effectively forbade abortions, that prohibited publicizing availability of abortion services, that required spousal or parental consent, and that forbade state employees to recommend abortions is summarily affirmed.

880. *Bowen* v. *Women's Services*, 429 U.S. 1067 (1977).

District court decision invalidating parental consent requirement for abortion upon minor during first 12 weeks of pregnancy is summarily affirmed.

881. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).

Statutory imposition of weight requirements in packaging for sale of bacon and flour which did not allow for loss of weight resulting from moisture loss during distribution while the applicable federal law does is invalid (1) as to bacon because of express federal law and (2) as to flour because adherence to state law would defeat a purpose of the federal law and hence supremacy clause requires that both state laws yield to federal.

Justices Concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, and Chief Justice Burger.

Justices Dissenting: Rehnquist and Stewart as to flour.

882. *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

Requirement that state license plates bear motto "Live Free or Die" and making it a misdemeanor to obscure the motto coerce dissemination of ideological message by person on his own property and violates First Amendment.

Justices Concurring: Chief Justice Burger and Brennan, Stewart, White, Marshall, Powell, and Stevens.

Justices Dissenting: Rehnquist and Blackmun.

883. *Trimble* v. *Gordon*, 430 U.S. 762 (1977).

Law allowing illegitimate children to inherit by intestate succession only from their mothers while legitimate children may take from both parents denies illegitimates the equal protection of the laws.

Justices Concurring: Powell, Brennan, White, Marshall, and Stevens.

Justices Dissenting: Chief Justice Burger and Stewart, Blackmun, and Rehnquist.

884. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

Retroactive repeal of a statutory covenant under which bonds had been sold by Port Authority, covenant limiting the authority's ability to subsidize rail passenger transportation from revenues and reserves pledged as security for the bonds, impaired the obligations of the contract and violated Article I, § 10, cl. 1

Justices Concurring: Blackmun, Rehnquist, Stevens, and Chief Justice Burger.
Justices Dissenting: Brennan, White, and Marshall.

885. *Chappelle* v. *Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).

Statutory qualification of ownership of assessed property in jurisdiction in which airport is located as condition of appointment to airport commission is invalid.

Justices Concurring: Chief Justice Burger and Brennan, Stewart, White, Marshall, Blackmun, Powell, and Stevens.
Justice Dissenting: Rehnquist.

886. *Douglas* v. *Seacoast Products*, 431 U.S. 265 (1977).

Statute prohibiting nonresidents from carrying on fishing within certain state waters is preempted by federal enrollment and licensing laws that grant affirmative right to fish in coastal waters and is invalid under supremacy clause.

887. *Roberts* v. *Louisiana*, 431 U.S. 633 (1977).

Statute imposing mandatory death sentence upon one convicted of first-degree murder of police officer engaged in performance of his duties violates Eighth Amendment.

Justices Concurring: Stewart, Powell and Stevens.
Justices Concurring Specially: Brennan and Marshall.
Justices Dissenting: Chief Justice Burger and Blackmun, White, and Rehnquist.

888. *Carey* v. *Population Services Int.*, 431 U.S. 678 (1977).

Law making it a crime (1) for any person to sell or distribute contraceptives to minors under 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over, and (3) for anyone to advertise or display contraceptives violates First and Fourteenth Amendments.

Justices Concurring: Brennan, Stewart, Marshall, and Blackmun.
Justices Concurring Specially: White, Powell, and Stevens.
Justices Dissenting: Chief Justice Burger and Rehnquist.

889. *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

Statute automatically removing from office and disqualifying from any office for next five years any political party officer who refuses to testify or to waive immunity against subsequent criminal prosecution when subpoenaed before an authorized tribunal violates Fifth Amendment self-incrimination clause.

Justices Concurring: Chief Justice Burger, Stewart, White, Blackmun, and Powell.

Justices Concurring Specially: Brennan and Marshall.

Justice Dissenting: Stevens.

890. *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977).

Statutory provision barring from access to state financial assistance for higher education aliens who have not either applied for citizenship or affirmed the intent to apply when they qualify violates equal protection clause.

Justices Concurring: Blackmun, Brennan, White, Marshall, and Stevens.

Justices Dissenting: Chief Justice Burger, Powell, Stewart, Rehnquist.

891. *Hunt* v. *Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977).

Statute requiring that all apples sold or shipped into State in closed containers be identified by no grade on containers other than applicable federal grade or a designation that apples are ungraded violates commerce clause by burdening and discriminating against interstate sale of Washington apples.

892. *Wolman* v. *Walter*, 433 U.S. 229 (1977).

Provision of loan of instructional material and equipment to nonpublic religious schools and transportation and services for field trips for nonpublic school pupils violates First Amendment religion clauses.

Justices Concurring: Blackmun, Brennan, Stewart, Marshall, and Stevens.

Justices Dissenting: Chief Justice Burger, White, Rehnquist; Powell (as to field trips only).

893. *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

Statute authorizing a court of the State to take jurisdiction of a lawsuit by sequestering property of defendant that happens to be located in State violates due process clause because it permits state courts to exercise jurisdiction in the absence of sufficient contacts among defendant, litigation, and State.

894. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

Statutory height and weight requirements for prison guards have impermissible discriminatory effect upon women and under supremacy clause must yield to federal fair employment law.

Justices Concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, and Chief Justice Burger.
Justice Dissenting: White.

895. *Jernigan* v. *Lendall*, 433 U.S. 901 (1977).

District court decision invalidating law that requires independent candidate for office to file for office no later than first Tuesday in April is summarily affirmed.

896. *Coker* v. *Georgia*, 433 U.S. 584 (1977).

Statute authorizing death penalty as punishment for rape violates Eighth Amendment.

Justices Concurring: White, Stewart, Blackmun, and Stevens.
Justices Concurring Specially: Brennan, Marshall, and Powell.
Justices Dissenting: Chief Justice Burger and Rehnquist.

897. *Maher* v. *Buckner*, 434 U.S. 898 (1977).

Statutory rule rendering ineligible for welfare benefits individuals who have transferred assets within seven years of applying for benefits unless they can prove the transfer was made for "reasonable consideration" is inconsistent with Social Security Act and therefore falls under supremacy clause.

898. *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977).

Authorization for reimbursement to nonpublic schools for performance of certain state-mandated services for remainder of school year to replace reimbursement program declared unconstitutional also violates First Amendment religion clause.

Justices Concurring: Stewart, Brennan, Marshall, Blackmun, Powell, and Stevens.
Justices Dissenting: White, Rehnquist, and Chief Justice Burger.

899. *Zablocki* v. *Redhail*, 434 U.S. 374 (1978).

Statute that requires court permission to marry of any resident having minor children and in his custody and who is under a court order to support and that conditions permission on showing that support obligation has been met and that the children are not and are not likely to become public charges violates equal protection clause.

Justices Concurring: Marshall, Brennan, White, Blackmun, and Chief Justice Burger.

Justices Concurring Specially: Stewart, Powell, and Stevens.
Justice Dissenting: Rehnquist.

900. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Certain provisions of statute imposing design or safety standards on oil tankers using state waters and banning operation in those waters of tankers exceeding certain weights, as well as certain pilotage requirements, are invalid under the supremacy clause as conflicting with federal law.

Justices Concurring: White, Stewart, Blackmun, Powell, and Stevens, and Chief Justice Burger.
Justices Dissenting (in part): Marshall, Brennan, and Rehnquist.

901. *Ballew* v. *Georgia*, 435 U.S. 223 (1978).

Provisions of state law directing certain trials in criminal cases to be before five-person juries unconstitutionally impair the right to trial by jury.

902. *McDaniel* v. *Paty*, 435 U.S. 618 (1978).

Statutory qualification of convention delegates by incorporating state constitutional ban on ministers or priests violates the Constitution.

903. *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978).

Criminal statute that banned banks and business corporations from making expenditures to influence referendum votes on any questions not affecting the property, business, or assets of the corporation violated the First Amendment.

Justices Concurring: Powell, Stewart, Blackmun, Stevens, and Chief Justice Burger.
Justices Dissenting: White, Brennan, Marshall, and Rehnquist.

904. *Landmark Communications* v. *Virginia*, 435 U.S. 829 (1978).

Statute making it a misdemeanor to divulge information regarding proceedings before a state judicial review commission cannot constitutionally be applied to persons who are not parties before the commission.

905. *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978).

Law mandating that state residents be preferred to nonresidents in employment on oil and gas pipeline work violates Article IV, § 2, the privileges and immunities clause.

906. *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

Law prohibiting importation into State for disposal at landfills of solid or liquid waste violates commerce clause.

Justices Concurring: Stewart, Brennan, White, Marshall, Blackmun, Powell, and Stevens.

Justices Dissenting: Rehnquist and Chief Justice Burger.

907. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).

Statutory imposition on existing negotiated collective bargaining agreements of different terms respecting pensions impaired the employer's rights under the obligation of contracts clause.

Justices Concurring: Stewart, Powell, Rehnquist, Stevens, and Chief Justice Burger.

Justices Dissenting: Brennan, White, and Marshall.

908. *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

Statute authorizing imposition of death penalty upon conviction of first-degree murder unconstitutionally restricted consideration of mitigating factors by the sentencing party.

Justices Concurring: Chief Justice Burger and Stewart, Powell, and Stevens.

Justices Concurring Specially: White, Marshall, and Blackmun.

Justices Dissenting: Rehnquist.

909. *Duren* v. *Missouri*, 439 U.S. 357 (1979).

Statute, implementing a constitutional provision, which provides for the excusal of any women requesting exemption from jury service, operates to violate the fair cross section requirement of Sixth and Fourteenth Amendments because of the underrepresentation of women jurors that results.

Justices Concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, and Chief Justice Burger.

Justice Dissenting: Rehnquist.

910. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979).

California community property statute under which property acquired during the marriage by either spouse belongs to both may not be applied to award interest to other spouse upon divorce of pension benefits under Railroad Retirement Act, because Act precludes subjecting it to any legal process to deprive recipient of it.

Justices Concurring: Blackmun, Brennan, White, Marshall, Powell, Stevens, and Chief Justice Burger.

Justices Dissenting: Stewart and Rehnquist.

911. *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

Provisions of abortion law that require the physician to make a determination that the fetus is not viable and if it is viable to exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive are void for vagueness under the due process clause of the Fourteenth Amendment.

Justices Concurring: Blackmun, Brennan, Stewart, Marshall, Powell, and Stevens.

Justices Dissenting: White, Rehnquist, and Chief Justice Burger.

912. *Miller* v. *Youakim*, 440 U.S. 125 (1979).

Provision of state law differentiating between children who reside in foster homes with relatives and those who do not reside with relatives and giving the latter greater benefits than the former conflicts with federal law which requires the same benefits be provided regardless whether the foster home is operated by a relative and thus must yield under the supremacy clause of Article VI.

913. *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979).

Law requiring new political parties and independent candidates to obtain 5% of the number of persons who voted at the previous election for such office in order to get on the ballot in political subdivisions of the State, insofar as it applies to mandate the obtaining of a greater number and proportion of signatures than is required to get on the ballot for statewide office lacks a rational basis and violates the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Marshall, Brennan, Stewart, White, and Powell.

Justices Concurring Specially: Blackmun, Stevens, Rehnquist, and Chief Justice Burger.

914. *Orr* v. *Orr*, 440 U.S. 268 (1979).

Alabama statute which imposes alimony obligations on husbands but not wives violates the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Brennan, Stewart, White, Marshall, Blackmun, and Stevens.

Justices Dissenting (on other grounds): Powell, Rehnquist, and Chief Justice Burger.

915. *Ashcroft* v. *Freiman*, 440 U.S. 941 (1979).

Federal court decision invalidating under the Fourteenth Amendment's due process clause of Missouri statute requiring doctor to ver-

bally inform any woman seeking abortion that, if live born infant results, women will lose her parental rights is summarily affirmed.

916. *Quern* v. *Hernandez*, 440 U.S. 951 (1979).

District court decision voiding as denial of due process under Fourteenth Amendment Illinois attachment law because it permits attachment prior to filing of complaint and prior to notice to debtor is summarily affirmed.

917. *Burch* v. *Louisiana*, 441 U.S. 130 (1979).

State statutory implementation of constitutional provision permitting conviction for a nonpetty offense by five out of six jurors violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.

918. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979).

Imposition of tax upon electricity produced in State and sold outside State which is not offset against other taxes as is the case with electricity sold within State violates federal statute prohibiting any State from taxing the generation or transmission of electricity in a manner that discriminates against out-of-state consumers and thus is unenforceable under the supremacy clause.

919. *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979).

Statute prohibiting transportation or shipment outside the State for sale natural minnows seined or procured from waters within the State violates the commerce clause.

Justices Concurring: Brennan, Stewart, White, Marshall, Blackmun, Powell, and Stevens.

Justices Dissenting: Rehnquist and Chief Justice Burger.

920. *Caban* v. *Mohammed*, 441 U.S. 380 (1979).

New York law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent is an impermissible gender distinction violative of the equal protection clause of the fourteenth Amendment.

Justices Concurring: Powell, Brennan, White, Marshall, Blackmun.

Justices Dissenting: Stewart, Stevens, Rehnquist, and Chief Justice Burger.

921. *Japan Lines* v. *County of Los Angeles*, 441 U.S. 434 (1979).

Imposition of California ad valorem property tax upon cargo containers which are based, registered, and subjected to property tax in Japan results in multiple taxation of instrumentalities of foreign commerce and violates the commerce clause.

Justices Concurring: Blackmun, Brennan, Stewart, White, Marshall, Powell, Stevens, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

922. *Beggans* v. *Public Funds for Public Schools*, 442 U.S. 907 (1979).

Federal court decision invalidating New Jersey statute that allowed taxpayers personal deduction from gross income for each of their dependent children attending nonpublic elementary or secondary schools as a violation of the First Amendment's religion clause is summarily affirmed.

923. *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979).

Statute authorizing police to search the luggage of any person arriving in Puerto Rico from the United States without a warrant or probable cause violates the Fourth Amendment.

924. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

West Virginia statute that makes it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender violates the First and Fourteenth Amendments.

925. *Bellotti* v. *Baird*, 443 U.S. 622 (1979).

Massachusetts law requiring parental consent for an abortion for a woman under age 18 and providing for a court order permitting abortion for good cause if parental consent is refused violates the due process clause of the Fourteenth Amendment.

Justices Concurring: Powell, Stewart, Rehnquist, and Chief Justice Burger.
Justices Concurring Specially: Stevens, Brennan, Marshall, Blackmun.
Justice Dissenting: White.

926. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum*, 445 U.S. 97 (1980).

California statute requiring all wine producers and wholesalers to file fair trade contracts or price schedules with the State and to follow the price lists is a resale price maintenance scheme in violation of the Sherman Act and cannot stand under the supremacy clause.

927. *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980).

Texas public nuisance statute authorizing state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene is an invalid prior restraint violative of the First and Fourteenth Amendments.

Justices Concurring: Brennan, Stewart, Marshall, Blackmun, Stevens.

Justices Dissenting (on other grounds): Powell and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

928. *Vitek* v. *Jones*, 445 U.S. 480 (1980).

Nebraska statute which authorizes the authorities to summarily transfer a prison inmate from jail to another institution if a physician find he suffers from a mental disease or defect and cannot be given proper treatment in jail violates the liberty guaranteed by the due process clause of the Fourteenth Amendment unless the transfer is accompanied by adequate procedural protections.

Justices Concurring: White, Brennan, Marshall, Powell, Stevens.
Justices Dissenting (on other grounds): Stewart, Blackmun, Rehnquist, and Chief Justice Burger.

929. *Payton* v. *New York*, 445 U.S. 573 (1980).

Statute authorizing police officers to enter a private residence without a warrant and without necessarily exigent circumstances to effectuate a felony arrest violates the Fourth and Fourteenth Amendments.

Justices Concurring: Stevens, Brennan, Stewart, Marshall, Blackmun, Powell.
Justices Dissenting: White, Rehnquist, Chief Justice Burger.

930. *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

Missouri workers' compensation law denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on her earnings but granting a widow death benefits regardless of her dependency is a gender discrimination violative of the equal protection clause of the Fourteenth Amendment.

Justices Concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

931. *Lewis* v. *BT Investment Managers*, 447 U.S. 27 (1980).

Florida statute prohibiting out-of-state banks, bank holding companies, and trust companies from owning or controlling a business within the State that sells investment advisory services violates the commerce clause.

932. *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980).

Imposition of state motor vehicle excise tax and mobile home, camper, and trailer taxes to vehicles owned by the Tribe or its members and used both on and off the reservation violates federal law and cannot stand under the supremacy clause.

Justices Concurring: White, Brennan, Marshall, Blackmun, Powell, Stevens, and Chief Justice Burger.

Justices Dissenting: Stewart and Rehnquist.

933. *Carey* v. *Brown,* 447 U.S. 455 (1980).

Illinois statute that prohibits picketing of residences or dwellings, but exempts peaceful picketing of such buildings that are places of employment in which there is a labor dispute violates the equal protection clause of the Fourteenth Amendment.

Justices Concurring: Brennan, Stewart, White, Marshall, Powell, Stevens.

Justices Dissenting: Rehnquist, Blackmun, Chief Justice Burger.

934. *Beck* v. *Alabama,* 447 U.S. 625 (1980).

Capital punishment statute which forbids giving the jury the option of convicting a defendant of a lesser included offense but requiring it to convict on the capital offense or acquit violates the Eighth and Fourteenth Amendments.

935. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980).

Imposition of Arizona motor carrier license tax and use fuel tax to non-Indian enterprise authorized to do business in Arizona but operating entirely on reservation conflicts with federal law and cannot stand under the supremacy clause.

Justices Concurring: Marshall, Brennan, White, Blackmun, Powell, and Chief Justice Burger.

Justices Dissenting: Stevens, Stewart, Rehnquist.

936. *Central Machinery Co.* v. *Arizona State Tax Comm.,* 448 U.S. 160 (1980).

Imposition of tax upon sale of farm machinery by non-Indian enterprise to Indian tribe which took place on the reservation, although the enterprise did not reside on the reservation conflicts with federal law and is invalid under the supremacy clause.

Justices Concurring: Marshall, Brennan, White, Blackmun, and Chief Justice Burger.

Justices Dissenting: Stewart, Powell, Rehnquist, Stevens.

937. *Minnesota* v. *Planned Parenthood,* 448 U.S. 901 (1980).

Federal court decision holding that statute authorizing grants for prepregnancy family planning to hospitals and health maintenance organizations but prohibiting such grants to other nonprofit organizations if they perform abortions violates equal protection clause is summarily affirmed.

938. *Stone* v. *Graham*, 449 U.S. 39 (1980).

Statute requiring copy of Ten Commandments, purchased with private contributions, to be posted on the wall of each public classroom in the State violates the establishment clause of the First Amendment.

Justices Concurring: Brennan, White, Marshall, Powell, Stevens.
Justices Dissenting: Chief Justice Burger and Blackmun, Stewart, Rehnquist.

939. *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980).

Statutory authorization for county to retain as its own interest accruing on interpleader fund deposited in registry of county court was a taking violating the Fifth and Fourteenth Amendments.

940. *Weaver* v. *Graham*, 450 U.S. 24 (1981).

Statute repealing an earlier law and reducing the amount of "gain time" for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence is an invalid ex post facto law as applied to one whose crime was committed prior to the statute's enactment.

941. *Jefferson County* v. *United States*, 450 U.S. 901 (1981).

Court of Appeals decision holding invalid a state statute that imposed use tax on government-owned, contractor operated facility as constituting ad valorem general property tax on federal government property and thus contravening the supremacy clause is summarily affirmed.

942. *Democratic Party* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

State law mandating national convention delegates chosen at party's state convention to vote at the national convention for the candidate prevailing in the State's preference primary, in which voters may participate without regard to party affiliation, violates the First Amendment right of association of the national party whose rules preclude seating of delegates who were not selected in accordance with national party rules, including the limiting of the selection process to those voters affiliated with the party.

Justices Concurring: Stewart, Brennan, White, Marshall, Stevens, and Chief Justice Burger.
Justices Dissenting: Powell, Blackmun, Rehnquist.

943. *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

State statute subjecting to damages a common carrier who abandons service and thereby injures shippers is preempted by the Inter-

state Commerce Act which empowers ICC to approve cessation of service on branch lines upon carrier petitions and is void under the supremacy clause.

944. *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981).

Statute giving husband unilateral right to dispose of jointly-owned community property without wife's consent is an impermissible sex classification and violates equal protection clause.

945. *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

Statute barring 65-foot double-trailer trucks on State's highways, while all neighboring States permit them, violates the commerce clause.

Justices Concurring: Powell, White, Blackmun, Stevens.
Justices Concurring Specially: Brennan and Marshall.
Justices Dissenting: Rehnquist, Stewart, Chief Justice Burger.

946. *Alessi* v. *Raybestos-Manhattan, Inc.*,, 451 U.S. 504 (1981).

Workmen's compensation provision denying employers right to reduce retiree's pension benefits by amount of compensation award under act is preempted by federal pension regulation law and is invalid under the supremacy clause.

947. *Maryland* v. *Louisiana*, 451 U.S. 725 (1981).

State first-use tax statute which, because of exceptions and credits, imposes a tax only on natural gas moving out-of-state impermissibly discriminates against interstate commerce and another provision that required pipeline companies to allocate cost of tax to ultimate consumer is preempted by federal law.

948. *Little* v. *Streater*, 452 U.S. 1 (1981).

Provision requiring person is paternity action who requests blood grouping tests to bear cost of tests denies due process in violation of Fourteenth Amendment to an indigent against whom State has required institution of paternity action.

949. *McCarty* v. *McCarty*, 453 U.S. 210 (1981).

Community property statute to the extent it treated retired pay of Army officer as property divisible between spouses on divorce is preempted by federal law and cannot be applied under supremacy clause.

Justices Concurring: Blackmun, White, Marshall, Powell, Stevens, Chief Justice Burger.
Justices Dissenting: Rehnquist, Brennan, Stewart.

950. *Campbell* v. *John Donnelly & Sons*, 453 U.S. 916 (1981).

Court of Appeals decision holding violative of First Amendment a statute prohibiting roadside billboards, except for signs announcing place and time of religious or civic events, election campaign signs, and signs erected by historic and cultural institutions, is summarily affirmed.

951. *Agsalud* v. *Standard Oil Co.*, 454 U.S. 801 (1981).

Court of Appeals decision holding preempted by federal pension law state law requiring employers to provide their employees with comprehensive prepaid health care plan is summarily affirmed.

952. *Louisiana Dairy Stabilization Bd.* v. *Dairy Fresh Corp.*, 454 U.S. 884 (1981).

Court of Appeals decision holding violative of the commerce clause a milk industry regulatory statute, which required all dairy product processors, including out-of-state processors, who sell dairy products to retailer or distributor for resale in State to pay assessment per unit of milk for use in administration and enforcement of statute, is summarily affirmed.

953. *Brockett* v. *Spokane Arcades*, 454 U.S. 1022 (1981).

Court of Appeals decision holding violative of First Amendment a statute which authorized courts to issue temporary and permanent injunctions, without providing prompt trial on merits, against any business that regularly sells or exhibits "lewd matter" is summarily affirmed.

954. *Firestone* v. *Let's Help Florida*, 454 U.S. 1130 (1982).

Court of Appeals decision holding violative of the First Amendment a statute that restricts size of contributions to political committees organized to support or oppose referenda is summarily affirmed.

955. *Treen* v. *Karen B.*, 455 U.S. 912 (1982).

Court of Appeals decision holding violative of First Amendment establishment clause statute authorizing school boards to permit students to participate in one-minute prayer period at start of school day, upon parental consent, is summarily affirmed.

956. *Santosky* v. *Kramer*, 455 U.S. 745 (1982).

Provision of state law authorizing termination of parental rights which authorized proof by only a fair preponderance of the evidence violates the due process clause of the Fourteenth Amendment.

Justices Concurring: Blackmun, Brennan, Marshall, Powell, Stevens.

Justices Dissenting: Rehnquist, White, O'Connor, Chief Justice Burger.

957. *California State Bd. of Equalization* v. *United States*, 456 U.S. 901 (1982).

Court of Appeals decision invalidating as an impermissible infringement of the immunity of the United States from state taxation of a sales tax based on gross rentals paid by United States to lessors of data processing and other equipment, which permitted lessor to maximize profit only by separately stating and collecting tax from lessee, is summarily affirmed.

958. *Brown* v. *Hartlage*, 456 U.S. 45 (1982).

Statute prohibiting candidate from offering material benefits to voters in consideration for their votes violates First Amendment speech clause as applied to a candidate's promise to lower salary of his office if elected.

959. *Mills* v. *Habluetzel*, 456 U.S. 91 (1982).

Statute imposing one-year period from date of birth to bring action to establish paternity of illegitimate child, paternity being necessary for child to obtain support from father at any time during his minority, denies equal protection of the laws.

960. *Larson* v. *Valente*, 456 U.S. 228 (1982).

Provision of charitable solicitations law exempting from registration and reporting only those religious organizations that receive more than half of their total contributions from members or affiliated organizations is an impermissible denominational preference and violates First Amendment establishment clause.

Justices Concurring: Brennan, Marshall, Blackmun, Powell, Stevens.
Justices Dissenting: White, Rehnquist (on merits); O'Connor and Chief Justice Burger (on standing).

961. *Greene* v. *Lindsey*, 456 U.S. 444 (1982).

Statute authorizing service of process in forcible entry and detainer action by posting summons in a conspicuous place if no one could be found on premises denies due process on showing that notices are often removed before defendants find them.

Justices Concurring: Brennan, White, Marshall, Blackmun, Powell, Stevens.
Justices Dissenting: O'Connor, Rehnquist, Chief Justice Burger.

962. *Zobel* v. *Williams*, 457 U.S. 55 (1982).

State law providing a dividend distribution to all State's adult residents from earnings on oil and mineral development in State

denies equal protection of the laws by determining amount of dividend for each person on length of residency in State.

Justices Concurring: Chief Justice Burger, Brennan, White, Marshall, Blackmun, Powell, Stevens.
Justice Concurring Specially: O'Connor.
Justice Dissenting: Rehnquist.

963. *Blum* v. *Bacon*, 457 U.S. 132 (1982).

Provision of emergency assistance program precluding assistance to persons receiving AFDC to replace a lost or stolen AFDC grant is contrary to valid federal regulations proscribing inequitable treatment under the emergency assistance program.

964. *Plyler* v. *Doe*, 457 U.S. 202 (1982).

Statute withholding state funds form local school districts for the education of any children not legally admitted into United States and authorizing boards to deny enrollment to such children denies the equal protection of the laws.

Justices Concurring: Brennan, Marshall, Blackmun, Powell, Stevens.
Justices Dissenting: Chief Justice Burger, White, Rehnquist, O'Connor.

965. *Globe Newspapers Co.* v. *Superior Court*, 457 U.S. 596 (1982).

Statute requiring, under all circumstances, exclusion of press and public during testimony of minor victim of a sex offense violates the First Amendment.

Justices Concurring: Brennan, White, Marshall, Blackmun, Powell.
Justice Concurring Specially: O'Connor.
Justices Dissenting: Chief Justice Burger, Rehnquist, Stevens.

966. *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982).

Take-over statute which extensively regulates tender offerors and imposes registration and reporting requirements, because it directly regulates and prevents interstate tender offers and because the burdens on interstate commerce are excessive compared with local interests served, violates the commerce clause.

Justices Concurring: White, Blackmun, Powell, Stevens, O'Connor, Chief Justice Burger.
Justices Dissenting: Marshall, Brennan, Rehnquist (all on mootness grounds).

967. *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U.S. 141 (1982).

Statutory provision barring unreasonable restraints on alienation, construed to prohibit "due-on-sale" clauses in mortgage contracts is preempted by Federal Home Loan Bank Board regulations

permitting federal savings and loan associations to include such clauses in their contracts.

Justices Concurring: Blackmun, Brennan, White, Marshall, O'Connor, Chief Justice Burger.
Justices Dissenting: Rehnquist, Stevens.

968. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Statute requiring landlords to permit installation of cable television wiring on their property and limiting fee charged to that determined to be reasonable by a commission (which set a one-time $1 fee) constituted a taking of property in violation of the Fifth and Fourteenth Amendments.

969. *Washington* v. *Seattle School Dist.*, 458 U.S. 457 (1982).

Statutory provision, enacted by initiative vote of the electorate, barring school boards from busing students for racially integrative purposes denies the equal protection of the laws.

Justices Concurring: Blackmun, Brennan, Marshall, White, Stevens.
Justices Dissenting: Powell, Rehnquist, O'Connor, Chief Justice Burger.

970. *Enmund* v. *Florida*, 458 U.S. 782 (1982).

Statute authorizing death penalty solely for participation in a robbery in which another robber kills someone violates the Eighth Amendment.

Justices Concurring: White, Brennan, Marshall, Blackmun, Stevens.
Justices Dissenting: O'Connor, Powell, Rehnquist, Chief Justice Burger.

971. *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832 (1982).

State tax imposed on the gross receipts that non-Indian construction company received from tribal school board for construction of school for Indian children on reservation is preempted by federal law.

Justices Concurring: Marshall, Brennan, Blackmun, Powell, O'Connor, Chief Justice Burger.
Justices Dissenting: Rehnquist, White, Stevens.

972. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

State statute requiring a permit before anyone withdraws ground water from any well located in the State and transports it across state line and providing for denial of permit unless the State to which the water will be transported grants reciprocal rights to withdraw and transport water into this State violates the commerce clause.

Justices Concurring: Stevens, Brennan, White, Marshall, Blackmun, Powell, Chief Justice Burger.
Justices Dissenting: Rehnquist, O'Connor.

## II. ORDINANCES

1. *Weston* v. *City Council of Charleston*, 2 Pet. (27 U.S.) 449 (1829).

City ordinance which levied a tax on stock issued by the United States impaired the federal borrowing power and was void (Art. VI).

Justices Concurring: Marshall, C.J., Washington, Duvall, Story.
Justices Dissenting: Johnson, Thompson.

2. *Cannon* v. *New Orleans*, 20 Wall. (87 U.S.) 577 (1874).

New Orleans ordinance of 1852, imposing a charge for use of piers measured by tonnage of vessel, levied an invalid tonnage duty.

3. *Murray* v. *Charleston*, 96 U.S. 432 (1878).

Charleston, South Carolina, tax ordinance which withheld from interest payments on municipal bonds a tax levied after issuance of such bonds at a fixed rate of interest impaired the obligation of contract (Art. I, § 10).

Justices Concurring: Strong, Waite, C.J., Clifford, Bradley, Swayne, Harlan, Field.
Justices Dissenting: Miller, Hunt.

4. *Moran* v. *New Orleans*, 112 U.S. 69 (1884).

Ordinance of New Orleans, so far as it imposed license tax upon persons owning and running towboats to and from the Gulf of Mexico, was an invalid regulation of commerce.

5. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650 (1885).

Municipal ordinance granting to a public utility an exclusive right to supply the city with gas and state constitutional provision abolishing outstanding monopolistic grants impaired the obligation of contract when enforced against a previously chartered utility which, through consolidation, had inherited the monopolistic, exclusive privileges of two utility corporations chartered prior to the constitutional proviso and ordinance.

6. *New Orleans Water-Works Co.* v. *Rivers*, 115 U.S. 674 (1885).

When a utility is chartered with an exclusive privilege of supplying a city with water, a subsequently enacted ordinance authorizing an individual to supply water to a hotel impaired the obligation of contract.

7. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

San Francisco ordinance regulating certain phases of the laundry business, as arbitrarily enforced against Chinese, held to violate the equal protection of the laws.

8. *Leloup* v. *Port of Mobile*, 127 U.S. 640 (1888).

A Mobile, Alabama, ordinance which levied an occupational license tax on a telegraph company doing an interstate business was void.

9. *McCall* v. *California*, 136 U.S. 104 (1890).

Municipal ordinances which imposed a license tax on a soliciting agent for a foreign corporation was void as levying a tax on interstate commerce.

Justices Concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford.
Justices Dissenting: Fuller, C.J., Gray, Brewer.

10. *Harman* v. *Chicago*, 147 U.S. 396 (1893).

Chicago ordinance imposing a license tax on tug boats licensed under federal authority and engaged in interstate commerce held invalid.

11. *Brennan* v. *Titusville*, 153 U.S. 289 (1894).

Ordinance of Pennsylvania city requiring license tax of soliciting agent for manufacturer in another State was held invalid as imposing a tax upon interstate commerce.

12. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1 (1898).

Washington city ordinance which authorized construction of a municipal water works impaired the obligation of a contract previously negotiated with a private utility providing the same service.

13. *Los Angeles* v. *Los Angeles City Water Co.*, 177 U.S. 558 (1900).

Ordinance expanding city limits beyond those to be served by a utility leasing a municipality's water works and effecting diminution of the rates stipulated in the original agreement without any equivalent compensation impaired the obligation of contract between the utility and the city.

14. *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U.S. 368 (1902).

City ordinances, which adjusted the rate of fare stipulated in agreements made with a street railway company, held to impair the obligation of contract.

15. *Caldwell* v. *North Carolina*, 187 U.S. 622 (1903).

City ordinance imposing a license on photographic business, as applied to an agent of an out-of-state corporation, was held an invalid regulation of commerce.

16. *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U.S. 64 (1904).

Pennsylvania municipal ordinance authorizing an inspection fee on telegraph companies doing an interstate business held to be an unreasonable and invalid regulation of commerce.

Justices Concurring: Peckham, Fuller, C.J., Brown, White, McKenna, Holmes, Day.

Justices Dissenting: Harlan, Brewer.

17. *Cleveland* v. *Cleveland City Ry. Co.*, 194 U.S. 517 (1904).

Ordinance reducing the rate of fares to be charged by railway companies lower than cited in previous ordinances held to impair the obligation of contract.

18. *Dobbins* v. *Los Angeles*, 195 U.S. 223 (1904).

No change in the neighborhood having occurred between passage of two zoning ordinances, the second of which excluded a gas company from erecting a plant within the area authorized by the first ordinance was held to effect an arbitrary deprivation of property without due process of law.

19. *Cleveland* v. *Cleveland Electric Ry.*, 201 U.S. 529 (1906).

Ordinance according to a consolidated municipal railway an extension of the duration date of franchises issued to its predecessors, in consideration of which substantial sums were expended on improvements, gave rise to a new contract, which was impaired by later attempt on the part of the city to reduce the rate stipulated in the franchises thus extended.

20. *Rearick* v. *Pennsylvania*, 203 U.S. 507 (1906).

An ordinance imposing a license fee for the solicitation of orders for the sale of merchandise not of the parties own manufacture imposed an invalid burden on interstate commerce when applied to a Pennsylvania agent of an Ohio company who solicited orders for the latter's products and upon receipt of the latter, consigned to a designated purchaser, consummated the sale by delivering the merchandise to such purchaser and, upon the latter's approval of the parcel delivered, collected the purchase price for transmission to the Ohio employer.

21. *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496 (1907).

Municipal contract with utility fixing the maximum rate to be charged for supplying water to inhabitants was invalidly impaired by subsequent ordinances altering said rates.

22. *Londoner* v. *Denver*, 210 U.S. 373 (1908).

The due process requirements of notice and hearing in connection with the assessment of taxes were violated by a municipal assessment ordinance which afforded the taxpayer the privilege merely of filing objections but no opportunity to support his objections by argument and proof in open hearing.

Justices Concurring: Moody, Harlan, Brewer, White, Peckham, McKenna, Day.
Justices Dissenting: Fuller, C.J., Holmes.

23. *Minneapolis* v. *Street Railway Co.*, 215 U.S. 417 (1910).

Minneapolis ordinance of 1907, directing the sale of six tickets for 25¢, was void as impairing the contract which arose from passage of the ordinance of 1875 granting to a railway a franchise expiring in 1923 and establishing a fare of not less than 5¢.

24. *Eubank* v. *Richmond*, 226 U.S. 137 (1912).

Municipal ordinance requiring authorities to establish building lines on separate blocks back of the public streets and across private property upon the request of less than all the owners of the property affected invalidly authorized the taking of property, not for public welfare but, for the convenience of other property owners; and therefore was violative of due process.

25. *Williams* v. *Talladega*, 226 U.S. 404 (1912).

A $100 license fee imposed by ordinance of an Alabama city on a foreign telegraph company, part of whose business income was derived from the transmission of messages for the Federal Government was void as a tax on a federal instrumentality (Art. VI).

26. *New York Central Railroad Co.* v. *Hudson County*, 227 U.S. 248 (1913).

Congress, having expressly included ferries used in connection with interstate railroads in its legislation regulating interstate commerce, two New Jersey municipal ordinances fixing passenger rates for travel on ferries between New Jersey and New York points were superseded thereby and therefore invalid.

27. *Grand Trunk Western Ry.* v. *South Bend*, 227 U.S. 544 (1913).

South Bend, Indiana, ordinance of 1901 repealing so much of an ordinance of 1866 authorizing a railroad to lay double tracks on one of its streets impaired the obligation of contract contrary to Art. I, § 10.

Justices Concurring: Lamar, Holmes, White, C.J., Lurton, Van Devanter, McKenna, Day (separately).

Justices Dissenting: Hughes, Pitney.

28. *Owensboro* v. *Cumberland Telephone Co.*, 230 U.S. 58 (1913).

An ordinance of a Kentucky muncipality which required a telephone company to remove from the streets poles and wires installed under a prior ordinance granting permission to do so, without restriction as to the duration of such privilege, or, in the alternative, pay a rental not prescribed in the original ordinance impaired an obligation of contract contrary to Art. I, § 10.

Justices Concurring: Lurton, White, C.J., Holmes, Van Devanter, Lamar.
Justices Dissenting: Day, McKenna, Hughes, Pitney.

29. *Boise Water Co.* v. *Boise City*, 230 U.S. 84 (1913).

An ordinance of an Idaho municipality adopted in 1906 which subjected a water company to monthly rental fees for the use of its streets invalidly impaired the obligation of contract arising under an ordinance of 1889 which granted a predecessor company the privilege of laying water pipes under the city streets without payment of any charge for the exercise of such right.

30. *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100 (1913).

An ordinance of a Nebraska municipality adopted in 1908 requiring, without any showing of the necessity therefor, a utility to remove its poles and wires from the city streets invalidly impaired an obligation of contract arising from an ordinance of 1884 granting in perpetuity the privilege of erecting and maintaining poles and wires for the transmission of power.

31. *Adams Express Co.* v. *New York*, 232 U.S. 14 (1914).

New York city ordinances requiring an express company to obtain a local license, exacting license fees for express wagons and drivers, and requiring drivers to be citizens, to the extent that they extended to interstate commerce, imposed invalid burdens on such commerce.

*Accord: U.S. Express Co.* v. *New York*, 232 U.S. 35 (1914).

32. *Sault Ste. Marie* v. *International Transit Co.*, 234 U.S. 333 (1914).

Michigan city municipal ordinance which compelled operator of a ferry between Canadian and Michigan points to take out a license imposed an invalid burden on the privilege of engaging in foreign commerce.

33. *South Covington Ry.* v. *Covington*, 235 U.S. 537 (1915).

Kentucky municipal ordinance, insofar as it sought to regulate the number of street cars to be run, and the number of passengers allowed in each car, between interstate points imposed an unreasonable burden on interstate commerce. Also, the requirement that temperature in the cars never be permitted to be below 50° was unreasonable and violative of due process.

34. *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U.S. 55 (1916).

St. Louis ordinance which levied one-fourth of the cost of paving on property fronting on the street and the remaining three-fourths upon all property in the taxing district according to area and without equality as to depth denied equal protection of the laws.

35. *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

A Louisville, Kentucky, ordinance which forbade Negroes to occupy houses in blocks where the majority of the houses were occupied by whites was deemed to prevent sales of lots in such blocks to Negroes and to deprive the latter of property without due process of law.

36. *Accord: Harmon* v. *Tyler*, 273 U.S. 668 (1927), voiding a similar New Orleans ordinance.

37. *Accord: City of Richmond* v. *Deans*, 281 U.S. 704 (1930), voiding a similar Richmond, Virginia, ordinance.

38. *Northern Ohio Traction & Light Co.* v. *Ohio ex rel. Pontius*, 245 U.S. 574 (1918).

Resolution of county commissioners in 1912 purporting to revoke an electric railway franchise previously granted in perpetuity by appropriate county authorities in 1892 amounted to state action impairing the obligation of contract.

Justices Concurring: McReynolds, White, C.J., McKenna, Holmes, Van Devanter, Pitney.
Justices Dissenting: Clarke, Brandeis.

39. *Denver* v. *Denver Union Water Co.*, 246 U.S. 178 (1918).

Rates fixed by a Denver ordinance pertaining to the charges to be collected for services by a water company deprived the latter of its property without due process of law by reason of yielding a return of 4.3% compared with prevailing rates in the city of 6% and higher obtained on secured and unsecured loans.

Justices Concurring: Pitney, White, C.J., McReynolds, Day, Van Devanter, McKenna.

Justices Dissenting: Holmes, Brandeis, Clarke.

40. *Covington* v. *South Covington, St. Ry. Co.*, 246 U.S. 413 (1918).

Kentucky city ordinance of 1913 purporting to grant a 25-year franchise for a street railway over certain streets to the best bidder impaired the obligation of contract of an older street railway accorded a perpetual franchise over the same street.

Justices Concurring: Holmes, Pitney, White, C.J., McReynolds, Day, Van Devanter, McKenna.
Justices Dissenting: Clark, Brandeis.

41. *Detroit United Railway* v. *Detroit*, 248 U.S. 429 (1919).

Detroit ordinance which compelled street railway company to carry passengers on continuous trips over franchise lines to and over nonfranchise lines, and vice versa, for a fare no greater than its franchises entitled it to charge upon the former alone impaired the obligation of the franchise contracts; and insofar as its enforcement would result in a deficit, also deprived the company of its property without due process.

Justices Concurring: Day, Pitney, White, C.J., McReynolds, Van Devanter, McKenna.
Justices Dissenting: Clarke, Holmes, Brandeis.

42. *Los Angeles* v. *Los Angeles Gas Corp.*, 251 U.S. 32 (1919).

Los Angeles ordinance authorizing city to establish lighting system of its own could not effect removal of fixtures of a lighting company occupying streets pursuant to rights granted by a prior franchise without paying compensation required by due process clause.

Justices Concurring: McKenna, White, C.J., Holmes, Day, Van Devanter, McReynolds, Brandeis.
Justices Dissenting: Pitney, Clarke.

43. *Houston* v. *Southwestern Tel. Co.*, 259 U.S. 318 (1922).

Houston ordinance was void inasmuch as the rates fixed thereunder were confiscatory and deprived the utility of its property without due process of law.

44. *Paducah* v. *Paducah Ry.*, 261 U.S. 267 (1923).

Fares prescribed by ordinance of Kentucky city were confiscatory and deprived the utility of property without due process of law.

45. *Texas Transp. Co.* v. *New Orleans*, 264 U.S. 150 (1924).

New Orleans license tax ordinance could not be validly enforced as to the business of a corporation employed as agent by owners of vessels engaged exclusively in interstate and foreign commerce,

where its business was a necessary adjunct of said commerce and consisted of the soliciting and engaging of cargo, the nomination of vessels to carry it, arranging for delivery on wharf and for stevedores, payment of ships' disbursements, issuing bills of lading, and collecting freight charges.

Justices Concurring: Sutherland, Taft, C.J., Sanford, McReynolds, Butler, McKenna, Van Devanter.

Justices Dissenting: Brandeis, Holmes.

46. *Asakura* v. *Seattle*, 265 U.S. 332 (1924).

Seattle ordinance which confined to citizens the pawnbroking business was void as applied to a Japanese alien lawfully admitted into the United States and protected by a treaty with Japan according the nationals of the latter country the right to carry on a "trade" (Art. VI).

47. *Real Silk Mills* v. *Portland*, 268 U.S. 325 (1925).

Portland, Oregon, ordinance which exacted a license fee and a bond for insuring delivery from solicitors who go from place to place taking orders for goods for future delivery and receiving deposits in advance was invalid as unduly burdening interstate commerce when enforced against solicitors taking orders for an out-of-state corporation which confirmed the orders, shipped the merchandise directly to the customers, and permitted the solicitors to retain the deposited portion of the purchase as compensation.

48. *Mayor of Vidalia* v. *McNeely*, 274 U.S. 676 (1927).

Ordinance of Louisiana municipality which exacted license as a condition precedent for operation of a ferry across boundary waters separating two States imposed an invalid burden on interstate commerce.

49. *Delaware L. & W.R.R.* v. *Morristown*, 276 U.S. 182 (1928).

New Jersey municipal ordinance which compelled use of railroad station grounds for a public hackstand without compensation deprived the railroad of property without due process.

Justices Concurring: Brandeis, Holmes (separately).

50. *Sprout* v. *South Bend*, 277 U.S. 163 (1928).

Indiana municipal ordinance which exacted from motor bus operators a license fee adjusted to the seating capacity of a bus could not be validly enforced against an interstate carrier for the fee was not exacted to defray expenses of regulating traffic in the interest of

safety, or to defray the cost of road maintenance or as an occupation tax imposed solely on account of intrastate business.

51. *Nectow* v. *Cambridge*, 277 U.S. 183 (1928).

Massachusetts municipal zoning ordinance which placed owner's land in a residential district with resulting inhibition of use for commercial purposes deprived the owner of property without due process because the requirement did not promote health, safety, morals, or general welfare.

52. *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U.S. 116 (1928).

Municipal (Washington) zoning ordinance which conditioned issuance of a permit to enlarge a home for the aged in a residential area upon the approval of the owners of two-thirds of the property within 400 feet of the proposed building was unconstitutional and violative of due process because the condition bore no relationship to public health, safety, and morals and entailed an improper delegation of legislative power to private citizens.

53. *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

Griffin, Georgia, ordinance which exacted a permit for the distribution of literature by hand or otherwise was violative of freedom of press as guaranteed by the due process clause of the Fourteenth Amendment by imposing censorship in advance of publication.

54. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).

A Jersey City ordinance forbidding distribution of printed matter and the holding, without permits, of public meetings in streets and other public places withheld freedom of speech and assembly contrary to the due process clause of the Fourteenth Amendment.

Justices Concurring: Roberts, Black, Frankfurter, Douglas, Stone, Reed, Hughes, C.J. (concurred with opinions of Roberts and Stone).
Justices Dissenting: McReynolds, Butler.

55–58. *Schneider* v. *City of Irvington*, 308 U.S. 147 (1939).

A municipal ordinance prohibiting solicitation and distribution of circulars by canvassing from house to house, unless licensed by the police, is void as applied to one who delivered literature and solicited contributions from house to house in the name of religion. Ordinances forbidding distribution of printed matter are not made valid by limiting their operation to streets and alleys and leaving other public places free. Any burden imposed upon cities in cleaning and maintaining streets as an indirect consequence of such distribution results from the constitutional protection of freedom of speech, press, and religion guaranteed by the due process clause of the Fourteenth Amend-

ment. Ordinances of Los Angeles, Milwaukee, Worcester (Massachusetts), and Irvington (New Jersey) were held unconstitutional by reason of conflict with such provision.

Justices Concurring: Hughes, C.J., Butler, Stone, Roberts, Reed, Frankfurter, Douglas, Black.

Justice Dissenting: McReynolds.

59. *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940).

The New York City sales tax cannot be collected on sales to vessels engaged in foreign commerce of fuel oil manufactured from imported crude petroleum in bond. Thus enforced, the city ordinance is invalid as an infringement of congressional regulations of foreign and interstate commerce (Art. I, § 8, cl. 3).

60. *Carlson* v. *California*, 310 U.S. 106 (1940).

A Shasta County, California, ordinance making it unlawful for any person to carry or display any sign or badge in the vicinity of any place of business for the purpose of inducing others to refrain from buying or working there, or for any person to loiter or picket in the vicinity of any place of business for such purpose, is unconstitutional and is violative of freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy.

Justice Dissenting: McReynolds.

61. *Jamison* v. *Texas*, 318 U.S. 413 (1943).

A Dallas ordinance made it unlawful to throw any handbills, circulars, cards, newspapers or any advertising material upon any street or sidewalk in the city. As applied, the ordinance prohibited the dissemination of information, a denial of the freedom of the press, and where the handbills contained an invitation to participate in a religious activity, a denial of freedom of religion, in violation of the First and Fourteenth Amendments of the Constitution.

62. *Largent* v. *Texas*, 318 U.S. 418 (1943).

Involving a Paris City ordinance which made it unlawful for any person to silicit orders or to sell books, wares or merchandise within the residential portion of Paris without a permit. As applied, the ordinance abridges the freedom of religion, speech and press guaranteed by the Fourteenth Amendment of the Constitution in that it forbids the distribution of religious publications without a permit, the issuance of which is in the discretion of a municipal officer.

63. *Jones* v. *Opelika*, 319 U.S. 103 (1943).

An Opelika, Alabama, ordinance imposing licenses and taxes on various businesses cannot constitutionally be applied to the business of selling books and pamphlets on the streets or from house to house. As applied the ordinance infringes liberties of speech and press and religion guaranteed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge.
Justices Dissenting: Reed, Roberts, Frankfurter, Jackson.

64. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

An ordinance of the City of Jeanette, stated that all persons soliciting therein orders for merchandise of any kind, or persons delivering such articles under orders so obtained must procure a license and pay a prescribed fee therefor in an amount measured by the time for which the license is granted. When applied to religious colporteurs engaged in dissemination of their religious beliefs through the sale of books and pamphlets from house to house, the ordinance invades freedom of religion, speech and press contrary to the First and Fourteenth Amendments of the Constitution.

Justices Concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge.
Justices Dissenting: Roberts, Reed, Frankfurter, Jackson.

65. *Martin* v. *Struthers*, 319 U.S. 141 (1943).

An ordinance of Struthers, Ohio, made it unlawful for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon occupants of any residence to the door for the purpose of receiving such handbills, etc. The ordinance, as applied to one distributing leaflets advertising a religious meeting, interfered with the rights of freedom of speech and press guaranteed by the First Amendment. The ordinance, by failing to distinguish between householders who are willing to receive the literature and those who are not, extended further than was necessary for protection of the community.

Justices Concurring: Stone, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge.
Justices Dissenting: Roberts, Reed, Jackson.

66. *Follett* v. *McCormick*, 321 U.S. 573 (1944).

A McCormick, South Carolina, ordinance required a license to be paid: agents selling books, per day $1.00, per year $15.00. The constitutional guaranty of religious freedom under the First and Fourteenth Amendments of the Constitution precludes exacting a book agent's license fee from a distributor of religious literature notwith-

standing that his activities are confined to his hometown and his livelihood is derived from contributions requested for the literature distributed.

Justices Concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge.
Justices Dissenting: Roberts, Frankfurter, Jackson.

67. *Nippert* v. *Richmond,* 327 U.S. 416 (1946).

Richmond, Va., City Code imposed upon persons "engaged in business as solicitors an annual license tax of $50.00 plus one-half of one per centum of their gross receipts or commissions for the preceding license year in excess of $1,000.00." Permit of Director of Public Safety was required before issuance of the license. The ordinance violated the commerce clause in that it discriminated against out-of-state merchants in favor of local ones and operated as a barrier to the introduction of out-of-state merchandise.

Justices Concurring: Stone, C.J., Reed, Frankfurter, Rutledge, Burton.
Justices Dissenting: Black, Douglas, Murphy.

68. *Joseph* v. *Carter & Weekes Co.,* 330 U.S. 422 (1947).

A New York City law provided that for the privilege of carrying on within the city any trade, business, or profession, every person shall pay a tax of one-tenth of one per centum upon all receipts received in and/or allocable to the city during the year. The excise tax levied on the gross receipts of a stevedoring corporation is invalid since it would burden interstate and foreign commerce in violation of the commerce clause of the Constitution.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Douglas (dissenting in part), Murphy (dissenting in part), Jackson, Rutledge (dissenting in part), Burton.
Justice Dissenting: Black.

69. *Saia* v. *New York,* 334 U.S. 558 (1948).

A Lockport ordinance forbidding use of sound amplification excepted public dissemination, through loudspeakers, of news, matters of public concern, and athletic activities, provided that the latter be done under permission obtained from the Chief of Police. The ordinance is unconstitutional on its face as a previous restraint on the right of free speech in violation of the First Amendment of the Constitution, made applicable to the States by the Fourteenth Amendment. No standards were prescribed for the excercise of discretion by the Chief of Police.

Justices Concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge.
Justices Dissenting: Reed, Frankfurter, Jackson, Burton.

70. *Terminiello* v. *Chicago,* 337 U.S. 1 (1949).

A Chicago ordinance proscribed the making of improper noises or other conduct contributing to a breach of the peace. Petitioner was convicted of violating said ordinance by reason of the fact that he had addressed a large audience in an auditorium where he had vigorously criticized various political and racial groups as well as the disturbances produced by an angry and turbulent crowd protesting his appearance. At this trial, the judge instructed the jury that any behavior which stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, violates the ordinance.

As construed and applied by the trial court the ordinance violates the right of free speech guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment.

Justices Concurring: Black, Reed, Douglas, Murphy, Rutledge.
Justices Dissenting: Vinson, C.J., Frankfurter, Jackson, Burton.

71. *Kunz* v. *New York,* 340 U.S. 290 (1951).

Because of prior denunciation of other religious beliefs, appellant's license to conduct religious meetings on New York City streets was revoked. A local ordinance forbade the holding of such meetings without a license but contained no provisions for revocation of such licenses and no standard to guide administrative action in granting or denying permits. Appellant was convicted for holding religious meetings without a permit.

The ordinance was held to grant discretionary power to control in advance the right of citizens to speak on religious issues and to impose a prior restraint on the exercise of freedom of speech and religion.

Justices Concurring: Vinson, C.J., Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton.
Justices Dissenting: Jackson.

72. *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951).

A Madison, Wisconsin, ordinance prohibited the sale of milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the central square of Madison. An Illinois corporation, engaged in gathering and distributing milk from farms in Illinois and Wisconsin was denied a license to sell milk within the City solely because its pasteurization plants were more than five miles away. The ordinance unjustifiably discriminated against interstate commerce in violation of the commerce clause of the Constitution.

Justices Concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark.

Justices Dissenting: Black, Douglas, Minton.

73. *Gelling* v. *Texas*, 343 U.S. 960 (1952).

Marshall City, Texas, motion picture censorship ordinance, as enforced, was unconstitutional as denying freedom of speech and press protected by the due process clause of the Fourteenth Amendment.

74. *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953).

A Pawtucket ordinance read as follows: "No person shall address any political or religious meeting in any public park, but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park." Because services of a Jehovah's Witnesses sect differed from those conducted by other religious groups, in that the former were marked by lectures rather than confined to orthodox rituals, that sect was prevented from holding religious meetings in parks. Thus applied, the ordinance was held to violate the First and Fourteenth Amendments of the Federal Constitution, including the equal protection clause of the latter.

75. *Slochower* v. *Board of Education*, 350 U.S. 551 (1956).

Section 903 of the New York City Charter provides that whenever a city employee invokes the privilege against self-incrimination to avoid answering inquiries into his official conduct by a legislative committee, his employment shall terminate. The summary dismissal thereunder, without notice and hearing, of a teacher at City College who was entitled to tenure and could be discharged only for cause and after notice, hearing and appeal, violated the due process clause of the Fourteenth Amendment. Invocation of the privilege to justify refusal to answer questions of a congressional committee concerning membership in the Communist Party in 1948-1949 cannot be viewed as the equivalent either to a confession of guilt or a conclusive presumption of perjury.

Justices Concurring: Black (concurring specially), Douglas (concurring specially), Warren, C.J., Frankfurter, Clark.

Justices Dissenting: Reed, Burton, Minton, Harlan.

76. *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955).

Atlanta ordinance which reserved certain public parks and golf courses for white persons only was violative of the equal protection clause of the Fourteenth Amendment.

77. *West Point Grocery Co.* v. *Opelika*, 354 U.S. 390 (1957).

Ordinance of Opelika, Alabama, provided that a wholesale grocery business which delivers groceries in the City from points without the City must pay an annual privilege tax of $250. As applied to a Georgia corporation which solicits orders in the City and consummates purchases by deliveries originating in Georgia, the tax is invalid under the commerce clause of the Constitution.

Justices Concurring: Warren, C.J., Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker.
Justice Dissenting: Black.

78. *Lambert* v. *California*, 355 U.S. 225 (1957).

Los Angeles Municipal Code made it unlawful for a person who has been convicted of a crime punishable in California as a felony to remain in the city longer than five days without registering with the Chief of Police. Applied to a person who is not shown to have had actual knowledge of his duty to register, this ordinance violates the due process clause of the Fourteenth Amendment of the Constitution.

Justices Concurring: Warren, C.J., Black, Douglas, Clark, Brennan.
Justices Dissenting: Frankfurter, Burton, Harlan, Whittaker.

79. *Staub* v. *City of Baxley*, 355 U.S. 313 (1958).

Baxley, Georgia, made it an offense to "solicit" membership in any "organization, union or society" requiring the payment of "fees [or] dues" without first receiving a permit from the Mayor and Council. Issuance or refusal may occur after the character of the applicant, the nature of the organization in which memberships are to be solicited, and its effect upon the general welfare of the City have been considered. Appellant had been convicted for soliciting memberships in a labor union without a license.

The ordinance is void on its face because it makes enjoyment of freedom of speech contingent upon the will of the Mayor and City Council and thereby constitutes a prior restraint upon that freedom contrary to the Fourteenth Amendment of the Constitution.

Justices Concurring: Warren, C.J., Douglas, Black, Burton, Harlan, Brennan, Whittaker.
Justices Dissenting: Frankfurter, Clark.

80. *Chicago* v. *Atchinson, T. & S.F.R. Co.*, 357 U.S. 77 (1958).

As applied to a newly organized motor carrier hired by interstate railroads operating in and out of Chicago to transfer interstate passengers and their baggage between different railway terminals in that City, the provision in the Chicago Municipal Code requiring any new transfer service to obtain a certificate of convenience and necessity

plus approval of the City Council is unconstitutional. Chicago has no power to decide whether the new motor carrier can operate a service which is an integral part of interstate railway transportation subject to regulations under the Federal Interstate Commerce Act.

Justices Concurring: Warren, C.J., Black, Douglas, Clark, Brennan, Whittaker.
Justices Dissenting: Frankfurter, Burton, Harlan.

81. *Smith* v. *California,* 361 U.S. 147 (1959).

A Los Angeles City ordinance making it unlawful for any bookseller to possess any obscene publication denies him freedom of press, as guaranteed by the due process clause of the Fourteenth Amendment, when it is judicially construed to make him absolutely liable criminally for mere possession of a book, later adjudged to be obscene, notwithstanding that he had no knowledge of the contents thereof. Such construction would tend to restrict the books he sells to those he has inspected and thereby to limit the public's access to constitutionally protected publications.

Justices Concurring: Clark, Warren, C.J., Whittaker, Brennan, Stewart, Black (separately), Frankfurter (separately), Douglas (separately), Harlan (dissenting in part; separately).

82. *Bates* v. *Little Rock,* 361 U.S. 516 (1960).

Little Rock and North Little Rock, Arkansas, ordinances which, as a condition of exempting charitable organizations from an annual business license tax, required the disclosure of the identity of the officers and members of said organizations, as endorced against the N.A.A.C.P., denied members of the latter freedom of association, press, and speech as guaranteed by the due process clause of the Fourteenth Amendment.

Justices Concurring: Brennan, Clark, Frankfurter, Stewart, Warren, C.J., Whittaker, Harlan, Black (separately), Douglas (separately).

83. *Talley* v. *California,* 362 U.S. 60 (1960).

Los Angeles ordinance which forbade distribution under any circumstance of any handbill which did not have printed thereon the name and address of the person who prepared, distributed, or sponsored it was void on its face as abridging freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment. Such ordinance is not limited to identifying those responsible for fraud, false advertising, libel, disorder, or littering.

Justices Concurring: Warren, C.J., Stewart, Harlan (separately), Douglas, Black.
Justices Dissenting: Clark, Frankfurter, Whittaker.

84. *Schroeder* v. *City of New York*, 371 U.S. 208 (1962).

New York City Water Supply Act, insofar as it authorized notification of land owners, whose summer resort property would be adversely affected by city's diversion of water, by publication of notices in January in New York City official newspaper and in newspapers in the county where the resort property was located as well as by notices posted on trees and poles along the waterway adjacent to such property, did not afford the quality of notice, i.e., to the owners' permanent home address, required by the due process clause of the Fourteenth Amendment.

85. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

Ordinance authorizing warrantless entry of residential property to inspect for housing code violations violates Fourth and Fourteenth Amendments.

86. *See* v. *City of Seattle*, 387 U.S. 541 (1967).

Ordinance authorizing warrantless entry of commercial property to inspect for fire code violations violates Fourth and Fourteenth Amendments.

87. *Tietel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968).

Chicago motion picture censorship ordinance is unconstitutional in several procedural aspects.

88. *Avery* v. *Midland County*, 390 U.S. 474 (1968).

Enactment of county commissioners court drawing boundaries for districts of election of members does not comply with required "one-man, one-vote" standard.

Concurring: Justices White, Black, Douglas, Brennan, and Chief Justice Warren.
Dissenting: Justices Harlan, Fortas, and Stewart.

89. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676 (1968).

Ordinance providing for classification of motion pictures as not suitable for viewing by young persons does not provide adequate standards and is void for vagueness.

Concurring: Justices Marshall, Black, Douglas, Brennan, Stewart, White, Fortas, and Chief Justice Warren.
Dissenting: Justice Harlan.

90. *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

Amendment to city charter providing that any ordinance enacted by council dealing with discrimination in housing was not to be effec-

tive until approved by referendum whereas no other enactment had to be so submitted violated equal protection clause.

Concurring: Justices White, Douglas, Brennan, Fortas, Marshall and Chief Justice Warren.
Concurring specially: Justices Harlan and Stewart.
Dissenting: Justice Black.

91. *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971).

Ordinance making it unlawful for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by is unconstitutionally vague and violates rights to assembly and association.

Concurring: Justices Stewart, Douglas, Harlan, Brennan, and Marshall.
Concurring specially: Justice Black.
Dissenting: Justices White and Blackmun and Chief Justice Burger.

92. *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972).

Vagrancy ordinance is void for vagueness because it fails to give a person fair notice that his contemplated conduct is forbidden, because it encourages arbitrary and erratic enforcement of the law, because it makes criminal activities which by modern standards are normally innocent, and because it vests unfettered discretion in police.

93. *Police Dept. of City of Chicago* v. *Mosley,* 408 U.S. 92 (1972).

Ordinance prohibiting all picketing within certain distance of any school except labor picketing violates equal protection clause by impermissibly distinguishing between types of peaceful picketing.

94. *Cason* v. *City of Columbia,* 409 U.S. 1053 (1972).

Ordinance prohibiting use of abusive language toward another as applied by court below without limitation to fighting words cannot sustain conviction.

95. *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624 (1973).

Ordinance placing an 11 p.m. to 7 a.m. curfew on jet take-offs from local airport is invalid as in conflict with the regulatory scheme of federal statutory control.

Justices Concurring: Douglas, Brennan, Blackmun, Powell, and Chief Justice Burger.
Justices Dissenting: Rehnquist, Stewart, White, and Marshall.

96. *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974).

Ordinance interpreted by state courts to punish the use of opprobrious words to police officer without limitation of offense to uttering of fighting words is invalid.

Justices Concurring: Brennan, Douglas, Stewart, White, and Marshall.
Justice Concurring Specially: Powell.
Justices Dissenting: Blackmun, Rehnquist, and Chief Justice Burger.

97. *Erznoznik* v. *City of Jacksonville*,, 422 U.S. 205 (1975).

A municipal ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights.

Justices Concurring: Powell, Douglas, Brennan, Stewart, Marshall, Blackmun.
Justices Dissenting: White, Rehnquist, Chief Justice Burger.

98. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976).

Municipal ordinance requiring that advance written notice be given to local police by any person desiring to canvass, solicit, or call from house to house for a charitable or political purpose held void for vagueness.

Justices Concurring: Chief Justice Burger and Brennan, Stewart, White, Marshall, Blackmun, and Powell.
Justice Dissenting: Rehnquist.

99. *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85 (1977).

Ordinance prohibiting posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the township perceived as flight of white homeowners violated the First Amendment.

100. *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977).

Zoning ordinance that limited housing occupancy to members of single family and restrictively defined family so as to prevent an extended family, i.e., two grandchildren by different children residing with grandmother, violated due process clause.

Justices Concurring: Powell, Brennan, Marshall, and Blackmun.
Justice Concurring Specially: Stevens.
Justices Dissenting: Stewart, Rehnquist, and White; Burger (on other grounds).

101. *Carter* v. *Miller*, 434 U.S. 356 (1978).

Lower court's invalidation on equal protection grounds of ordinance that permanently denies public chauffeur's license to applicants previously convicted of certain crimes while making revocation

of previously licensed persons convicted of same offenses discretionary is affirmed by an equally divided Court.

102. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980).

Ordinance prohibiting door-to-door or on-the-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes" violates First and Fourteenth Amendment speech protections.

Justices Concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

103. *Ventura County* v. *Gulf Oil Corp.*, 445 U.S. 947 (1980).

County zoning ordinances governing oil exploration and extraction activities cannot be applied to company which holds lease from United States Government because federal law preempts the field.

104. *Edwards* v. *Service Machine & Shipbuilding Corp.*, 449 U.S. 913 (1980).

Court of Appeals decision holding a violation of the commerce clause an ordinance requiring non-local job seekers and local workers seeking new jobs to obtain identification card and to provide fingerprints, photograph, and pay fee is summarily affirmed.

105. *Town of Southampton* v. *Troyer*, 449 U.S. 988 (1980).

Court of Appeals decision holding a violation of the First Amendment an ordinance barring door-to-door solicitation without prior consent of occupant, but excepting canvassers who have lived in the municipality at least six months is affirmed.

106. *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981).

Zoning ordinance construed to bar the offering of live entertainment within the township violated the First Amendment.

Justices Concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell.
Justice Concurring Specially: Stevens.
Justices Dissenting: Chief Justice Burger, Rehnquist.

107. *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1981).

Complex ban on billboard displays within the City, excepting certain onsite signs and 12 categories of particular signs violates First Amendment.

Justices Concurring: White, Stewart, Marshall, Powell.
Justices Concurring Specially: Brennan, Blackmun; Stevens (in part).
Justices Dissenting: Chief Justice Burger, Rehnquist.

108. *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981).

Ordinance limiting to $250 any contributions to committees formed to support or oppose ballot measures submitted to popular vote violates First Amendment.

Justices Concurring: Chief Justice Burger, Brennan, Powell, Rehnquist, Stevens.

Justices Concurring Specially: Marshall, Blackmun, O'Connor.

Justice Dissenting: White.

109. *Rusk* v. *Espinosa*, 456 U.S. 951 (1982).

Court of Appeals decision holding violative of the First Amendment ordinance regulating solicitation by charitable organizations but exempting solicitation by religious groups for "evangelical, missionary or religious" but no secular purpose is summarily affirmed.

# SUPREME COURT DECISIONS
# OVERRULED BY SUBSEQUENT DECISION

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While the Supreme Court sometimes expressly overrules a prior decision, in a great many instances the overruling must be deduced from the principles of related cases. Obviously, there is a chance here for a difference of opinion and this will be reflected in any listing.

The present compilation is based primarily upon the following sources:

Justice Brandeis dissenting in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393, 406-409 nn. (1932).

Emmet E. Wilson, "Stare Decisis, Quo Vadis?" 33 Geo. L.J. 251, 254, n. 17, 265 (1945);

William O. Douglas, "Stare Decisis," 49 Colum. L. Rev. 735-743, 756-758 (1949);

Albert R. Blaustein and Andrew H. Field, "Overruling Opinions in the Supreme Court," 57 Mich. L. Rev. 151, 184-194 (1958).

Inasmuch as there is not complete agreement among them that all of the cases listed constitute reversals by the Supreme Court of prior decisions, the following symbols have been employed to indicate the authority for inclusion in each instance:

An asterisk (*) designates reversals stated in express terms by the Supreme Court;

The letters *B*, *D*, and *A* indicate reversals listed respectively by Justice Brandeis, Justice Douglas and Professor Blaustein;

Cases not bearing a symbol have been added by the editors of this volume.

| | *Overruling Case* | *Overruled Case* |
|---|---|---|
| * | 1. *Hudson* v. *Guestier*, 6 Cr. (10 U.S.) 281, 285 (1810) | *Rose* v. *Himley*, 4 Cr. (8 U.S.) 241 (1808) |
| *B* | 2. *Gordon* v. *Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830) | *Wilson* v. *Daniel*, 3 Dall. (3 U.S.) 401 (1798) |
| *A* | 3. *Greene* v. *Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832) | *Patton* v. *Easton*, 1 Wheat. (14 U.S.) 476 (1816)<br>*Powell's Lessee* v. *Harmon*, 2 Pet. (27 U.S.) 241 (1829) |
| *B* | 4. *Louisville Railroad Co.* v. *Letson*, 2 How. (43 U.S.) 497, 554-556 (1844) | *Commercial and Railroad Bank* v. *Slocomb*, 14 Pet. (39 U.S.) 60 (1840)<br>*A* *Strawbridge* v. *Curtiss*, 3 Cr. (7 U.S.) 267 (1806); and qualifying,<br>*Bank of the United States* v. *Deveaux*, 5 Cr. (9 U.S.) 61 (1809) |
| *B** | 5. *The Genessee Chief*, 12 How. (53 U.S.) 443, 456 (1851) | *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825);<br>*The Orleans* v. *Phoebus*, 11 Pet. (36 U.S.) 175 (1837) |
| *B** | 6. *Gazzam* v. *Phillip's Lessee*, 20 How. (61 U.S.) 372, 377-378 (1858) | *Brown's Lessee* v. *Clements*, 3 How. (44 U.S.) 650 (1845) |

| | *Overruling Case* | *Overruled Case* |
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| *A* | 7. *Suydam* v. *Williamson*, 24 How. (65 U.S.) 427 (1861) | *Williamson* v. *Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson* v. *Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson* v. *Ball*, 8 How. (49 U.S.) 566 (1850) |
| * | 8. *Mason* v. *Eldred*, 6 Wall. (73 U.S.) 231, 238 (1868) | *Sheehy* v. *Mandeville*, 6 Cr. (10 U.S.) 253 (1810) |
| *BD* | 9. *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869) | *Allen* v. *Newberry*, 21 How. (62 U.S.) 244 (1858) (in part) |
| *BD* | 10. *Knox* v. *Lee (Legal Tender Cases)*, 12 Wall. (79 U.S.) 457, 553 (1871) | *Hepburn* v. *Griswold*, 8 Wall. (75 U.S.) 603 (1870) |
| *D* | 11. *Trebilcock* v. *Wilson*, 12 Wall. (79 U.S.) 687 (1871) | *Roosevelt* v. *Meyer*, 1 Wall. (68 U.S.) 512 (1863) |
| *B** | 12. *Hornbuckle* v. *Toombs*, 18 Wall. (85 U.S.) 648, 652–653 (1874) | *Noonan* v. *Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard* v. *Hughes*, 1 Wall. (68 U.S.) 73, 77 (1864); *Dunphy* v. *Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871) |
| *D** | 13. *Union Pac. R. Co.* v. *McShane*, 22 Wall. (89 U.S.) 444 (1874) | *Kansas Pac. R. Co.* v. *Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part) |
| *D** | 14. *County of Cass* v. *Johnston*, 95 U.S. 360 (1877) | *Harshman* v. *Bates County*, 92 U.S. 569 (1875) |
| *D** | 15. *Fairfield* v. *County of Gallatin*, 100 U.S. 47 (1879) | *Town of Concord* v. *Savings-Bank*, 92 U.S. 625 (1875) |
| *D** | 16. *Tilghman* v. *Proctor*, 102 U.S. 707 (1880.) | *Mitchell* v. *Tilghman*, 19 Wall. (86 U.S.) 287 (1873) |
| *D* | 17. *Kilbourn* v. *Thompson*, 103 U.S. 168, 192–200 (1881) | *Anderson* v. *Dunn*, 6 Wheat. (19 U.S.) 204 (1821) |
| * | 18. *United States* v. *Phelps*, 107 U.S. 320, 323 (1883) | *Shelton* v. *The Collector*, 5 Wall. (72 U.S.) 113, 118 (1867) |
| *BD** | 19. *Kountze* v. *Omaha Hotel Co.*, 107 U.S. 378, 387 (1883) | *Stafford* v. *The Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1853) |
| * | 20. *Morgan* v. *United States*, 113 U.S. 476, 496 (1885) | *Texas* v. *White*, 7 Wall. (74 U.S.) 700 (1869) |
| *D* | 21. *Wabash, S.L. & P. Ry. Co.* v. *Illinois*, 118 U.S. 557 (1886) | *Peik* v. *Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) ("substantially though not expressly overruled") |
| *D* | 22. *Phila. Steamship Co.* v. *Pennsylvania*, 122 U.S. 326 (1887) | *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) ("basic grounds of decision repudiated") |
| *D* | 23. *In re Ayers*, 123 U.S. 443 (1887) | *Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824) |
| *BD** | 24. *Leloup* v. *Port of Mobile*, 127 U.S. 640, 647 (1888) | *Osborne* v. *Mobile*, 16 Wall. (83 U.S.) 479 (1873) |
| * | 25. *Leisy* v. *Hardin*, 135 U.S. 100, 118 (1890) | *Peirce* v. *New Hampshire*, 5 How. (46 U.S.) 504 (1847) |
| * | 26. *Brenham* v. *German-American Bank*, 144 U.S. 173, 187 (1892) | *Rogers* v. *Burlington*, 3 Wall. (10 U.S.) 654 (1866); |

| | *Overruling Case* | *Overruled Case* |
|---|---|---|
| | | *Mitchell* v. *Burlington*, 4 Wall. (71 U.S.) 270 (1867) |
| * | 27. *Roberts* v. *Lewis*, 153 U.S. 367, 377 (1894) | *Giles* v. *Little*, 104 U.S. 291 (1881) |
| *B* | 28. *Pollock* v. *Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) | *Hylton* v. *United States*, 3 Dall. (3 U.S.) 171 (1796) |
| * | 29. *Garland* v. *Washington*, 232 U.S. 642, 646 (1914) | *Crain* v. *United States*, 162 U.S. 625 (1896) |
| * | 30. *United States* v. *Nice*, 241 U.S. 591, 601 (1916) | *Matter of Heff*, 197 U.S. 488 (1905) |
| *B* | 31. *Pennsylvania R.R. Co.* v. *Towers*, 245 U.S. 6, 17 (1917) | *Lake Shore & M.S. Ry. Co.* v. *Smith*, 173 U.S. 684 (1899) (in part) |
| *B** | 32. *Rosen* v. *United States*, 245 U.S. 467, 470 (1918) | *United States* v. *Reid*, 12 How. (53 U.S.) 361 (1851) |
| * | 33. *Boston Store* v. *American Graphophone Co.*, 246 U.S. 8, 25 (1918); and *Motion Picture Co.* v. *Universal Film Co.*, 243 U.S. 502, 518 (1917) | *Henry* v. *Dick Co.*, 224 U.S. 1 (1912) |
| * | 34. *Terrel* v. *Burke Constr. Co.*, 257 U.S. 529, 533 (1922) | *Doyle* v. *Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U.S. 246 (1906) |
| * | 35. *Lee* v. *Chesapeake & Ohio Ry.*, 260 U.S. 653, 659 (1923) | *Ex parte Wisner*, 203 U.S. 449 (1906); and qualifying, *In re Moore*, 209 U.S. 490 (1908) |
| * | 36. *Alpha Cement Co.* v. *Massachusetts*, 268 U.S. 203, 218 (1925) | *Baltic Mining Co.* v. *Massachusetts*, 231 U.S. 68 (1913) |
| *A* | 37. *Ches. & Ohio Ry. Co.* v. *Leitch*, 276 U.S. 429 (1928) (rehearing) | *Chesapeake and Ohio Ry. Co.* v. *Leitch*, 275 U.S. 507 (1927) (not recorded) |
| * | 38. *Gleason* v. *Seaboard Ry.*, 278 U.S. 349, 357 (1929) | *Friedlander* v. *Texas & Railway Co.*, 130 U.S. 416 (1889) (in part) |
| * | 39. *Farmers Loan Co.* v. *Minnesota*, 280 U.S. 204, 209 (1930) | *Blackstone* v. *Miller*, 188 U.S. 189 (1903) |
| * | 40. *East Ohio Gas Co.* v. *Tax Comm.*, 283 U.S. 465, 472 (1931) | *Penna. Gas Co.* v. *Pub. Service Comm.*, 252 U.S. 23 (1920) |
| * | 41. *Chicago & E.I.R. Co.* v. *Commission*, 284 U.S. 296 (1932) | *Erie R.R. Co.* v. *Collins*, 253 U.S. 77 (1920); *Erie R.R. Co.* v. *Szary*, 253 U.S. 86 (1920) |
| *A* | 42. *Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932) | *Long* v. *Rockwood*, 277 U.S. 142 (1928) |
| | 43. *New York ex rel. Northern Finance Corp.* v. *Lynch*, 290 U.S. 601 (1933) *See also:* *United States* v. *City of Detroit*, 355 U.S. 466, 472 n. 2 (1958) | *Macallen Co.* v. *Massachusetts*, 279 U.S. 620 (1929) |
| *A** | 44. *Funk* v. *United States*, 290 U.S. 371, 373, 386 (1933); *See also:* *Hawkins* v. *United States*, 358 U.S. 74, 76 (1958) | * *Stein* v. *Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); * *Hendrix* v. *United States*, 219 U.S. 79 (1911); |

| | *Overruling Case* | *Overruled Case* |
|---|---|---|
| | | *A Logan* v. *United States*, 144 U.S. 263 (1892); |
| * | 45. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) | * *Jin Fuey Moy* v. *United States*, 254 U.S. 189 (1920)<br>*Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923) |
| *A* | 46. *R.R. Comm.* v. *Pacific Gas Co.*, 302 U.S. 388 (1938) (rehearing) | *A Morehead* v. *N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)<br>*Railroad Commission* v. *Pacific Gas Co.*, 301 U.S. 669 (1937) (not recorded) |
| * | 47. *Helvering* v. *Producers Corp.*, 303 U.S. 376 (1938) | *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922);<br>*Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) |
| *D** | 48. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 69, 79 (1938) | *Swift* v. *Tyson*, 16 Pet. (41 U.S.) 1 (1842) |
| * | 49. *Graves* v. *N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939) | *A Dobbins* v. *Erie County*, 16 Pet. (41 U.S.) 435 (1842);<br>*Collector* v. *Day*, 11 Wall. (78 U.S.) 113 (1871);<br>*N.Y. ex rel. Rogers* v. *Graves*, 299 U.S. 410 (1937);<br>*A Brush* v. *Commissioners*, 300 U.S. 352 (1937) |
| *A* | 50. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939) | *Procter & Gamble* v. *United States*, 225 U.S. 282 (1912) |
| *D** | 51. *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939) | *A Evans* v. *Gore*, 253 U.S. 245 (1920)<br>*Miles* v. *Graham*, 268 U.S. 501 (1925)<br>*Colgate* v. *Harvey*, 296 U.S. 404 (1935) |
| * | 52. *Madden* v. *Kentucky*, 309 U.S. 83 (1940) | |
| * | 53. *Helvering* v. *Hallock*, 309 U.S. 106 (1940) | *Helvering* v. *St. Louis Trust Co.*, 296 U.S. 39 (1935);<br>*Becker* v. *St. Louis Trust Co.*, 296 U.S. 48 (1935) |
| *D* | 54. *Tigner* v. *Texas*, 310 U.S. 141 (1940) | *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902) |
| * | 55. *United States* v. *Darby*, 312 U.S. 100 (1941) | *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918);<br>*Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936) (limited) |
| * | 56. *United States* v. *Chicago, M. St. P. & P.R. Co.*, 312 U.S. 592 (1941) | *United States* v. *Lynah*, 188 U.S. 445 (1903) (in part);<br>*A United States* v. *Heyward*, 250 U.S. 633 (1919) (not recorded) |
| * | 57. *Nye* v. *United States*, 313 U.S. 33 (1941) | *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402 (1918) |
| * | 58. *California* v. *Thompson*, 313 U.S. 109 (1941) | *Di Santo* v. *Pennsylvania*, 273 U.S. 34 (1927) |
| *D* | 59. *United States* v. *Classic*, 313 U.S. 299 (1941) | *Newberry* v. *United States*, 256 U.S. 232 (1921) |

| | *Overruling Case* | *Overruled Case* |
|---|---|---|
| * | 60. *Olsen* v. *Nebraska*, 313 U.S. 236 (1941) | *Ribnik* v. *McBride*, 277 U.S. 350 (1928) |
| * | 61. *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941) | *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218 (1928); *Graves* v. *Texas Company*, 298 U.S. 393 (1936) |
| *D* | 62. *Toucey* v. *N.Y. Life Ins. Co.*, 314 U.S. 118 (1941) | *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921) |
| *A* | 63. *Edwards* v. *California*, 314 U.S. 160 (1941) | *City of New York* v. *Miln*, 11 Pet. (36 U.S.) 102 (1837) |
| * | 64. *State Tax Comm.* v. *Aldrich*, 316 U.S. 174 (1942) | *First National Bank* v. *Maine*, 284 U.S. 312 (1932) |
| * | 65. *Williams* v. *North Carolina*, 317 U.S. 287 (1942) | *Haddock* v. *Haddock*, 201 U.S. 562 (1906) |
| * | 66. *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575 (1943) | *Johnson* v. *Fleet Corporation*, 280 U.S. 320 (1930) |
| * | 67. *Jones* v. *Opelika*, 319 U.S. 103 (1943) (re-argument); | *Jones* v. *Opelika*, 316 U.S. 584 (1942) |
| *A* | *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) | *Childers* v. *Beaver*, 270 U.S. 555 (1926) |
| *D* | 68. *Oklahoma Tax Comm.* v. *United States*, 319 U.S. 598 (1943) | *Minersville District* v. *Gobitis*, 310 U.S. 586 (1940) |
| * | 69. *Board of Education* v. *Barnette*, 319 U.S. 624 (1943) | *United Railways* v. *West*, 280 U.S. 234 (1930) (in part) |
| *D* | 70. *FPC* v. *Hope Gas Co.*, 320 U.S. 591 (1944) | *Leeds & Catlin Co.* v. *Victor Talk. Mach. (No. 2)*, 213 U.S. 325 (1909) (limited) |
| *D* | 71. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661 (1944) | *Plamals* v. *Pinar Del Rio*, 277 U.S. 151 (1928) (in part) |
| *D* | 72. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944) | *Grovey* v. *Townsend*, 295 U.S. 45 (1935) |
| * | 73. *Smith* v. *Allwright*, 321 U.S. 649 (1944) | |
| *D* | 74. *United States* v. *Southeastern Underwriters' Assn.*, 322 U.S. 533 (1944) | *Paul* v. *Virginia*, 8 Wall. (75 U.S.) 168 (1869) |
| * | 75. *Girouard* v. *United States*, 328 U.S. 61 (1946) | *United States* v. *Schwimmer*, 279 U.S. 644 (1929); *United States* v. *MacIntosh*, 283 U.S. 605 (1931); *United States* v. *Bland*, 283 U.S. 636 (1931) |
| *A* | 76. *Halliburton Co.* v. *Walker*, 329 U.S. 1 (1946) (rehearing) | *Halliburton Co.* v. *Walker*, 326 U.S. 696 (1946) |
| *A* | 77. *MacGregor* v. *Westinghouse Co.*, 329 U.S. 402 (1947) (rehearing) | *MacGregor* v. *Westinghouse Co.*, 327 U.S. 758 (1946) |
| * | 78. *Angel* v. *Buelington*, 330 U.S. 183 (1947) | *David Lupton's Sons* v. *Auto. Club of Am.*, 225 U.S. 489 (1912) (rendered obsolete by prior change in law) |
| *A* | 79. *Zap* v. *United States*, 330 U.S. 800 (1947) (rehearing) | *Zap* v. *United States*, 328 U.S. 624 (1946) |

| | | *Overruling Case* | *Overruled Case* |
|---|---|---|---|
| *A* | 80. | *Thibaut* v. *Car and General Ins. Corp.*, 332 U.S. 828 (1947) (on rehearing) | *Thibaut* v. *Car and General Ins. Corp.*, 332 U.S. 751 (1947) |
| *D* | 81. | *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948) | *Andrews* v. *Andrews*, 188 U.S. 14 (1903) (in part) |
| | 82. | *Lincoln Federal Labor Union* v. *Northwestern*, 335 U.S. 525 (1949); *See also:* | *Adair* v. *United States*, 208 U.S. 161 (1908) |
| *A* | | *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941) | *Coppage* v. *Kansas*, 236 U.S. 1 (1915) |
| *A** | 83. | *Comr.* v. *Estate of Church*, 335 U.S. 632, 637 (1949) | *May* v. *Heiner*, 281 U.S. 238 (1930) |
| *A* | 84. | *Ott* v. *Mississippi Barge Line*, 336 U.S. 169 (1949) | *St. Louis* v. *Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co.* v. *Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co.* v. *Kentucky*, 202 U.S. 409 (1906) |
| * | 85. | *Oklahoma Tax Comm.* v. *Texas Co.*, 336 U.S. 342 (1949) | *Choctaw & Gulf R.R.* v. *Harrison*, 235 U.S. 292 (1914); *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522 (1916); *Howard* v. *Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co.* v. *Howard*, 248 U.S. 549 (1919); *Oklahoma* v. *Barnsdall Corp.*, 296 U.S. 521 (1936) |
| * | 86. | *Cosmopolitan Co.* v. *McAllister*, 337 U.S. 783 (1949) | *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707 (1946) |
| * | 87. | *United States* v. *Rabinowitz*, 339 U.S. 56, 66, 85 (1950) | *Trupiano* v. *United States*, 334 U.S. 699 (1948); *McDonald* v. *United States*, 335 U.S. 451 (1948) |
| *A** | 88. | *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952) | *Mutual Film Corp.* v. *Ohio Indus'l Comm.*, 236 U.S. 230 (1915) |
| * | 89. | *Brown* v. *Board of Education*, 347 U.S. 483, 491, 494-495 (1954) | *Cumming* v. *Board of Education*, 175 U.S. 528 (1899); *Gong Lum* v. *Rice*, 275 U.S. 78 (1927) |
| *A* | 90. | *In re Disbarment of Isserman*, 348 U.S. 1 (1954) (on rehearing) | *In re Isserman*, 345 U.S. 286 (1953) |
| *A* | 91. | *Gayle* v. *Browder*, 352 U.S. 903 (1956) | *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) |
| * | 92. | *Reid* v. *Covert*, 354 U.S. 1 (1957) | *Kinsella* v. *Krueger*, 351 U.S. 470 (1956); *Reid* v. *Covert*, 351 U.S. 487 (1956) |
| * | 93. | *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 419 (1957); *See also:* | *Thompson* v. *Thompson*, 226 U.S. 551 (1913) |
| * | | *Armstrong* v. *Armstrong*, 350 U.S. 568, 581 (1956) | |

| | *Overruling Case* | *Overruled Case* |
|---|---|---|
| * 94. | *Ladner* v. *United States*, 358 U.S. 169 (1958) (on rehearing) | *Ladner* v. *United States*, 355 U.S. 282 (1958) |
| * 95. | *United States* v. *Raines*, 362 U.S. 17, 27 (1960) | *United States* v. *Reese*, 92 U.S. 214, 220–221 (1876) |
| * 96. | *Elkins* v. *United States*, 364 U.S. 206, 210, 212–213, 283 (1960); *Rios* v. *United States*, 364 U.S. 253 (1960) | *Weeks* v. *United States*, 232 U.S. 383, 398 (1914) (in part); *Center* v. *United States*, 267 U.S. 575 (1925); *Byars* v. *United States*, 273 U.S. 28, 33 (1927) (in part); *Feldman* v. *United States*, 322 U.S. 487, 492 (1944) (in part) |
| * 97. | *James* v. *United States*, 366 U.S. 213, 215, 221, 223, 241 (1961) | *CIR* v. *Wilcox*, 327 U.S. 404 (1946) |
| * 98. | *Mapp* v. *Ohio*, 367 U.S. 643, 653–655 (1961); *See also:* *Ker* v. *California*, 374 U.S. 23, 45, 53, 59 (1963) | *Wolf* v. *Colorado*, 338 U.S. 25 (1949) (in part) *Irvine* v. *California*, 347 U.S. 128 (1954) (in part) |
| * 99. | *Baker* v. *Carr*, 369 U.S. 186, 277, 280 (1962) | *Colegrove* v. *Green*, 328 U.S. 549 (1946) (in part); |
| * 100. | *Wesberry* v. *Sanders*, 376 U.S. 1 (1964) | *Colegrove* v. *Barrett*, 330 U.S. 804 (1947) |
| * 101. | *Smith* v. *Evening News Assn.*, 371 U.S. 195, 199 (1962); *See also:* *Truck Drivers Union* v. *Riss & Co.*, 372 U.S. 517, 520 (1963) | *Westinghouse Employees* v. *Westinghouse Corp.*, 348 U.S. 437 (1955) (in part) |
| * 102. | *Construction Laborers* v. *Curry*, 371 U.S. 542, 552, 554 (1963) | *Building Union* v. *Ledbetter Co.*, 344 U.S. 178 (1952) (in part) |
| * 103. | *Gideon* v. *Wainwright*, 372 U.S. 335, (1963) | *Betts* v. *Brady*, 316 U.S. 455 (1942) |
| * 104. | *Gray* v. *Sanders*, 372 U.S. 368, 383 (1963) | *Cook* v. *Fortson*, *Turman* v. *Duckworth*, 329 U.S. 675 (1946); *South* v. *Peters*, 339 U.S. 276 (1950); *Cox* v. *Peters*, 342 U.S. 936 (1952); *Hartsfield* v. *Sloan*, 357 U.S. 916 (1958) |
| * 105. | *Fay* v. *Noia*, 372 U.S. 391, 435 (1963) | *Darr* v. *Burford*, 339 U.S. 200 (1950) (in part) |
| * 106. | *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963) | *Adams* v. *Tanner*, 244 U.S. 590 (1917) |
| 107. | *Schneider* v. *Rusk*, 377 U.S. 163 (1964) | *Mackenzie* v. *Hare*, 239 U.S. 299 (1915) |
| * 108. | *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964) | *Twining* v. *New Jersey*, 211 U.S. 78 (1908) *Adamson* v. *California*, 332 U.S. 46 (1947) |
| * 109. | *Murphy* v. *Waterfront Comm.*, 378 U.S. 52, 57, 77 (1964) | *Jack* v. *Kansas*, 199 U.S. 372 (1905) *United States* v. *Murdock*, 284 U.S. 141 (1931) |

| | *Overruling Case* | *Overruled Case* |
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